IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

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| J. DAVID MACKES, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 06A-03-001-RFS |
| | ) | |
| BOARD OF ADJUSTMENT OF THE TOWN OF FENWICK ISLAND, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

# MEMORANDUM OPINION

Upon an Appeal of the Fenwick Island Board of Adjustment. Reversed.

Submitted: November 30, 2006
Decided: February 8, 2007

Dennis L. Schrader, Esquire, Wilson Halbrook & Bayard, Georgetown, Delaware, Attorney for Plaintiff.

Mary Robin Schrider-Fox, Esquire, Tunnell & Raysor, P.A., Georgetown, Delaware, Attorney for Defendant.

STOKES, Judge

This is my decision regarding J. David Mackes' (hereinafter "Mackes") appeal of the Fenwick Island Board of Adjustment's (hereinafter "Board") denial of a variance. For the reasons set forth herein, the Board's decision is reversed.

## STATEMENT OF FACTS

Mackes is the owner of property located at 41 Bayside Drive, known as Lot 211 (hereinafter "Property"), within the corporate limits of the Town of Fenwick Island, Sussex County, Delaware (hereinafter "Town"). The Property is designated as Sussex County Tax Map No. 1-34-23.16-188.00. Mackes has owned the subject Property for approximately eighteen years and has used it to store boats.

The Property, although irregular in shape, meets the minimum residential buildable lot requirements of the Fenwick Island Building Code (hereinafter "Code").[1] The lot frontage of the Property along Bayside Drive is 127.30 feet; the westerly side line boundary is 65.66 feet; the rear lot line, along the lagoon, is 138.98 feet; and the easterly lot line is 14.96 feet. The total lot size is 5,016.41 square feet, more or less.

The Town requires that "[t]he building limit line … be set back from the front lot line not less than 25 feet," and that the rear yard have a minimum depth of 20 feet. Fenwick Island Code § 160-4(C). When applied to Mackes' lot, this leaves a building envelope of only 423 square feet. Transcript of Fenwick Island Board of Adjustment hearing on January 24, 2006 (hereinafter "Transcript") at 36, ll. 7-13. The Code also requires that all buildings erected in Fenwick Island must occupy at least 750 square feet of the lot.

[1] The Code requires a minimum lot size of five thousand square feet and road frontage of at least fifty feet. Fenwick Island Code § 160-4(C)(1).

Fenwick Island Code § 160-4(D). A literal application of both the setback requirements and the minimum lot coverage requirement would render it impossible to build a structure on Mackes' Property that is in full compliance with the Code.

On April 18, 2005, the Board convened to hear Mackes' request to improve the Property by placing an already existing house thereon. On May 20, 2005, the Board issued a decision that denied Mackes permission to relocate the house on the Property. That house measured twenty-four feet by thirty-six feet, for a total of 900 square feet, and it would have encroached on both the front and rear yard setback requirements. At that time, the Board concluded that "although the Applicant faces an exceptional practical difficulty because of the configuration of the lot creating a seven side buildable area, this particular request is not the minimum necessary to resolve the difficulty."[2] Fenwick Island Bd. of Adjustment Decision (May. 20, 2005), at 3. Furthermore, the Board found that "it had not received evidence that the lot was unbuildable with some other design or structure other than the proposed existing structure to be moved on to the Property." *Id*.

After seeking input from the Board on what type of structure would be acceptable for the Property, Mackes had Keith Iott (hereinafter "Iott"), a licensed architect and registered engineer, design what was believed to be a suitable structure for the Property. Mackes' building permit was again denied by Patricia J. Schuchman (hereinafter "Schuchman"), the Town's Building Official.

[2] At oral argument, the parties acknowledged that the lot is triangular; not seven sided.

On December 20, 2005, Mackes appealed Schuchman's denial. The appeal included a request for a ten foot variance from the front setback requirement, making it fifteen feet instead of the twenty-five feet required by Code.[3] The proposed structure had two floors and measured 821 square feet of lot coverage. There was a "bump out" above grade on the first and second floors which would be 11 feet 2 and 3/4 inches from the street line. The bump out was approximately twenty-two square feet per floor, and extended 4 feet 9 and 1/4 inches into the fifteen foot front yard setback that Mackes requested.

The Board heard testimony on Mackes' second request for a variance on January 24, 2006. The focus of the Board hearing concerned the bump out, parking concerns, and opposition from neighbors.[4]

As gleaned from the record, the area surrounding the Property is zoned residential. Mackes testified that the proposed structure would be similar to the surrounding houses and "consistent with the Fenwick Island view," although, according to Mackes, it possibly would be a bit more "beachy" in appearance. Transcript at 27, ll. 19-25; at 28, ll. 1-10. However, there was contrary opinion offered through a letter written by Barbara Housely (hereinafter "Housely"), of 30 Bayside Drive. Housely believed that the granting of the requested variance would "ruin the face and fabric" of the town. Transcript at 60, ll. 11-13.

Also, the Board heard objections from adjacent property owners that the addition of the proposed structure would increase parking problems. Robert Logan (hereinafter

[3] A variance from the rear yard setback, from twenty feet to seventeen feet, had been granted to the prior property owner in 1974.

[4] There was a question about the front steps but the Board ultimately agreed that their placement was permitted. Transcript at 14.

"Logan"), of 34 Bayside Drive, claimed that the rear ends of the largest sport utility and pickup vehicles might affect the edge of the street. Transcript at 51, ll.18-25; at 52, ll.1-6. Logan also commented on the fact that the lot had been used as an overflow lot, albeit without Mackes' approval, for cars that belonged to persons renting at neighboring properties, and, if a home were placed on the property, those vehicles would have to park in the street, causing an added safety concern. Transcript at 51, ll. 3-17.

Several neighbors objected that it would be improper to grant a variance allowing Mackes to build the proposed structure when the Property was believed by many to be unbuildable. Judy Logan (hereinafter "Judy"), also of 34 Bayside Drive, stated that Mackes knew that his Property was unbuildable when he bought it. Judy claimed that he had informed everyone that he did not plan on building a structure. Transcript at 56, ll. 20-25. John Barthel (hereinafter "Barthel"), of 26 Bayside Drive, felt that "it was common knowledge … that [the] lot was unbuildable." Transcript at 57, ll.16-19. Additionally, Bill and Judy Collishaw (hereinafter collectively referred to as "Collishaws"), of the adjacent lot located at 405 Glenn Avenue, stated through a letter that they had been informed multiple times by the town of Fenwick Island that it would not be possible to construct any improvements on the site. Transcript at 62, ll. 21-25; at 63, ll.1-7. The general feeling of the neighboring property owners was that the Property should be used exclusively for boat storage.

Mary Pat Kyle (hereinafter "Kyle"), acting Chairperson of the Board, expressed an opinion regarding fire safety. Kyle felt that by shortening the required setbacks the

community would be at an increased risk from fires, which have the potential of spreading quickly from one house to the next. Transcript at 74, ll.1-2.

The Board issued a decision on February 13, 2006, which denied the variance request. The Board made the following pertinent conclusions:

> The Board concluded that the lot meets the Town's minimum size but it is an unusual shape and configuration. The Board further concluded that although the Applicant may face an exceptional practical difficulty because of such configuration, this particular request is not the minimum necessary to resolve the difficulty. The proposed structure still currently exceeds the minimum requirement. Further reductions, which may increase the setback from the street fronting the property, have not been considered.
>
> The property and its use as a residence is appropriate to the zone and in character with the neighbors; however, the size of the house and the 10 foot encroachment is excessive where the Applicant has owned the property for many years knowing its configuration, using it solely for boat storage, and making statements to the neighbors regarding such limited usage as the only usage available. If the Board were to permit this Application and variance, the resulting encroachment is excessive and will have a negative impact on the neighborhood.
>
> The Board concluded that this request is not the minimum necessary to resolve the potential difficulty of this lot. Furthermore, the Board expressed concern over the safety in the neighborhood of parking on this lot once the proposed structure is completed. Furthermore, the Board concluded that the Applicant purchased this lot with knowledge of its difficulties and treated it as unbuildable as believed by the community. To allow the Applicant now to benefit from those representations to the community would be contrary to the public interest and imposes a burden on the neighbors.
>
> The Board finally concluded that granting this application would not be in the spirit of the Zoning Ordinance with its stringent limitations on setbacks and height, especially when balanced with the public concerns for safety, for access, ingress to and egress from the lot, and off-street parking.

Fenwick Island Bd. of Adjustment Decision (Feb. 13, 2006) (hereinafter "Decision").

## STANDARD OF REVIEW

The Delaware Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing court is to determine whether substantial evidence exists on the record to support a zoning board's findings of fact and to correct any errors of law. *Hellings v. City of Lewes Bd. of Adjustment*, 1999 Del. LEXIS 235, at *4 (Del. July 19, 1999); *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Holowka v. New Castle County Bd. of Adjustment,* 2003 Del. Super. LEXIS 161, at *11 (Del. Super. Apr. 15, 2003); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986). Substantial evidence is "more than a scintilla, but less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

"[T]he Court gives great deference to the Board, requiring only 'evidence from which an agency could fairly and reasonably reach the conclusion that it did.'" *Dempsey v. New Castle County Bd. of Adjustment*, 2002 Del. Super. LEXIS 312, at *9 (Del. Super. Apr. 17, 2002). The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings. *Holowka*, 2003 Del. Super. LEXIS 161, at *11. The appellate court merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d). Application of this standard requires the reviewing court to consider the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably have reached

the conclusion it did. *Holowka*, 2003 Del. Super. LEXIS 161, at *14. "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." *Mellow v. New Castle County Bd. of Adjustment*, 565 A.2d 947, 955 (Del. Super. 1988). If the Board's decision is "fairly debatable" then there has been no abuse of discretion. *Id.*

## DISCUSSION

### I. Fenwick Island Board of Adjustment's Denial of Variance Request.

A variance from the front, side and rear setback requirements is an "area" variance rather than a "use" variance. *Riedinger v. Sussex County Bd. of Adjustment*, 2000 Del. Super. LEXIS 473, at *20 (Del. Super. Sept. 26, 2000). An area variance addresses the exceptional practical difficulty in using a particular property for a permitted use. *Holowka*, 2003 Del. Super. LEXIS 161, at *18. 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." *Id.* at *19 (emphasis added). In determining whether the difficulties presented by an owner are practical rather than theoretical, and exceptional rather than routine, a board must consider:

> the nature of the zone in which the property lies; the character of the immediate vicinity and the uses contained therein; whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses; and whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make

> normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.

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

Furthermore, in this analysis, a determination of whether or not the requested dimensional change is minimal must be made. *Id.* What is "minimal" is a fact intensive finding based upon the particular circumstances of an application. There is no hard-and-fast definition for every case.

In this regard, the parties disagree about the meanings of the words "minimal" and "minimum." Mackes argues that the only concern should be if the variance has a minimal impact. The Board contends that the variance should be the absolute minimum possible. In this context, Mackes asserts that the Board applied a wrong legal standard. Merriam-Webster's collegiate dictionary defines "minimum" as "the least quantity assignable, admissible, or possible." *Merriam-Webster's Collegiate Dictionary* 741 (10th ed. 1998). The word "minimal" is defined as "the least possible." *Id.* As these definitions indicate, the two words are synonymous in use, meaning, and practice.

"When acting in conformity with its statutory powers the board of adjustment's paramount consideration is the public interest."[5] *Baker v. Connell,* 488 A.2d 1303, 1307 (Del. 1985). By granting a variance, the board overrides the law in circumstances which

[5] It is noted that this language is taken from a case where the matter in issue was a use variance as opposed to an area variance like the one at issue herein. The law remains uniform in both applications, however, since the overarching concern for the "public interest" governs both use and area variances.

are not contrary to the public interest. *See In re Emmett S. Hickman Co.*, 108 A.2d 667, 673 (Del. 1954). With this consequence in mind, the deviation from the statute must be the least possible. This principle is recognized in analogous zoning regulations and judicial decisions. *See, e.g.,* 9 *Del. C.* § 6917(e) (for the Sussex County Board of Adjustment, the variance must be the "minimum variance" to afford relief); *Lowe's Home Ctrs. v. Sussex County Bd. of Adjustment*, 2001 Del. Super. LEXIS 526 (Del. Super. Nov. 30, 2001) (applying the *Kwik-Check* factors with 9 *Del. C.* § 6917).

The public policy for this rule has been described as follows:

> The general rule is that variances and exceptions are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. Otherwise, zoning regulations would be emasculated by exceptions until all plan and reason would disappear and zoning in effect would be destroyed. Moreover, prospective purchasers of property would have little confidence in nominal standards and would hesitate to purchase in a zoned area, where the zoning meant little in view of arbitrary, free and easy grants of variances by a zoning board. A variance should be strictly construed and granted only in cases of extreme hardship where the statutory requirements are present. Indeed, because a variance affords relief from the literal enforcement of a zoning ordinance, it will be strictly construed to limit relief to the minimum variance which is sufficient to relieve the hardship. A board should not grant a variance greater than the minimum necessary to afford relief.

8 McQuillen Mun. Corp. § 25.162 (3rd ed.).

Other treatises have confirmed this well-established point. *See* 83 Am. Jur. 2d *Zoning and Planning* § 856; 3 *Anderson's Am. Law. Zoning* § 20:86 (4th ed.). Certainly, the Supreme Court chose its words carefully in *Kwik-Check*. The statute then in effect and quoted at page 1290 authorized 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 difficulties* to the owner of 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 and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map . . ..

*Kwik-Check Realty, Inc.,* 389 A.2d at 1290 (quoting 9 *Del. C.* § 1352(a)(3) (redesignated 9 *Del. C.* § 1313(a)3)).

It is true the word "minimum" is not mentioned in this provision nor in 22 *Del. C.* § 327(3) under which the Board derived its power. However, the Supreme Court's phrase "where the requested dimensional change is minimal" expressed the customary view that variances should permit only the least necessary deviation to mitigate hardship.

Furthermore, the language in 22 *Del. C.* § 327(3) is similar to the language in 9 *Del. C.* § 1313(a)(3), a statute laying out the jurisdiction of the New Castle County Board of Adjustment. Under both statutes, an area variance may be authorized where "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 and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map." 22 *Del. C.* § 327(3); 9 *Del. C.* § 1313(a)(3). The concept of the least necessary variance arises from this language. This standard is the premise supporting any variation of a zoning law. As one court explained: it is a "time-honored condition that the relief granted should not exceed that necessary to cure the applicant's alleged hardship." *East Tarresdale Civic Assoc. v. Zoning Bd. of Adjustment of The City of Philadelphia*, 481 A.2d

976, 980 (Pa. Comm. Ct. 1984) (finding relief from the hardship under least necessary standard in legislation comparable to 22 *Del. C.* § 327(a) and 9 *Del. C.* § 1313(a)(3)).

After review of the record, the Board did articulate the correct legal standard in the two proceedings involving Mackes' desire to make residential use of the Property. After the first hearing, it felt something lesser could be proposed rather than moving a smaller existing home to the Property. With this in mind, Iott designed a home to address this concern which was the subject of the second hearing.

Although the standard was stated, it was not applied appropriately. While Iott acknowledged that the project would still be viable with the elimination of the bump-out, the Board provided no analysis nor did it give consideration concerning conditional approval on this basis. The Board was not interested in a modification of this nature which was described as "minor." Transcript at 71-72. Rather, as Board Member Michael Quinn (hereafter "Quinn") stated: "[h]aving looked at it, I do not feel that the plot plan that has been developed requests minimal changes; there's still room to go down." Transcript at 70, ll. 10-13. Quinn's reference was to Mackes' request for a fifteen foot front yard setback. Simply put, Quinn - as did the Board - felt another design might accomodate residential use with a front yard setback of more than fifteen but less than twenty-five feet.

In the background of the two hearings, this is an arbitrary demand and is not supported by competent evidence. Zoning standards must be reasonably applied; otherwise the governing body would always have unfettered discretion to deny an application. The specter of such arbitrary power was considered by Vice Chancellor Strine where a plan was

denied for being "out of character" of the area. He observed that,

> [w]ithout appropriate bounds, "out of character review" could become a capricious license to deny property owners their legitimate rights. In a vacuum, it could plausibly be interpreted to require absolute conformity with one's neighbors in all building details . . ..

*Gibson v. Sussex County Council*, 877 A.2d 54, 75 (Del. Ch. 2005).

Likewise, in a vacuum, a board always could say any submitted plan was not the minimum and should be denied. Designs can forever be tweaked. Iott, the designer, testified that the variance request and design made for a reasonable residential use of the Property which was not rebutted. Transcript at 44, l.17. Upon review of the record, there was no competent evidence for the Board to find there were other alternative designs which would permit a viable residential use of the Property.

Moreover, it is clear that one member of the Board had a closed mind on the subject and that he obviously influenced the Board. The following questions and answers show this problem as follows:

* * *

> BOARD MEMBER: And personally, I don't think that we should grant - - I don't think that we should allow houses to be at a 15-foot setback, when the variance clearly states 25 feet. I think that the lot was purchased with that understanding, and I think it ought to be retained. I mean it's contrary to public interest to bring it down to 15 foot, and I don't think there is an exceptional difficulty or practical difficulty from someone who purchases the lot with that in mind.
>
> COUNSEL: I think that you have to make some distinction with the decision from the Board last year, then. We haven't heard any testimony that the land itself or the lot itself has been changed since this was last before you. The plan has changed.

BOARD MEMBER: Well, I don't think the plan change affected the 15-foot variance. I mean the 15-foot variance was required for this home, and I disagree with it for a variance.

COUNSEL: Is there any variance that you would find acceptable?
BOARD MEMBER: There may be some, but they would be - - you know, on this lot, I don't think there is. I think it reduces the parking, I think it causes the undue hardship on the neighbors.

* * *

COUNSEL: The 15 foot you think is just too close to the road?

BOARD MEMBER: Yes.

COUNSEL: And if it were less, it might be - - what would be acceptable to you?

BOARD MEMBER: 25 feet, I think that's . . .

COUNSEL: That's the requirement. But you heard testimony that this applicant can meet either setbacks or the minimum square footage, but not both.

BOARD MEMBER: That makes this a non-buildable lot.

COUNSEL: Well, it meets all the other requirements, it's a buildable lot with the - -

BOARD MEMBER: With a 25-foot setback, it's not a practical house that can be built.

COUNSEL: They're arguing it's not practical to build in the 25-foot setback, you can't build a viable structure.

BOARD MEMBER: Well, I don't think that's a reason to grant an exception.

* * *

COUNSEL: What would be your reason for granting an exception?

BOARD MEMBER: If it was indeed a true hardship for them. He doesn't have a house there now, so where is the hardship?

COUNSEL: Well, it's a lot on your town map that is of sufficient square footage and is permitted to be improved with a house. So he's argued to you that the hardship is he can't build a house.

BOARD MEMBER: Well, I think that was understood when he - -

COUNSEL: You're basing it on his knowledge, is that right?

BOARD MEMBER: I don't think a practical house can be build on that lot.

COUNSEL: Okay.

* * *

Transcript at 71-76.

As can be seen, the member did not believe variances to build homes should be granted from the twenty-five foot setback. This same member would not find any variance acceptable. He believed that there was no reason to grant an exception even though it was not practical to build in the twenty-five foot setback and that no practical house can be built on the lot. Transcript at 71-76. In other words, Mackes bought an unbuildable lot and should never be able to build on it despite the law providing for potential relief.

In my view, this was an arbitrary and unreasonable position which affected the proceedings entirely and denied Mackes a fair hearing. It is apparent that nothing submitted would be fairly considered. As this Court has previously stated,

> Members of the board are not attorneys subject to the ethical restraints of the legal profession or trained in its concepts of fair conduct . . .. Rather they are

> citizens assigned to discharge a difficult task without guidelines which mark out the distinctions between interests which conflict with impartial decision and those which do not.
>
> * * *
>
> 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.
>
> The Zoning Board is a quasi-judicial agency and as such it must act with impartiality, as a neutral arbiter and not as an advocate for one position or another. *See* 4 Anderson's Am. Law. Zoning § 22:8 n. 87 (4th ed. 1997) ("Zoning hearing Board is quasi-judicial agency and has statutory power which lies in law and which includes only remedial powers expressly granted to it by statute or ordinances or which are implied by conferral of express powers."). Granted, it also has the obligation to protect the public interest, but this cannot be carried out at the expense of a fair proceeding for all involved.

*Brittingham v. Bd. of Adjustment of Rehoboth Beach,* 2005 Del. Super. LEXIS 18, at *38-39, 44 (Del. Super. Jan. 14, 2005)

The biased Board member's predisposition against Mackes' application tainted the proceedings, preventing Mackes from ever receiving a fair hearing. Because of such bias, this Court finds it unnecessary to discuss any further the quorum and voting requirements of the Fenwick Island Board.[6] The prejudiced position taken by the Board member

[6] The parties expressed their views on quorum and voting requirements at oral argument, and later addressed the issues through memoranda submitted to this Court. The lawyer for the Board argued that the bias of the one Board member should not affect the Board's decision because a majority of those present (two of three) voted against Mackes' application. However, as suggested Appellant's memoranda and accepted by this Court, the prejudice that existed affected the entire proceeding and prevented Mackes from receiving a fair hearing. The views expressed by the Board member are an inextricable part of the Board's deliberation. The undue influence, along with other reasons addressed herein, requires reversal of the Board's decision. In this context, no further discussion of quorum and voting requirements is necessary.

poisoned the proverbial well, thus preventing a majority of the Board members present from voting in favor of Mackes' application. Zoning applications should be judged on their merits and granted where the facts and the law warrant such a result. The Board, through the language used by one member, expressed an unwillingness to grant *any* variance on the property in question, even if the facts and the law dictated a contrary result. For this reason, the decision of the Board must be reversed.

Furthermore, the Board member, including the Board in its conclusion, believed Mackes' prior knowledge about the zoning restriction would preclude relief. The Delaware law, however, is not this way. As summarized in *Mesa Communications Group, L.L.C. v. Kent County Board of Adjustment*, Judge Witham noted:

> In adopting the Planning Department's recommendation, the Board found that the hardship for Mesa was self[-]imposed. Generally a board will deny a variance request when the hardship has been self-created. Self-imposed or self-created hardships are those that "arise from 'difficulties uniquely personal to the owner, rather than intrinsically related to the property itself.'" In *Dexter* [*v. New Castle County Bd. of Adjustment,* 1996 Del. Super. LEXIS 495 (Del. Super. Sept. 17, 1996)], the court went on to note that the self-created hardship cases "have typically involved some kind of affirmative action on the part of the land owner." No affirmative action has taken place in the immediate case. Mesa is asking for a variance to be able to build the proposed tower. Furthermore, "the fact that an application has prior knowledge of the existing zoning regulations applicable to the land does not preclude the right to a variance; it is merely an element to be considered in determining the existence of hardship." If prior knowledge of the zoning regulations acted as a bar to variance applications, it would be virtually impossible to obtain a variance. The Board can weigh the knowledge as a factor in its decision, but prior knowledge by itself does not make a hardship self-created. The Board was in error in finding that Mesa's hardship was self-created.

2000 Del. Super. LEXIS 417 (Del. Super. Oct. 31, 2000).

Moreover, the court in *Hanley v. City of Wilmington Zoning Bd. of Adjustment* cited 3 Rathkopf's Zoning and Planning § 38.06 which states that, "it should not be within the discretion of a board of appeals to deny a variance solely because a purchaser bought with knowledge of the zoning restrictions." 2000 Del. Super. LEXIS 262, at *11 (Del. Super. Aug. 3, 2000).

It is true that there was testimony offered on the impact of the residence on traffic. The design provided for parking and additional space on other parts of the Property. Nevertheless, the Board accepted Logan's non-expert opinion about possibilities arising from the largest oversized vehicles. This view is speculative. If overflow problems exist, they are not of Mackes' making, and the town should enforce or adopt parking ordinances. The concerns expressed about traffic from Logan and others are too general and uninformed to be reliable. They are not adequate grounds to deny Mackes' application, and the Town cannot effectively require Mackes to keep his land as a community parking lot. *See Gibson,* 877 A.2d at 72-73 (vague and unsupported traffic concerns are insufficient grounds for denying zoning relief).

In addition, the opinion expressed by Kyle about a fire and safety concern where a setback is varied is personal to her. Her view is not supported by any evidence of record. This is not appropriate, for as one court found:

> It is manifest from questions asked by members of the Board at the hearing that, in considering various aspects of this case, they were relying upon facts known to them personally but not made a matter of record by proper evidence. Our various administrative and quasi-judicial bodies should understand that any pertinent information known personally by the members,

> but not placed into the record by proper evidence, cannot be considered by a court on appellate review.

*Zoning Bd. of Adjustment of New Castle County v. Dragon Run Terrace, Inc.,* 222 A.2d 315, 318 (Del. 1966).

The Board's findings have to be based upon evidence which can be rebutted and subject to judicial review. *See Rollins Broadcasting of Delaware, Inc., et. al. v. Hollingsworth,* 248 A.2d 143, 145 (Del. 1968).

## CONCLUSION

In conclusion, I find the Board handled Mackes' application with a closed mind, which precluded any thoughtful analysis for the balancing of the factors required by *Kwik-Check* and the law. The Board's decision, therefore, must be reversed.[7]

***IT IS SO ORDERED.***

cc: Prothonotary

[7] In light of the result, Mackes' other points regarding condemnation are not addressed.