

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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GEORGETOWN, DE 19947

February 2, 2015

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***RE: Keith D. Riker v. Sussex County Board of Adjustment, et. al.
C.A. No.: S14A-07-005 ESB***

Dear Counsel:

This is my decision on Keith D. Riker's appeal of the Sussex County Board of Adjustment's denial of his application for an area variance. Riker owns a 50 x 100 foot corner lot in West Rehoboth Beach, Sussex County, Delaware. Riker has a legal non-conforming house on his lot. Riker retained Dover Pole Building ("DPB") to construct a detached pole building behind his house. DPB handled the preparation of the plans, the permitting process, and the construction of the pole building. The building plans, as designed by DPB and submitted to Sussex County, provided for a two-story building with no second floor. The pole building, as completed by DPB, was under 600 square feet. In order to save money, Riker decided against having

DPB construct any decks, stairs, or a second floor as part of the pole building. Instead, Riker decided he would construct those items himself.

DPB completed the construction of the pole building and then applied for, and received, a certificate of occupancy from Sussex County. Shortly after DPB completed the pole building, Riker added a deck, stairs, and second floor. He also did some work on an old pump house on his lot. Riker did not apply for or obtain a building permit for his work on the pole building and pump house.

Sussex County told Riker that, with the addition of the deck, stairs and second floor, his pole building now violated the zoning code and that the deck, stairs and second floor were built without a building permit. The addition of the deck, stairs, and second floor increased the square footage of the pole building, thereby increasing the setback requirements. Riker sought a variance of 9.1 feet from the 10 foot rear yard setback requirement for the second story landing, a variance of 9.6 feet from the 10 foot side yard setback requirement for the second story deck, and a variance of 9.2 feet from the 15 foot corner yard setback requirement for the second story deck. As part of his application, Riker also sought a variance of 22 feet from the 30 foot front yard setback requirement for his well and pump house.

The Board concluded that Riker did not meet the standards for obtaining a variance, finding that (1) he created his own hardship, (2) his lot was not unique, (3)

the lot was already developed so it could be developed in strict conformity with the zoning code, (4) the deck and stairs of the pole building impaired the uses of neighboring and adjacent properties, and (5) the variances were not necessary to enable the reasonable use of the lot. Riker now appeals the Board's decision to this Court.

STANDARD OF REVIEW

The standard of review on appeals from the Board of Adjustment is limited to the correction of errors of law and a determination of whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² If the Board's decision is supported by substantial evidence, a reviewing court must sustain the Board's decision even if such court would have decided the case differently if it had come before it in the first instance.³ "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable."⁴ In the

¹ *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976).

² *Miller v. Board of Adjustment of Dewey Beach*, 1994 WL 89022, *2 (Del. Super. Feb. 16, 1994).

³ *Mellow v. Board of Adjustment of New Castle County*, 565 A.2d 947, 954 (Del. Super. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).

⁴ *Mellow*, 565 A.2d at 956.

absence of substantial evidence, the Superior Court may not remand the Board's decision for further proceedings, but rather, may only "reverse or affirm, wholly or partly, or may modify the decision brought up for review."⁵

DISCUSSION

Riker argues that the Board used the wrong legal standard when it denied his application for an area variance. Riker argues that the Board subjected his application to the "unnecessary hardship" test which is used for use variances instead of the "exceptional practical difficulty" test which is used for area variances. A variance from a setback requirement is an area variance that addresses the exceptional practical difficulty in using a particular property for a permitted use.⁶ An exceptional practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted.⁷ An applicant for a special use variance bears a heavy burden of showing unnecessary hardship, since it is recognized that a prohibited use, if permitted, would result in a use of the land in

⁵ 22 *Del. C.* § 328(c).

⁶ *H.P. Layton Partnership v. Board of Adjustment of Sussex County*, 2010 WL 2106187, at *3 (Del. Super. May 27, 2010).

⁷ *Id.*

a manner inconsistent with the basic character of the zone.⁸ The “unnecessary hardship” test is more burdensome to overcome than the “exceptional practical difficulty” test.⁹ Riker argues that he may have been able to meet the lesser standard of “exceptional practical difficulty” but not the higher standard of “unnecessary hardship” since he was seeking an area variance. The Board has readily acknowledged that it used the unnecessary hardship test, arguing that it is required to do so by its zoning code.

The Board gets its authority to grant variances pursuant to 9 *Del. C.* §6917. Section 6917(3) states that the Board shall have the power to hear and decide requests for variances. The Board may grant a variance only if five certain findings are made. Section 6917(3)(a) and (c) address two of the findings and refer to the unnecessary hardship and exceptional practical difficulty tests. Section 6917(3)(a) states:

That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the **unnecessary hardship** or **exceptional practical difficulty** is due to such conditions, and not to circumstances or conditions generally created by the provisions of the zoning ordinance or code in the neighborhood or district in which the property is located.

⁸ *Id.*

⁹ *Wawa, Inc., v. New Castle County Bd. of Adjustment*, 929 A.2d 822 (Del. Super. 2005).

Section 6917(3)(c) states:

That such **unnecessary hardship** or **exceptional practical difficulty** has not been created by the appellant.

The Sussex County Council enacted §115-209 and §115-211 to implement 9 *Del. C.* §6917. Section 115-209(c) authorizes the Board to grant variances generally where the enforcement of the provisions of the zoning code will result in “unwarranted hardship and injustice.” Section 115-211 authorizes the Board, subject to the provisions of §115-209, to grant area variances. The Board does not have the authority to grant use variances. Section 115-211(A)(1) states that the Board shall have the authority to grant:

A variation in the yard requirements in any district so as to relieve **practical difficulties** or **particular hardships** in cases when and where, by reason of exceptional narrowness, shallowness or other unusual characteristic of size or shape of a specific piece of property at the time of the enactment of such regulation or restriction or by reason of exceptional topographical conditions or other extraordinary situation or condition of such piece of property or by reason of the use or development of property immediately adjacent thereto, the strict application of each regulation or restriction would result in peculiar and exceptional practical difficulties to or exceptional hardship upon the owner of such property. Such granting of variance shall comply, as nearly as possible, in every respect with the spirit, intent and purpose of this chapter, it being the purpose of this provision to authorize the granting of variation only for reasons of **demonstrable** and **exceptional hardship** as distinguished from variations sought by applicants for purposes or reasons of convenience, profit or caprice.

Section 115-211(B) provides that the Board shall grant a variance only if five

certain findings are made. Section 115-211(B)(1) and (3) address two of the findings and refer only to the **unnecessary hardship** test. Section 115-211 (B)(1) states:

That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the **unnecessary hardship** is due to such conditions, and not to circumstances or conditions generally created by the provisions of the Zoning Ordinance or code in the neighborhood or district in which the property is located.

Section 115-211(B)(3) states:

That such **unnecessary hardship** has not been created by the applicant.

I have concluded that the Board did apply the wrong legal standard when considering Riker's application for a variance. 9 Del. C. §6917(3)(a) and (b) and §115-211(A)(1), which specifically addresses area variances, all refer to the exceptional practical difficulty and unnecessary hardship tests but do not state which test is applicable to area variances. The exceptional practical difficulty test has long been held to apply to area variances.¹⁰ Thus, I have concluded that the Board should have used this test when considering Riker's application for an area variance. In addition to using the wrong test, the ordinances that the Board relied on are

¹⁰ See *Board of Adjustment v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978).

contradictory and ambiguous. Section 115-211(A)(1) refers to both the exceptional practical difficulty and the unnecessary hardship tests. Section 115-211(B)(1) and (3) omits the exceptional practical difficulty test and refers only to the unnecessary hardship test, leaving confusion over what happened to the exceptional practical difficulty test. This ambiguity must be resolved in favor of Riker and against the Board, requiring the Board to apply the less stringent exceptional practical difficulty test to Riker's application for an area variance.¹¹

The Board argues, based upon *Verleysen*,¹² that even if it did use the wrong test it is of no consequence because Riker had to satisfy all five findings set forth in §115-211(B)(1) - (5) and that there is substantial evidence in the record to support the Board's decision on those other findings.¹³ I agree that the Board's argument has merit. For example, it appears that Riker's problems are self-inflicted in that he simply tried to put too large a building on too little a lot. However, the Board's argument has been considered in the past and rejected. In *Hellings*,¹⁴ the Supreme Court stated:

¹¹ *Dewey Beach Enterprises, Inc., v. Board of Adjustment of the Town of Dewey Beach*, 1 A.3d 305 (Del. 2010).

¹² *Board of Adjustment of Sussex County v. Verleysen*, 36 A.3d 326 (Del. Feb. 8, 2012).

¹³ *Id.*

¹⁴ *Hellings v. City of Lewes Board of Adjustment*, 734 A.2d 641, 1999 WL 624114 (Del. July 19, 1999).

[H]aving determined that an error of law was made at the administrative level, the Superior Court was not free to review the evidence and apply a different, more lenient, legal standard because to do so would substitute its own judgment for that of the Board.¹⁵

I have concluded that the Board applied the wrong legal standard. *Hellings* prevents me from applying the correct legal standard and conducting the analysis that is properly the province of the Board. Moreover, I can not agree with the Board's argument that *Verleysen*¹⁶ is an exception to the rule in *Hellings* because the same argument was presented to and rejected by the Supreme Court in that case.

CONCLUSION

The Sussex County Board of Adjustment's decision is Reversed.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal

cc: Prothonotary

¹⁵ *Id.* at *2.

¹⁶ *Board of Adjustment of Sussex County v. Verleysen*, 36 A.3d 326 (Del. Feb. 8, 2012).

