SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2
GEORGETOWN, DE 19947

January 31, 2018

Mark F. Dunkle, Esquire
Parkowski, Guerke & Swayze, P.A.
116 West Water Street
P.O. Box 598
Dover, DE 19903

Daniel F. McAllister, Esquire
Baird, Mandalas, Brockstedt, LLC
6 South State Street
Dover, DE 19901

Michael J. Hoffman, Esquire
Tarabicos Grosso, LLP
One Corporate Commons
100 W. Commons Blvd.
New Castle, DE 19720

RE: ***Nepa v. City of Lewes***
C.A. No.: S17C-08-012ESB

Dear Counsel:

This is my decision on the Motion for Summary Judgment filed by the City of Lewes in this declaratory judgment action brought by Ernest M. and Deborah A. Nepa against the City challenging the constitutionality of the City's (1) R-4 dimensional requirements, (2) Historic Preservation District regulations of §197-56 *et seq*., and (3) Nonconforming Regulations of §197-84 *et seq.*

The Nepas own three parcels of real estate in the City's residential medium-density (historic) zoning district. Thus, the three parcels are subject to the eight-foot

side yard setback requirement and the City's historic district preservation regulations set forth in §197-56. The three parcels are improved by nonconforming structures, making them also subject to the City's nonconforming regulations set forth in §197-84. The Nepas' house located at 116 Dewey Avenue is very old and was built before the City had adopted the challenged regulations. It is located 3.2 feet from one side yard property line. The Nepas applied for, among other things, a variance from the eight-foot side yard setback requirement so that they could expand the house by adding a second story that also goes into the back yard. The City Board of Adjustment denied the Nepas' variance request. The Nepas' appeal of that denial is pending in this Court. The City's historic preservation district regulations limit, among other things, the alteration and demolition of properties in the historic district and favor the restoration rather than demolition of historic properties. The City's nonconforming regulations allow nonconforming structures to continue until they are removed, but limit any alteration of them that would increase their nonconformity. However, normal repair and maintenance are permitted. Taken together, the eight-foot side yard setback, and historic district and nonconforming regulations make it difficult for the Nepas to demolish or enlarge their homes. Thus, they are seeking to have the eight-foot side yard setback and other regulations declared unconstitutional.

The Nepas argue that (1) the eight-foot side yard setback requirement is void

as an irrational, arbitrary, and capricious exercise of the City's police powers, and (2) the simultaneous application of the historic district regulations and nonconforming regulations are void as an irrational, arbitrary and capricious exercise of the City's police powers. I have granted the City's Motion for Summary Judgment, concluding that the challenged regulations are reasonably related to the peace, good order, health, safety, morals or general welfare of the community.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[1] Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[2] The Court views the evidence in a light most favorable to the nonmoving party.[3] Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine

[1] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[2] *Id.* at 681.

[3] *Id.* at 680.

issue of material fact for trial.[4] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.[5] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.[6]

THE RATIONAL BASIS TEST

A municipality may regulate private property under its police powers.[7] The constitutionality of zoning ordinances promulgated to implement those powers is presumed. Therefore, anyone who challenges the constitutionality of a zoning ordinance bears the burden of proof.[8] While "it would be difficult if not impossible, to define the precise scope of [the State's police] powers, ... an ordinance based thereon must have some rational and necessary connection with the peace, good order, health, safety, morals or general welfare of the community."[9]

---

[4] *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

[6] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

[7] *Green v. County Council of Sussex County*, 508 A.2d 882, 884 (Del. Ch. 1986).

[8] *Buckson v. Town of Camden*, 2002 Del.Ch. LEXIS 126, at *3 (Del. Ch. Oct. 31, 2002).

[9] *Papaioanu v. Comm'rs of Rehoboth*, 20 A.2d 447 (Del. Ch. 1941).

"The test for determining the constitutionality of such an ordinance is whether its terms are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[10] "In considering what is a reasonable exercise of the police powers of the State a court must bear in mind that *if the validity of the legislation for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.* Thus, ... in any facial attack on the ordinance, the challenger must establish the absence of any state of facts that would furnish a basis to support the ordinance."[11] In *Buckson,* however, the court held that "[w]hether the ordinance, as drafted, is 'good' land use planning, of course, is not the issue.[12] The rational basis test does not require that a zoning ordinance use the least restrictive means of achieving its goal.[13] In *Rollins*, the Delaware Supreme Court stated:

> However, we read *Ceresini* to stand only for the overall proposition that "...under the guise of the police powers of the State, the use and enjoyment of private property cannot be subjected to *arbitrary*

---

[10] *Mayor and Council of New Castle v. Rollins Outdoor Adver., Inc.,* 475 A.2d 355, 360 (Del. 1984); accord *Town of Bethel v. West*, 1997 WL 525879, at *5 (Del. Ch. Aug. 18, 1997)(denying town's motion for summary judgment because it "proffered no specific reason why banning the keeping of horses promotes public health, welfare, and safety, or prevents a nuisance.").

[11] *Buckson*, 2002 Del.Ch. LEXIS 126, at *7 (internal quotations omitted)(emphasis added).

[12] *Id.*, at *9.

[13] *The Town of South Bethany v. Nagy*, 2006 WL 1451528, at *9 (Del. Ch. May 12, 2006).

and *unreasonable* restrictions which are clearly not essential to the public good or general welfare of the community." (Emphasis added). *Id.* at 449. We find that the implication arising from this language is that if an ordinance reasonably restricts or limits a specific use of property and the ordinance is reasonably related to the general welfare of the community, it would not be susceptible to constitutional challenge.[14]

DISCUSSION

I.

The Eight-Foot Side Yard Setback

The Nepas raise the following arguments regarding the City's eight-foot side yard setback:

(1) The Eight-Foot Side Yard Setback is an Irrational Standard that is not Essential to the Public Good or General Welfare.

In support of this argument the Nepas note that:

(a) The City has other zoning districts that have no side yard setbacks. There are no side yard setbacks in the Town Center and Town Center (Historic) districts. Thus, the Nepas reason that if the side yard setback is not needed everywhere, then it is not needed anywhere.

(b) Fire reduction is not the side yard setback's primary purpose because fire hazards are mitigated through building construction standards.

---

[14] *Mayor and Council of New Castle v. Rollins Outdoor Advertising, Inc.*, 475 A.2d at 355, 360 (Del. 1984).

(c) If existing homes that were built too close to a side yard property line were truly a menace, then they would have to be removed. Since the City is not requiring the homes to be removed, then the side yard setback serves no real purpose.

(d) Existing homes and new construction are treated differently, making this an impermissible double standard. Existing homes can violate the side yard setback and remain. New homes and additions to existing homes can not be built unless they conform to the side yard setback.

The Nepas' arguments mostly ignore the rational basis test, which is whether the City's eight-foot side yard setback is reasonably related to the general welfare of the community. I have concluded that it is. I note that side yard setbacks have been an accepted part of land use regulations for many years.[15] The City points out three reasons for its eight-foot side yard setback in the historic district. One, it helps to prevent the spread of fire in the historic district by prohibiting homes, as well as any additions to existing nonconforming homes, from being built too close together. Two, it allows for the placement and maintenance of utilities to service homes in the historic district. Three, it promotes health of the City's residents by allowing sufficient light and air to reach all homes in the historic district. These three benefits

[15] *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); In re *Cerisini,* 189 A. 443 (Del. Super. 1936).

provide a rational basis for the City's eight-foot side yard setback. The Nepas' failure to establish that there is no rational basis for the eight-foot side yard setback defeats their declaratory judgment action.

The matters that the Nepas note in support of their first argument are unavailing. It is no surprise that there are no side yard setbacks in the City's town center districts given the nature of them. Downtown areas probably always have been, and probably always will be, characterized by buildings with no side yard setbacks. Moreover, the Nepas' argument is fundamentally flawed. Simply because the City has chosen not to extend the benefits of side yard setbacks to the town center district does not mean that the side yard setback does not benefit the historic district. As the City pointed out, there are at least three benefits that flow to the historic district from the side yard setback.

Whether or not fire protection is the side yard setback's primary purpose is irrelevant. There is no doubt that the separation of structures reduces the likelihood of fire moving from one to another. The notion that because the City has chosen not to remove all homes in violation of the side yard setback means that the side yard setback serves no valid purpose is just nonsensical. Treating existing and new construction differently makes perfect sense and is not an impermissible double standard. If the City were unable to treat existing and new construction differently,

then the City would never be able to change as circumstances change. There is simply no authority for any of the Nepas' rationales.

(2) The Existing Side Yard Distances of Historic Homes Creates a De Facto Standard for Such Distances and Imposition of the Artificial Eight-Foot Setback Requirement is "Redundant, Unnecessary and an Irrational and Unreasonable Code Requirement for Structures in the R-4(H) Zone Such as 116 Dewey Avenue."

The homes in the historic district are built anywhere from 12 to 20 feet apart. The distance between the Nepas' home at 116 Dewey Avenue and 118 Dewey Avenue is 17 feet. Thus, the Nepas reason that there is no need for an additional setback requirement because the purpose of it has largely been achieved though the manner in which the homes are actually located. Aside from the fact that this argument ignores the rational basis test, the other flaw in it is that simply because the way the homes are located now does not mean that they will stay that way without the City's side yard setback. The Nepas, and others, if left to their own desires, would certainly renovate their homes in a manner that would change the existing location of the homes in the historic district. There is no basis for self-regulation in this area.

(3) The Fixed Eight-Foot Side Yard is an Inappropriate, Inflexible and Arbitrary Standard in the Historic Zone Which Ignores the Rational Method of Using the Established Height and Front Yard Distances of Neighboring Historic Houses on the Same Street to Determine Proper Historic Building Placement.

The historic district allows some flexibility in front yard setbacks and building

heights by using Established Building Lines and Established Building Heights to set the dimensions. Both the Established Building Lines and Established Building Heights use the existing front yard and building heights of neighboring homes on the street to establish their dimensions instead of using a fixed distance. The Nepas note that this flexibility helps to preserve the historic fabric and character of the City while the eight-foot sideyard setback does not. The Nepas' argument ignores the rational basis test. The City has chosen where it wants to be flexible and where it does not in order to accommodate the many interests that are served by land use regulations. Quite simply, the City does not have to allow for flexibility in every aspect of a home's dimensions in order to advance the preservation of historic homes.

(4) The Arbitrary Fixed Side Yard Setback Directly Conflicts with the Obligation of the Historic Preservation Commission to "Assist in Preserving the Historic Character and Historic Fabric of Lewes" Since the Proper Side Yard Distance Between Historic Structures in the Historic District Varies.

The Nepas' argument makes no sense. The eight-foot side yard setback in no way prevents the Nepas from preserving their homes. The notion that their homes have to be expanded in order to be preserved is unfounded.

(5) The Eight-Foot Side Yard Setback, as Applied to the R-4(H) Historic Zone, "Suppresses the Purpose of the Historic District Requirement and the Public Policy it was Intended to Involve."

The Nepas' argument once again makes no sense and is little different than

their previous argument. The general purpose of the historic district is to preserve the historic character and fabric of the City by preserving historic homes.[16] The eight-foot side yard setback does not suppress that purpose. Quite simply, the eight-foot side yard setback in no way prevents the Nepas from preserving their homes. The notion that their homes have to be expanded in order to be preserved is unfounded.

In conclusion, I have rejected the Nepas' arguments regarding the City's eight-foot side yard setback.

II.

The Historic District Regulations and the Nonconforming Regulations

The Nepas argue that the historic district regulations are arbitrary and capricious because (1) since the flexible height and front street setback in the historic district regulations support those existing attributes of historic homes as legally conforming, it is irrational to use the rigid side yard setback to make those same homes nonconforming, (2) the nonconforming status of the Nepas' house is in conflict with the historic district non-demolition and preservation provisions, (3) the nonconforming status of the Nepas' home prevents the Nepas from seeking a variance for the eight-foot side yard setback under §197-92(D)(2). Put another way, the Nepas argue that the application of both the historic and nonconforming regulations to their

[16] Lewes C. §197-56 (B).

homes is arbitrary and capricious.

There is nothing irrational about the fact that the side yard setback makes the Nepas' homes nonconforming structures. The notion that a historic structure can not also be a nonconforming structure makes no sense. The Nepas' homes and any other nonconforming structure in the historic district may be preserved in accordance with both the historic district and nonconforming regulations. Thus, there is no conflict between the regulations.

The nonconforming status of the Nepas' homes is not in conflict with the historic district's non-demolition and preservation provisions. One goal of the historic district is to preserve – not demolish – historic homes.[17] The purpose of the nonconforming regulations is to permit legal nonconforming structures to continue until they are removed.[18] However, removal is not required. Nonconforming historic structures may remain and be repaired.[19] Thus, once again there is no conflict between the historic and nonconforming regulations.

The fact that the Nepas' homes are nonconforming structures does not prevent the Nepas from seeking a variance from the eight-foot side yard setback requirement.

---

[17] Lewes C. §197-56 (B).

[18] Lewes C. §197-84 (b).

[19] Lewes C. §197-86 (B)(1).

While the Nepas may not use the nonconforming nature of their homes as a reason for a variance, they are free to use other reasons to support their request for a variance.[20]

In conclusion, I have rejected the Nepas' argument that the historic and nonconforming regulations create an irrational situation that conflicts with the City's goal of preserving historic homes.

Conclusion

The Motion for Summary Judgment filed by the City of Lewes is GRANTED.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal

oc: Prothonotary

[20] Lewes C. §197-92.