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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE CITY OF LEWES and THE BOARD OF ADJUSTMENT OF THE CITY OF LEWES,	§	Nos. 348, 2018 and 349, 2018
	§	C O N S O L I D A T E D
Appellees Below, Appellants,	§	Court Below: Superior Court of the State of Delaware
v.	§	C.A. No. S17A-06-003
ERNEST M. NEPA and DEBORAH A. NEPA,	§	
Appellants Below, Appellees.	§	

APPELLANTS' JOINT REPLY BRIEF ON APPEAL

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I. THE BOARD OF ADJUSTMENT APPLIED A LEGAL STANDARD CONSISTENT WITH DELAWARE LAW THAT WAS DULY ENACTED BY THE CITY OF LEWES.

Appellees Ernest M. Nepa and Deborah A. Nepa (the "Nepas") err fundamentally in concluding that the Board of Adjustment of the City of Lewes (the "Board") "derives its authority and legal standards for granting variances exclusively from 22 *Del. C.* § 327(a)(3)."[1] To the contrary, the General Assembly mandates that the legislative bodies of municipalities create and empower boards of adjustment consistent with the provisions of 22 *Del. C.* § 321 *et. seq.*[2]

Pursuant to this mandate, and consistent with its authority under Title 22, Chapter 3 and its Municipal Charter, the City of Lewes (the "City") adopted Sections 197-19 and 197-92 of the Municipal Code of the City of Lewes (the "Lewes Code") creating and empowering the Board. Accordingly, the Board is bound by the legal standards codified in **both** 22 *Del. C.* § 327(a)(3) ("Section 327(a)(3)") and Section 197-92 of the Lewes Code ("Section 197-92"). And since Section 197-92 is consistent with Section 327(a)(3), the Board did not err when it applied Section 197-92 to the Nepas' request for variances.

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[1] Appellees' Answering Brief ("Answering Brief") at p. 13.
[2] *See* 22 *Del. C.* § 321.

A. The Plain Language of 22 *Del. C.* § 321 Obligates and Authorizes Local Municipalities to Create Boards of Adjustment and Adopt Rules and Regulations Governing Such Boards.

Section 327(a)(3) is not the exclusive binding and authoritative standard applicable to area variances, and the Nepas overlook 22 *Del. C.* §§ 307 and 321 in arguing that it is. 22 *Del. C.* § 321 provides as follows:

> The **legislative body** of cities or incorporated towns shall provide for the appointment of a board to be known as the board of adjustment **and in the rules adopted pursuant to the authority of this chapter** shall provide that the board may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.[3]

Consistent with this legislative mandate, and pursuant to its lawful authority as outlined in Appellants' Opening Brief, the City established the Board and adopted regulations governing the same.[4] Thus, contrary to the Nepas' assertion, it was an Act of the City that created the Board - not the General Assembly.

The Nepas rely heavily on this Court's decision in *Board of Adjustment of New Castle County v. Henderson Union Associates* to argue that boards of adjustment "have very limited powers which are entirely delegated by statute directly from the General Assembly."[5] Not only is this assertion inconsistent with

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[3] 22 *Del. C.* § 321 (emphasis added).
[4] *See* Lewes Municipal Code §§ 197-19 and 197-92.
[5] Answering Brief at p. 15.

the plain language of 22 *Del. C.* § 321, it is also contrary to the Court's conclusion in *Henderson Union*.

In *Henderson Union*, this Court simply, and correctly, held that a board of adjustment's authority is derived from its jurisdictional statute.[6] The only jurisdictional statute at issue in *Henderson Union* was the Title 9 statute creating and empowering the New Castle County Board of Adjustment. However, 22 *Del. C.* § 321 mandates that the municipal boards of adjustment be created by the local legislative body, not the General Assembly. Thus, consistent with this Court's holding in *Henderson Union*, the Board's authority to grant a variance is derived from both locally adopted statute and state law. Critically, despite the Nepas' implication otherwise, the *Henderson Union* Court did not address whether a local jurisdiction, state or county, can adopt a more stringent standard for area variances so long as the minimum standards set forth by the state statute have been met.

The Nepas' reliance on *Jenney v. Durham* fails for the same reason.[7] In addressing the "confusion about the reach of the Board's jurisdiction vis-à-vis county ordinances" *Jenney* ruled that the criteria for permitted uses under the Steep Slope Ordinance may not be applied *in place of* (rather than in addition to) the

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[6] 374 A.2d 3, 4 (Del. 1977).

[7] 707 A.2d 752, 764 n. 4 (Del. 1997) (noting that the Board could not act outside of the parameters of Title 9, Section 1352 when, importantly, Section 1352 was the only statute at issue governing the Board's legal standards for area and use variances).

necessary minimum standard for receiving a use variance under the state statute. That is, *Jenney* recognized that creating additional criteria beyond the minimum standard for the granting of a variance does not "supersede, side-step or otherwise substitute for the legislative jurisdictional prerequisites" of the state enabling statute so long as the local ordinance does not reduce the standard under which a variance may be granted (or, in the words of the *Jenney* court, "provide an alternative route to approval of a non-conforming use.")[8] Because Section 197-92 does not reduce the minimum standards under which an area variance may be granted, it does not provide an alternative route to the approval of non-conforming dimensional standards, and it is entirely consistent with *Jenney.*

The Nepas' reliance on *Bridgeville Rifle & Pistol Club v. Small* is also misplaced. In *Bridgeville Rifle*, this Court noted that administrative agencies may exercise power only in accordance with the terms of its delegated authority.[9] Notably, the *Bridgeville Rifle* Court did not hold that administrative agencies could not adopt their own regulations; rather, the Court held that any duly adopted regulation must be consistent with the Constitution and State law.[10] Because the City's enactment of Section 197-92 is entirely consistent with both state law and the Constitution, *Bridgeville Rifle* is inapplicable.

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[8] *Id.*
[9] *See Bridgeville Rifle & Pistol Club v. Small*, 176 A.3d 632, 661 (Del. 2017).
[10] *See id.*

B. The General Assembly Has Not Preempted Municipalities From Adopting Area Variance Standards Otherwise Consistent With Delaware Law.

It is illogical to assert that the General Assembly reserved exclusive authority to empower and regulate boards of adjustment given the plain language of 22 *Del. C.* §§ 307 and 321. The latter expressly confers such authority to local municipalities, and the former expressly provides that the more restrictive local standard is controlling. The question is therefore not whether the City had authority to act - it was **obligated** to enact legislation creating the Board and regulating the same - but instead whether the General Assembly intended to be the exclusive voice concerning municipal boards of adjustment, and, more specifically, area variance standards.

This Court held in *Cantinca v. Fontana* that, "[i]n Delaware, the State and its political subdivisions are permitted to enact similar provisions and regulations, so long as the two regulations do not conflict."[11] The *Cantinca* Court further noted that, "[t]he predominant test for conflict in a preemption analysis is whether the state statute was intended to be exclusive."[12] "Legislative intent to make a state

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[11] 884 A.2d 468, 473 (Del. 2005).

[12] *Id.*; *see also Poynter v. Walling*, 177 A.2d 641, 646 (Del. Super. Ct. 1962) (holding that a municipal ordinance regulating the same subject as a state law is valid "so long as the ordinance does not conflict with the statue statute, and the statue statute does not show on its face that it was intended to be exclusive").

statute exclusive of any regulation of the same subject matter by a political subdivision may be express or implied."[13] According to the *Cantinca* Court:

> Express exclusivity intent exists where the statutory text or legislative history explicitly provides or demonstrates that the state statute is intended to replace or prevail over any pre-existing laws or ordinances that govern the same subject matter. Implied exclusivity intent may be found where two regulations are inconsistent; for example, where a state statute prohibits an act that is permitted by a local ordinance. To be inconsistent by implication, however, the local ordinance must hinder the objectives of the state statute.[14]

The Nepas have not articulated a basis to conclude that the General Assembly intended to preempt local regulation of the area variance standard.

The holding in *Board of Adjustment of Sussex County v. Verleysen* is not indicative of General Assembly preemption. Notwithstanding that *Verleysen* involved a Title 9 board of adjustment and not a municipal board of adjustment established by the local legislative body (a distinction the Nepas once again overlook), the *Verleysen* Court merely analyzed and applied the codified Title 9 standard.[15] The *Verleysen* Court did not hold or even suggest that the General Assembly was the exclusive authority governing area variance standards, as is the question today. Notably, as outlined in Appellants' Opening Brief, the Superior

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[13] *Cantinca*, 884 A.2d at 473.

[14] *Id.* at 473-74 (internal citations omitted); *see also Poynter*, 177 A.2d at 647-48 (upholding a local ordinance after concluding that it was duly adopted by the local legislative body, that it did not conflict with State law, and that there was no evidence of the General Assembly's intent to have the state statute preempt the field).

[15] *See Sussex Cnty. v. Verleysen*, 36 A.3d 326 (Del. 2012).

Court in two cases involving municipal boards of adjustment did not believe that the General Assembly had exclusive authority when it held that the local municipality could adopt more stringent variance standards.[16]

Indeed, nothing in 22 *Del. C.* § 321 *et seq.* expressly provides that the General Assembly is the exclusive voice on area variance standards. The Nepas' reliance on the 2008 Amendment to Section 327(a)(3) as evidence of preemption is strained.[17] The 2008 Amendment is merely an exception to 22 *Del. C.* § 321's requirement that area variances be evaluated by boards of adjustment created by local legislation. Prior to the 2008 Amendment, a local ordinance delegating such responsibility would be *ultra vires* because such a regulation would be inconsistent with 22 *Del. C.* § 321 *et seq.*

The Nepas' reliance on the 22 *Del. C.* § 327(a)(2) provisions regarding special use exceptions is also unavailing because it ignores that 22 *Del. C.* §§ 307 and 321 also authorize regulation of the Board by local ordinance, as addressed herein. 22 *Del. C.* § 327(a)(2) is entirely consistent with the General Assembly's deference to local authority.

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[16] *See Dale v. Elsmere*, 1988 WL 40018 (Del. Super. Ct. Apr. 20, 1988); *Hellings v. City of Lewes Bd. of Adjustment*, 1998 WL 960710 (Del. Super. Ct. Dec. 31, 1998) (*rev'd on other grounds, Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641 (Del. 1999)).

[17] *See* Answering Brief at p. 20.

Moreover, the Nepas' reliance on the organization of Title 22 is misplaced. 22 *Del. C.* § 321 *et seq.* has origins in the 1934 Act Granting to Municipalities of Delaware Authority to Adopt Zoning Regulation (the "1934 Act").[18] Notably, the local obligation to provide for a board of adjustment was addressed within the 1934 Act. Also addressed in the 1934 Act was the Conflict of Laws language currently codified as 22 *Del. C.* § 307. Contrary to the Nepas' assertion, this Conflict of Laws language very clearly applied to the entirety of the 1934 Act, including the language pertaining to boards of adjustment. Perhaps most notably, in advancing their arguments on the importance of the codified order of Section 327(a)(3) and 22 *Del. C.* § 307, the Nepas plainly ignore 1 *Del. C.* § 305, providing that "[t]he classification and organization of the titles, parts, chapters, and subchapters, and sections of this Code, and the headings thereto, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference or presumption of legislative construction shall be drawn therefrom."[19]

Where the General Assembly intended to preempt municipalities from regulating firearms, it adopted 22 *Del. C.* § 111.[20] And in 2015, the General Assembly adopted 22 *Del. C.* § 2001 expressly limiting municipal taxing powers.[21] Quite simply, as the Superior Court in *Poynter* noted, "[i]f the General Assembly

[18] *See* Appellants' Opening Brief Appendix at A-137-138.
[19] 1 *Del. C.* § 305.
[20] 22 *Del. C.* § 111; *see generally Bridgeville Rifle,* 176 A.3d at 657.
[21] 22 *Del. C.* § 2001.

intends State legislation in this field to be exclusive, then it must enact laws to make it exclusive."[22] Here, the General Assembly did not enact such laws.

C. Section 197-92 of the Lewes Code is Consistent with Delaware Law.

Absent express exclusivity, the validity of Section 197-92 turns on whether it was duly adopted and on whether Section 197-92 is consistent with Section 327(a)(3). As outlined in Appellants' Opening Brief, the City had authority to adopt Section 197-92 pursuant to its Municipal Charter and Title 22, Chapter 3. This conclusion is further bolstered by 22 *Del. C.* § 321 and the General Assembly's inherent intention that municipal legislative bodies exercise their authority to create and regulate boards of adjustment to further 22 *Del. C.* § 321's mandate.

Regarding consistency with Delaware law, the Nepas fail to rebut Appellants' contention that Section 197-92 is consistent with Delaware law. Instead, as outlined in Appellants' Opening Brief, Section 327(a)(3) prohibits only the granting of a variance to an applicant who has failed to meet the minimum standards as set forth in state law. Thus, a law that respects the established minimum standards and merely imposes additional, more stringent, standards is consistent with Section 327(a)(3). The General Assembly's intent to allow

[22] *Poynter*, 177 A.2d at 647.

adoption of such stricter standards is further evidenced by the inclusion of 22 *Del. C.* § 307.

The Nepas attempt to manufacture conflict between the statutes by arguing that the inherent purpose behind Section 327(a)(3) was to codify a "safety valve" free from interference by municipal ordinance.[23] Despite the Nepas' contentions, while the Section 327(a)(3) standards were adopted to allow for reasonable deviation from otherwise duly enacted zoning regulations, there is no evidence, express or implied, that the General Assembly adopted these standards out of concern over local interference. To the contrary, the Section 327(a)(3) standards were adopted as minimum standards necessary to lawfully delegate the subject authority to a board of adjustment. This conclusion is bolstered by the Superior Court's decision in the *Appeal of Blackstone*.[24]

In *Blackstone*, the Superior Court was asked, in part, to evaluate whether Section 8 of the 1934 Act was an unconstitutional delegation of authority to an administrative board of adjustment.[25] The *Blackstone* Court held that:

> …the standards and guides contained in the Enabling Act are sufficiently definite to control the discretion of the Board of Adjustment in its power to vary the terms of the Ordinance. The words 'unnecessary hardship,' 'spirit of the Ordinance' and 'substantial justice,' as contained in the Act, are words having meanings which are understandable to any person of average

[23] *See* Answering Brief at pp. 24-28.
[24] 190 A. 597 (Del. Super. Ct. 1937).
[25] *See id.* at 602.

> intelligence. The power granted to the Board can only be exercised within the spirit of the Ordinance impartially and with reasonable discretion. **It is not an uncontrolled power to do as the Board desires, but is a circumscribed power to be exercised by the Board in accordance with evidence of physical facts and circumstances**.[26]

In sum, the Section 327(a)(3) standards do not exist to check the power of **local legislative bodies**, but instead were intended to, as the *Blackstone* Court acknowledged, set forth a minimum set of standards to ensure that **boards of adjustment** did not have uncontrolled discretion. This reading is consistent with *Henderson Union*, which did not proscribe additional limitations placed on a board of adjustment; rather, it addressed a board of adjustment granting a variance it was not authorized to grant.

Given this backdrop, local standards that are more stringent than Section 327(a)(3) are not contrary to state law and instead promote the constitutional requirement that there be clear, prescribed standards for a board of adjustment to follow when determining whether to grant a request for variances. This conclusion is consistent with existing precedent.

D. 22 *Del. C.* § 307 is Evidence That There was No Express or Implied State Preemption of Local Section 197-92.

Statutes containing provisions explicitly deferring to stricter local ordinances "signal[] that the General Assembly did not intend for the [state statute] to be the

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[26] *Id.* at 606-07 (emphasis added).

exclusive body of law" and are "[p]ersuasive evidence that [the state statute] is not inconsistent with the [more restrictive local] ordinances by implication . . . ."[27]

In the present case, the Superior Court rejected the *Dale* and *Hellings* Courts' on-point conclusions that duly adopted more stringent municipal area variance standards are valid pursuant to 22 *Del. C.* § 307. While the *Dale* and *Hellings* Courts contained sparse written analysis, the *Dale* and *Hellings* Courts' conclusions are wholly supported by principles enunciated in *Cantinca*. *Cantinca* involved a state statute that contained a provision very similar to 22 *Del. C.* § 307, requiring that in the event of conflict, the more stringent local standard applies.[28]

Like the state statute in *Cantinca*, 22 *Del. C.* § 307 "signals" that the General Assembly did not intend for the State to be the exclusive voice on the area variance standard, and is "persuasive evidence" that Section 327(a)(3) is not inconsistent with the applicable municipal ordinance; namely because there is a means of resolving any conflict between the state statute and municipal ordinance in favor of the stricter standard. Thus, because a duly adopted municipal ordinance is not inconsistent with state law, and has not been preempted by the General Assembly, either expressly or impliedly, the *Dale* Court correctly held that "pursuant to [22 *Del. C.* § 307], the [local ordinance] governs the issuance of area variances in the

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[27] 884 A. 2d at 474.

[28] 16 *Del. C.* § 6633(b) ("Where there is a conflict between installation requirements [of a smoke detector], this section shall be interpreted to require the more stringent of the installation specifications, for a particular occupancy.")

town of Elsmere"[29], and the *Hellings* Court correctly held that that the City "could have adopted the more stringent standard of undue hardship only[, if it] would have [taken] steps to adopt only that standard."[30]

Lastly, in their Answering Brief, the Nepas emphasize the importance of adhering to the principle of *stare decisis*.[31] Appellants agree. Unfortunately for the Nepas, the only cases directly on-point in this matter support the Appellants' position.

[29] *Dale*, 1988 WL 40018, at *2.
[30] *Hellings*, 1998 WL 960710, at *4 (citing *Dale* and Section 307 in support).
[31] *See* Answering Brief at pp. 17-18.

II. THE NEPAS IGNORE THE PLAIN LANGUAGE OF SECTION 327(a)(3) AND OVER FORTY YEARS OF JUDICIAL PRECEDENT IN ADVOCATING FOR AN OVERLY NARROW INTERPRETATION OF THE EXCEPTIONAL PRACTICAL DIFFICULTY STANDARD FOR AREA VARIANCES.

A. The Nepas' Proposed Standard Ignores the Critical Reality That the Exceptional Practical Difficulty Standard Has Been Shaped by Forty-Years of Judicial Precedent.

The bulk of the Nepas' Answering Brief pertaining to this issue is devoted to highlighting how the words of Section 197-92 differs from the words within the four factors identified in *Kwik-Check*. However, the parties do not dispute that the words within Section 197-92 differs from the words of the four factors as articulated in *Kwik Check*. The question is not whether different **words** are utilized, but, instead, whether the **standard** required under Section 197-92 is different from the exceptional practical difficulty standard for area variances articulated by nearly a half century of judicial precedent.

In addressing the differences in the words used, the Nepas are silent on the impact of the over forty years of judicial precedent following the *Kwik-Check* case that has helped guide and refine the exceptional practical difficulty standard. The exceptional practical difficulty standard is shaped by the ever-evolving case law interpreting Section 327(a)(3) and does not exist in a vacuum, as the Nepas would lead this Court to believe. For example, while the Nepas are correct that the words 'unique character' are not included in any of the four *Kwik-Check* factors, as

outlined in Appellants' Opening Brief, unique character has indeed been evaluated by several courts as an important consideration in evaluating the nature of the zone and character of the immediate vicinity, which are two of the four *Kwik-Check* factors.

Accordingly, the Nepas err in limiting the exceptional practical difficulty standard for area variances to the specific words within *Kwik-Check*. In doing so, the Nepas ignore the plain language of Section 327(a)(3) and the subsequent case law interpreting the same. Indeed, given the plain language of Section 327(a)(3), the exceptional practical difficulty standard cannot simply be an inquiry into whether the harm to the property owner exceeds the harm to the community, as the Nepas suggest.

As the Superior Court articulated in *Holowka v. New Castle County Board of Adjustment*, the exceptional practical difficulty standard for area variances requires consideration of <u>both</u> the statutory objectives of Section 327(a)(3), which include avoiding a "deleterious effect on the public good" and ensuring that the variance not be "contrary to the intent or purpose of the zoning code", <u>and</u> satisfying the four-factor standard articulated in *Kwik-Check*.[32] As outlined in Appellants' Opening Brief, Section 197-92 codified a standard that acknowledges and incorporates the statutory objectives of Section 327(a)(3) and the judicial precedent

[32] 2003 WL 21001026, at *4 (Del Super. Ct. Apr. 15, 2003).

interpreting and applying the *Kwik Check* factors. The Nepas, however, improperly ignore these statutory objectives and seek to limit the Board to evaluating an area variance under a newly proffered, unduly narrow standard.

B. Use of the Word "Hardship" as Opposed to "Exceptional Practical Difficulty" is Inapposite to the Analysis.

Contrary to the Nepas' assertion, there is no confusion within the record that the Board was evaluating a request for an area variance and applying the area variance standard. The Board uttered the word "hardship" when discussing the variance request because that is the word utilized in Section 197-92. But within the context of this record and Section 197-92, there can be no question as to the standard applied by the Board.

Unlike *Riker v. Sussex County Board of Adjustment* and *Stingray Rock, LLC v. Board of Adjustment of the City of Rehoboth Beach*, the record clearly establishes that the Board applied the legal standard for an area variance in the City of Lewes, and did not improperly apply the legal standard for a use variance. Indeed, in *Riker*, the primary issue was that the Sussex County Board applied the wrong standard to area variances. Specifically, the governing portion of the County Code "refer[red] to both the exceptional practical difficulty test and the unnecessary hardship test" in one section and omitted the exceptional practical

difficulty test but not the unnecessary hardship test from a subsequent section.[33] Similar confusion does not exist within Section 197-92.

Notably, the Nepas did not assert that the Board failed to apply an area variance standard. To the contrary, the question at issue in this case is whether the Section 197-92 area variance standard is *ultra vires*. If the Section 197-92 standard is upheld, as we maintain it should be, there is no question that the Board applied the proper standard for an area variance request, and not the standard for a use variance.

[33] *Riker v. Sussex Cnty. Bd. of Adjustment*, 2015 WL 648531, at *8 (Del. Super. Ct. Feb. 2, 2015).

III. THE NEPAS FAILED TO DEMONSTRATE BY SUBSTANTIAL EVIDENCE ON THE RECORD THAT AN EXCEPTIONAL PRACTICAL DIFFICULTY EXISTS TO SUPPORT AN AREA VARIANCE.

The Nepas' claim that substantial evidence supports a finding of exceptional practical difficulty based upon the "normal improvements" they seek to make is belied by the record. Preliminarily, as noted in Appellants' Answering Brief to the Superior Court, the record is devoid of any evidence supporting the Nepas' claim that there are numerous other historic homes in the area with full second stories and similar improvements to those proposed. The Board, and this Court, is tasked with reviewing evidence on the record. Absent such evidence, arguments relying on purported factual claims unsupported by the evidence must fail.

In addition, with or without the Nepas' unsupported factual claims, the Board's decision is due a certain degree of deference, such that the legal standard on review is not whether there is any record evidence supporting the Nepas' position, but instead whether substantial evidence – less than a preponderance but more than a scintilla – supports the Board's decision.

Here, the evidence that the Nepas provided to the Board did not create a sufficient basis upon which the Board could grant the requested variances. As the record establishes, the evidence offered by the Nepas was very limited.[34]

[34] *See* Appellants' Opening Brief Appendix at A-117.

During the hearing, the Nepas placed heavy weight on the quality of the workmanship, the opinion of their next-door neighbor, and the City's Comprehensive Plan (the "Comp Plan").[35] The Board generally approved of the quality of the workmanship on the structure and agreed with those who complimented the aesthetics of the Nepas' renovations.[36] However, none of these criteria support a finding of an exceptional practical difficulty.

And while the Nepas relied heavily on testimony from the adjacent neighbor, as the Chair of the Board stated on the record, the exceptional practical difficulty "standard doesn't say: If you[r] neighbor likes it, you grant it."[37] Instead, the Board balanced the weight of the evidence, and determined that it supported denial. Indeed, several parties opposed to the variances submitted evidence that the variances would have a negative effect on the community and the character of the area.[38]

At the hearing, Brenda Jones, an architectural designer, testified that granting the variance would discourage parties from seeking variances before making non-conforming changes to their properties.[39] Several neighbors and

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[35] *See id.;* City of Lewes 2015 Comprehensive Plan, at pp. 6-7.
[36] *See* Appellants' Opening Brief Appendix at A-117.
[37] See *id.* at A-86:4-5.
[38] *Id.* at A-115, A-104-106.
[39] *Id.* at A-81-83.

interested parties submitted letters to the Board asking that the variances be denied on the same bases.[40] Such requests conform to the view of Delaware's Courts that:

> The existing violation of the zoning regulation is not justification for granting a variance which would permit that same violation . . . . To hold otherwise would encourage those who want a variance to build in spite of the restriction, knowing that the fact that the improvement was complete would be justification for the variance.[41]

Additionally, Petitioners cited to the Comp Plan's goal of providing more opportunities for residents to age in place.[42] While the Comp Plan does include this goal, such evidence falls short of establishing an exceptional practical difficulty sufficient to enable the Board to reasonably grant the requested variances. Notably, the Comp Plan does not mandate or even suggest that *all* homes have a first-floor bedroom to allow ageing in place.[43] Even if it did, however, the articulation of such a goal does not clear a path for property owners to ignore building dimensional requirements in the furtherance of that goal.

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[40] *Id.* at A-114-115.

[41] *Matarese v. Bd. of Adjustment of New Castle Cnty.*, 1985 WL 188970, at *2 (Del. Super. Ct. Feb. 12, 1985); s*ee also Gilani v. Bd. of Adjustment*, 2001 WL 946511, at *4 (Del. Super. Ct. July 21, 2001) ("[T]his Court looks unfavorably at those who violate the Code and then seek a variance…."); *cf. Sawers v. New Castle Cnty. Bd. of Adjustment*, 1988 WL 117514, at *2 (Del. Super. Ct. Mar. 15, 1988) (holding that the existing violation of the zoning regulation is not a justification for granting a variance which would permit the same violation).

[42] *See* Appellants' Opening Brief Appendix at A-117.

[43] *See id.*; *see also* City of Lewes 2015 Comprehensive Plan, at pp. 6-7.

In sum, the record clearly establishes that the Board properly weighed the evidence before it under the exceptional practical difficulty standard, and found that the evidence was not sufficient to justify granting the variances.[44]

The lack of evidence supporting an exceptional practical difficulty is even more notable given the Board's attempts to identify such a difficulty during the hearing. Specifically, during the hearing, the Board's Counsel asked "What is the exceptional practical difficulty?"[45] And the Chair of the Board asked, "In other words, would this have been granted from the get go, given the size and the nonconformity to increasing it so substantially?" [46]

The Nepas' counsel responded to their questions with the following:

> And one of the records – excuse me – letters is from Lee Ann Wilkinson, who, of course, we all know. And she explained the reason for the addition. And that is the city has encouraged in its architecture people having homes that they can live in when they're more than my age, when you don't have to go up and down steps, when you – the only way to do that is bedrooms and bathrooms on the first floor.
>
> Now, I can't speak for everyone here. My house is about the same age, 1890, no bathroom, no bedroom on the first floor. Many of the houses are like that.
>
> To make this a home that can be used into the future – not by someone who's 35 and has three children and coming down to use as a beach home – but to encourage full-time, long time-residents, it

[44] *See* Appellants' Opening Brief Appendix at A-117.
[45] *Id.* at A-89:2.
[46] *Id.* at A-89:10-12.

> needs living space. It needs practical, functional living space on the first floor.[47]

During the closing presentation, the Nepas' counsel added the following regarding the exceptional practical difficulty and the desire for a first-floor bedroom:

> … [The p]ictures are the case. They show the difference between the house before, the house after, and you have a significant intervening and I think, exceptional practical difficulty with the reason that it went from the way it was going to be – Mr. Nepa even testified that he had to buy those little windows so they'd fit in where the little windows were – to the way it is now, I believe that is the exceptional practical difficulty.
>
> The second part – and that's – so that covers, to me, the left-hand side closest to Ms. Mitchell, and on the addition to make the house functional, in my opinion a – if you're going to do work, it makes sense to have the bathroom, bedroom on the first floor. And that was done.[48]

The Nepas' original plans to renovate their property without the need for variances demonstrate that "normal improvements" can be and were approved and being implemented on the property without the need for a variance from any zoning restrictions. The Nepas did not claim to require any variances for "normal improvements" until after the storm of February 2016. The Nepas' ability to make such "normal improvements" within the confines of the existing dimensional and

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[47] *Id.* at A-89:17 – A-90:10.
[48] *Id*. at A-97:7-23.

setback requirements is *prima facie* evidence that no exceptional practical difficulty exists.[49]

While the Nepas did certainly articulate the interruption to their work caused by the February 2016 storm, they have failed to identify an exceptional practical difficulty that necessitated the deviations from the previously-obtained approvals. Quite simply, the Nepas failed to explain how they could have made "normal improvements" before February 2016 without adding a first-floor bedroom, but suddenly after February 2016, they could not. This is because no exceptional practical difficulty exists, a conclusion supported by substantial evidence on the record.

[49] See *Weaver v. New Castle Cnty. Bd. of Adjustment*, 1991 WL 236963, at *3 (Del. Super. Ct. Oct. 28, 1991) ("[the issue is] whether they could have constructed the building and/or utilized the property in compliance with the applicable regulations without exceptional practical difficulty.").

CONCLUSION

For the reasons above, the Superior Court's decision should be reversed.

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