IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

BAKER RESIDENTIAL OF)	
PENNSYLVANIA, LLC, a Delaware)	
limited liability company,)	
)	
Plaintiff in Error,)	
V.)	C.A. NO. N13A-03-004 ALR
)	
NEW CASTLE COUNTY and NEW)	
CASTLE COUNTY BOARD OF)	
ADJUSTMENT,)	
)	
Defendants in Error.)	

Submitted: October 3, 2013 Decided: October 15, 2013

On Appeal from Decision of the New Castle County Board of Adjustment

AFFIRMED

MEMORANDUM OPINION

A. Kimberly Hoffman, Esquire, Attorney for Plaintiff in Error

Bernard V. Pepukayi, County Attorney, Attorney for Defendants in Error

ROCANELLI, J.

This is an appeal by Baker Residential of Pennsylvania ("Applicant") from the February 19, 2013 decision of the New Castle County Board of Adjustment ("Board"). Applicant sought a variance from the area requirements of the New Castle County Unified Development Code on November 14, 2012. A public hearing on the application was held on December 20, 2012. The Board met on January 10, 2013 and unanimously voted to deny Applicant's request ("Board's Denial Decision"). The Board concluded there was no showing that, if the restriction were retained, the Applicant would face an exception practical difficulty to make improvements to the land. Additionally, the Board concluded that there would be a substantial detriment to the public good if it were to grant the variance sought.

On March 11, 2013, Applicant appealed the Board's Denial Decision. According to Claimant, Applicant met the standard for the variance to be granted. Applicant also contends that the Board's Denial Decision was not supported by substantial evidence. For the reasons set forth below, the Board's Denial Decision must be affirmed.

I. PROCEDURAL HISTORY

A. FACTS AND THE BOARD'S DENIAL DECISION

Applicant is the owner of an undeveloped parcel located at 153 E. Fulton Road, Wilmington, Delaware ("DE Parcel") and a contiguous parcel of land located in Pennsylvania ("PA Land"), which abuts the northern boundary of the DE Parcel. ¹ Applicant intends to build a 47-unit townhome community ("Development") on the PA Land. The PA Land is landlocked and does not have direct access to a public roadway. Currently, access can be gained through the use of an existing easement across an

¹ R. at 25.

adjoining property. However, Applicant sought a variance to create entry to the Development, located entirely in Pennsylvania, by constructing an access road through the DE Parcel to connect to E. Fulton Road in Delaware. As a result of constructing the access road through the DE Parcel, two nonconforming lots are created.

The DE Parcel is located on E. Fulton Road, which is a residential cul-de-sac in an area zoned NC40.² The New Castle County Unified Code requires that lots within an NC40 zone have a minimum lot size of 40,000 square feet and minimum lot width of 125 feet.³ The proposed construction of the access road across the DE Parcel will result in the land being split into two residential lots that do not meet the minimum size and width requirements of land zoned NC40. Accordingly, a variance is necessary to create two parcels that do not conform to the applicable zoning requirements. On February 19, 2013, the Board issued its decision denying the Applicant's variance request.

II. STANDARD OF REVIEW

This Court's scope of review on appeals from the Board is limited to correction of errors of law and to determine whether substantial evidence exists on the record below to support the Board's decision. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the Board's conclusion. The Court does not weigh the evidence, determine questions of credibility, or make its own factual findings. When substantial evidence is present, the Court may not substitute its own

² R. at 18.

³ New Castle Cnty. C. §40.04.110.

⁴ Janaman v. New Castle Cnty. Bd. of Adjustment, 364 A.2d 1241, 1242 (Del. Super. 1976).

⁵ Wawa, Inc. v. New Castle Cnty. Bd. Of Adjustment, 929 A.2d 822, 830 (Del. Supr. 2005).

⁶ *Id*.

judgment for the Board's judgment.⁷ The Court merely determines if the evidence is legally adequate to support the Board's judgment.⁸

III. DISCUSSION

This Court must decide if the Board's decision to deny Applicant's request for a variance was supported by substantial evidence and whether the Board made any errors of law.

When a landowner seeks permission to use property in a manner otherwise forbidden or restricted by applicable zoning regulations or laws, the landowner may seek a variance from the Board⁹ which is authorized to grant a variance where:

owing to special conditions or exceptional situation, a literal interpretation of the provisions of any zoning ordinance, code or regulation will result in unnecessary hardship or exceptional practical difficult to the owner of the property so that the spirit of the ordinance, code or regulation shall be observed and substantial justice done, provided such relief may be granted without substantial detriment to the public good.... ¹⁰

A variance can be classified as either a use variance or an area variance.¹¹ An area variance allows for a deviation from zoning restrictions related to the physical characteristics on the land.¹² In contrast, a use variance permits a particular property to be used in a manner otherwise prohibited by applicable law or zoning regulation.¹³ Here, Applicant is requesting an area variance and the Board correctly applied the applicable standard. Accordingly, the Board properly considered if the DE Parcel was burdened by

⁷ Janaman, 364 A.2d at 1242.

⁸ Wawa, 929 A.2d 822.

⁹ Wawa, 364 A.2d at 830.

¹⁰ 9 Del. C. §1313

¹¹ Wawa, 364 A.2d at 830.

¹² *Id*.

¹³ *Id*.

an exceptional practical difficulty and the impact granting the variance would have on the public good.

A. Exceptional Practical Difficulty

Area variances are granted if the Board finds that the zoning law results in exceptional practical difficulties to ownership. ¹⁴ To test if an exceptional practical difficulty exists, the following elements are considered: 1) the nature of the zone in which the property is located; 2) the character of the immediate vicinity; 3) the uses in that vicinity; 4) whether, if the restrictions were removed, a serious effect on neighborhood property and uses would result; and 5) if the restriction(s) were not removed, would there be a hardship on the owner to make normal improvement allowed for the use permitted in the zoning regulation of the property. ¹⁵

The Board's conclusion that no exceptional practical difficulty is present on the DE Parcel is supported by substantial evidence. Indeed, absent the variance, there is no impediment present that would hinder normal improvement on the land. For instance, a single family home could be built on the DE Parcel without seeking any variances. While it may be difficult for Applicant to place a roadway through the DE Parcel to serve the Development in Pennsylvania, this is not a normal improvement to the land.

On December 20, 2012, the Board heard testimony at a public hearing. Applicant argued that construction of an access road is a normal improvement because Applicant has the option to construct an access road to the Development in such a manner that would not require a variance. First, Applicant stated that access could be gained to the

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¹⁴ Kwik-Check Realty Co. v. Bd. of Adjustment of New Castle Cnty., 369 A.2d 694, 698 (Del. Super. 1977).

¹⁵ Wawa, 364 A.2d at 831.

Development by making use of an existing easement, which will move the access road from E. Fulton Road closer to Route 202. Second, Applicant argued that an access road could be constructed on the DE Parcel in such a manner that a variance would not be required by dedicating the entire parcel to a right-of-way. To support this alternative plan, Applicant pointed to a letter from the Delaware Department of Transportation ("DelDOT"). In pertinent part, the DelDOT letter, purely advisory in nature, stated that using a parcel of land as a right-of-way is a permissible use if the road is used to access a use that is permissible in a NC40 zone. The Board was not persuaded by this argument. The Board concluded that Applicant's reliance on the DelDot letter was misplaced because the Development is not a use that is permissible in a NC40 zone, therefore, the DE Parcel cannot be used as a right-of-way for access.

The Board's finding that no exceptional difficulty to making normal improvements on the DE Parcel was appropriate.

B. Public Good

Under Delaware law, the Board must weigh the variance against the public interest and its impact on the public good. ¹⁶ Zoning regulations are established to control the future use of land by encouraging appropriate groupings of compatible and related uses to promote and protect the public health, safety and general welfare. ¹⁷ In analyzing the public good, the Board may consider 1) the nature of the zone in which the property is

¹⁶ 9 *Del. C.* §1313

¹⁷ Petrucelli v. New Castle Cntv. Bd. of Adjustment, 1998 WL 109885, at *3 (Feb. 20. 1998).

located; 2) the character and use of the immediate vicinity; and 3) the effect granting the variance will have on the neighborhood.¹⁸

Based on evidence presented at the December 20, 2012 hearing, the Board concluded that, if the variance were granted, there would be a significant detrimental impact on the surrounding community. Specifically, the Board considered the residential character of E. Fulton Road. Placing an entrance on E. Fulton Road for access to 47 townhomes located on the PA Land would convert the quiet cul-de-sac from its residential character to a potentially busy thoroughfare. Moreover, the Board was concerned with overburdening already deficient roadways in the area.

The Board considered but was not persuaded by Applicant's position that, without the variance, access will be constructed on an existing easement and the effect on the community will be the same. The Board rejected this argument by reasonably concluding that if Applicant were to use the easement, the access road to the Development would be located closer to Route 202 and away from the residential roadways. Additionally, as discussed above, the Board rejected Applicant's argument that the DE Parcel could be dedicated to a right-of-way to construct the access road.

Therefore, the Board's conclusion that granting the variance would have a detrimental effect on the public good was supported by substantial evidence and the Board's decision to deny the application was appropriate.

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¹⁸ Wawa, 364 A.2d at 831.

IV. CONCLUSION

The Court has examined the record. Substantial evidence exists to support the Board's findings and the Board did not commit any errors of law. Because no legal error was committed, the Board's decision must be and hereby is AFFIRMED.

IT IS SO ORDERED this day 15th day of October, 2013.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli