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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES L. LAIRD, ELIZABETH A. LAIRD, PETER H. LUCAS , ROSE A. LUCAS, JOSEPH MCAVOY, KATIE MCAVOY, SUZANNE MESSINA, KATHLEEN R. SULLIVAN, as trustee, and PHILLIP C. WINKLER,	)	Case No. 392, 2014
Appellants Below, Appellants,	)	Appealed from the Superior Court of the State of Delaware C.A. No. S14-A-01-001 ESB
v.	)	
BOARD OF ADJUSTMENT OF THE TOWN OF DEWEY BEACH, WALTER G. BRUHL, JR., and HELENE S. BRUHL,	)	
Appellees Below, Appellees.	)	

APPELLANTS BELOW, APPELLANTS' REPLY IN SUPPORT OF THEIR OPENING BRIEF

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B) Scope of Review. Appellants rely on the Scope of Review set forth in Argument I.B. of their Opening Brief at pp. 12-13.

C) Merits of the Argument.

(1) *The issue of whether the Structure's configuration was "essentially the same" was squarely before the Board*.

In their Answering Brief, the Appellees argue that the only issue before the Board was whether the Structure could be raised eight feet, as opposed to only five. The Appellees argue that the original building permit authorized an eight foot rise. They conclude that the Appellants should have appealed the issuance of the original permit to the Board, and having failed to do so, the Board's review of the matter as significantly narrowed.

The Appellees ignore the fact that the Board could not approve the eight foot rise without first concluding that the resulting configuration was "essentially the same" as before and was, thus, permitted by § 185-59 of the Town Code. However, the Board's determination that raising the Structure to a height of eight feet above ground level results in "essentially the same" configuration is not

supported by substantial evidence in the Written Decision. The Written Decision never states any reason or basis why raising the Structure more than five feet above ground level is "essentially the same" configuration.[1] Thus, the Court is left to guess at the reasons for the Board's conclusion, and cannot conclude that the Board's decision is supported by substantial evidence.

Appellees' argument that Appellants should have appealed the initial issuance of the permit to Board illustrates perfectly the problem inherent in a case with an incomplete record. Appellants simply assume that the Appealing Neighbors "were aware that a permit had been issued." (Answering Brief, p. 12). This argument assumes that the permit was properly posted so that the Appealing Neighbors had notice of the scope of the work that was to be performed. Put simply, there is no record that such notice was provided. In fact, some of the Appealing Neighbors would have testified, had they been permitted to do so, that the permit had not been posted and that they had otherwise not received notice of the extent and the details of the proposed construction. (A-71, A-76).

Appellants also argue that "the configuration of the Bruhls' homes was not being changed or expanded", and that the only "physical change to the home was

[1] R. at 23.

its elevation and extension of steps." (Answering Brief, p.14). That is incorrect. The Structure was also to receive a different roof, an A Frame, which would have changed the fundamental shape of the home as well as added internal volume. (A-10, A-17-18, A-70). In addition, the plans called for the relocation of a door into a setback area, which then required additional stairs to be added into the setback. (A-17-18, A-78). Unfortunately, the incomplete record makes it impossible to determine whether the Board considered the change in the roof or door relocation and corresponding additional steps in the setback when it concluded that the home was being restored to "essentially the same" configuration.

(2) *The Board Erred as a Matter of Law in Permitting the Raising of the Structure Without Requiring a Variance.*

The Appellees next argue that the Board correctly determined that Sections 185-59 and 101-11(A) permit the Bruhls to elevate their home eight feet above grade. The Appellees do not address the fact that the elevation of the Bruhls' home violates other sections of the Town Code and is, therefore, illegal. Based on the survey of the Property, the original Structure encroaches into: 1) the front yard setback by 15.3 feet; 2) the side yard setback by as much as 4.3 feet; and 3) the adjacent building set back by 1.1 feet.[2] Raising the Structure eight feet and adding external steps expands the Structure both vertically and horizontally, further

[2] *See* R. at 9; *see also, supra* at, n. 2.

encroaching into the setback area.[3] This encroachment is in violation of §§ 185-49 and 185-60(B) of the Town Code. The violation of these sections is not addressed by the Appellees in their Answering Brief and is not resolved by their interpretation of §101-3 of the Town Code.

Based on application of §§ 101-11, 185-49, 185-59, and 185-60 of the Town Code to the Property and the Structure and the lack of a valid legal explanation from the Appellees to why those sections do not apply to the Property, it is clear that the Bruhls' Property will be in violation of one section or another of the Town Code as a nonconforming property until and unless the it is brought into full compliance with the Zoning Code.

Sections 101-21 and 185-68 of the Town Code, however, allow the Bruhls to apply for variances to relieve them of the "unnecessary hardships and exceptional practical difficulties"[4] of strict compliance with the Town Code. The relief available to the Bruhls under §§ 101-21 and 185-68 of the Town Code are,

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[3] *See* Building Plans at Exhibit D to Opening Br. *See also* Town Code § 185-49 ("In residential districts, . . . steps . . . which do not extend above the level of the first floor of the building may extend or project into the required front or rear yard not more than five feet. Such extension or projection *shall not be greater than four feet above grade* and in no event be closer than six feet to the front property line.").

[4] Town Code § 185-68(A)(1).

however, subject to important limitations stated therein – namely, the variances must "represent the minimum variance that will afford relief"[5] and "involve only the least modification to provide relief."[6] When applied to the Bruhls' Property, this means that variances may only be granted for the Bruhls to raise the Structure to a height of approximately five feet above ground level, *i.e.*, the minimum height required by § 101-11(A). Five feet is the height that represents the least modification to the requirements of the Town Code while still providing relief to the Bruhls.

(3) *The Bruhls are Not Entitled to Relief on the Basis of Equitable Estoppel.*

The Bruhls (though not the Board) next argue that they are entitled to relief based on the doctrine of equitable estoppel. The Bruhls first asserted this argument in their Answering Brief to the trial court.[7] The trial court declined to rule on the issue. Regardless, the record of this case shows that the Bruhls have waived the argument that an estoppel should apply. "The general rule is that a reviewing court

[5] *Id.* §185-68(A)(5).

[6] *Id.* § 101-21(A).

[7] *See* Appellees' Ans. Br. at 15-16.

cannot consider issues and arguments not raised before an administrative agency."[8] In this case, the Bruhls did not raise their equitable estoppel claim on appeal before the Board, therefore it is deemed waived.[9]

The Bruhls equitable estoppel claim also fails on its merits. In Delaware, it is the property owner's responsibility to know the zoning and other regulations of the location where the property is located and how they affect the property in question.[10] Thus, the Bruhls are deemed responsible for knowing the zoning regulations, including §§185-49, 185-59, and 185-60 of the Town Code, that the Property was nonconforming, and that compliance with §101-11(A) of the Town Code would result in the Bruhls being required to bring the Property into full compliance with the Zoning Code or obtain the necessary variances.

[8] *Beiser v. The Bd. of Adjustment of the Town of Dewey Beach*, 1991 Del. Super. LEXIS 425, at *10 (Oct. 25, 1991).

[9] *Id. See also* Letter from Michael J. Hoffman, Attorney for Dewey Beach Board of Adjustment, to The Honorable E. Scott Bradley, Joining in Appellee Bruhl's Answering Brief in Part [D.I. No. 25), at 1.

[10] *Lowes Home Ctrs. v. Sussex Cnty Bd. of Adjustment*, 2001 Del. Super. LEXIS 526, at *18 (Nov. 30, 2001); *Cheng v. D'Onfrio*, 1994 Del. Ch. LEXIS 169, at *8 (Sep. 20, 1994); *Beiser*, 1991 Del. Super. LEXIS 425, at *14.

Consequently, the Bruhls "cannot invoke the doctrine of equitable estoppel since [they] had the means of discovering the truth."[11]

Furthermore, as Appellants have stated before, neither the Board nor the Building Official has the authority to permit the construction or reconstruction of any structure in violation of the Town Code unless a variance is requested and granted by the Board. As a result, the Building Permit, to the extent that it permitted the Bruhls to raise the Structure in violation of §§ 185-49, 185-59, and 185-60 of the Town Code, was invalid and void *ab initio*.[12] As this Court has stated:

> In Delaware, where there is an invalid permit, the doctrine of estoppel may be applied only in exceptional circumstances. Where an owner has followed a course of conduct based on a mistake regarding the zoning regulations and how they affect his property, this Court has refused to find that exceptional circumstances exist which allow the Court to deter from the general rule that *the holder of an illegal or invalid building permit may not invoke the doctrine of equitable estoppel.*[13]

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[11] *Beiser*, 1991 Del. Super. LEXIS 425, at *14; *see also Wilson v. Am. Insur. Co.*, 209 A.2d 902, 904 (Del. 1965).

[12] *Beiser*, 1991 Del. Super. LEXIS 425, at *14.

[13] *Id.* at *15. *See also Miller v. Bd. of Adjustment of Dewey Beach*, 521 A.2d 642, 646 (Del. Super. 1986); *Stokes v. Bd. of Adjustment of the City of Dover*, 285 A.2d, 813, 815 (Del. Super. 1971).

Thus, the doctrine of equitable estoppel is not available to the Bruhls as holders of the illegal and void Building Permit.

In any event, at the very least, there is not enough of a factual record for the Court to determine whether the steps taken by Appellees in reliance on the Building official's initial determination meet the criteria for either "substantial improvements" or "expensive and permanent improvements."[14]

[14] Appellees cite *Eastern Shore Environmental, Inc. v. Kent County Dept. of Planning*, 2002 Del. Ch. LEXIS 15 (Feb. 1, 2002) to establish the elements of a properly pled equitable estoppels claim as follows: 1) a party that is acting in good faith, 2) relies on affirmative acts or representations of the government, 3) by making substantial improvements to property, and 4) it would be inequitable to allow the government to impair or destroy the rights the property owner has thereby acquired. While this is an accurate quotation of the cited case, Appellants note that the *Eastern Shore* court, in pronouncing these elements, itself relied upon a prior Superior Court decision, *Miller v. Bd. of Adjustment of Town of Dewey Beach*, 521 A.2d 642 (Del. Super. 1986). That case provides that the elements of equitable estoppel are as follows: "(1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine." *Id.* at 645-46 (citing *Saah v. District of Columbia Board of Zoning*, 433 A.2d 1114, 1116 (D.C. App. 1981)). The wording of the third element is different and the "substantial improvements", as described by Appellees in their Answering Brief, do not seem to rise to the level of the "expensive and permanent" standard set forth by the

Therefore, the Court must hold that the doctrine of equitable estoppel is not available to the Bruhls both because the Bruhls had the means of discovering and the responsibility of knowing the applicable provisions of the Zoning Code and because Delaware law does not allow the application of the doctrine to the facts at hand.

Miller court. Other Delaware courts have also utilized the "expensive and permanent" standard as well.

II. THE BOARD'S DECISION SHOULD BE REVERSED BECAUSE IT FAILED TO CREATE A REVIEWABLE RECORD TO SUPPORTS ITS FACTUAL DETERMINATIONS.

A) Question Presented. Appellants rely on the Question Presented set forth in Argument II.A. of their Opening Brief at p. 24.

B) Scope of Review. Appellants rely on the Scope of Review set forth in Argument II.B. of their Opening Brief at pp. 24-25.

C) Merits of the Argument. Appellees argue that the issue before the Board was strictly legal, *i.e.* whether the operative sections of the Town Code permit the Structure to be raised above five feet over grade. However, as already stated above, that legal conclusion could only proceed from first establishing the factual predicate that any raise in elevation would be "essentially the same" configuration. The Board failed to create any record which could sustain appellate review. We do not know whether *any* evidence, let alone substantial evidence, was taken to support the Board's conclusion that an eight-foot rise in elevation, a new A Frame roof, and a door and stairs added into a setback area result in "essentially the same" configuration of the Bruhls' property. Without that, there is no support for the Board's conclusion that raising the property eight feet was legally permissible.

III. THE BOARD'S DECISION SHOULD BE REVERSED BECAUSE IT DID NOT PROVIDE APPELLANTS WITH THE OPPORTUNITY TO BE HEARD.

A) Question Presented. Appellants rely on the Question Presented set forth in Argument III.A. of their Opening Brief at p. 31.

B) Scope of Review. Appellants rely on the Scope of Review set forth in Argument III.B. of their Opening Brief at pp. 31-32.

C) Merits of the Argument.

The Board was required to provide Appellants, as parties in interest, with an opportunity to be heard at the Hearing. The Appellees argue that the general public (as opposed to parties in interest) has no right under § 185-65 of the Town Code or Title 22 of the Delaware Code to be heard at an appeal before the Board. The Appellees, however, fail to recognize that Appellants are parties in interest. Indeed, each of the Appellants were sent specific notice of the Hearing as "parties in interest" in compliance with § 185-65 of the Town Code.[15] Thus, even the Board recognized prior to the Hearing that the Appellants, as adjacent property owners, had an interest in the outcome of the Bruhls' appeal and were entitled to receive notice as parties in interest as required by the Town Code.

[15] R. at 2.

Furthermore, the Appellees concede that the "Appellants could have appealed the determination of the Building Official to the Board pursuant to §185-66 [of the Town Code] which authorizes an appeal when there is an alleged error in a decision or determination of the Building Official."[16] The Town Code only permits a "person aggrieved" by a decision to appeal it to the Board.[17] Incredibly, the Appellees argue that, while the Appellants were aggrieved persons with standing to initiate an appeal of the Building Permit, they were not parties with a sufficient interest in the outcome of the Hearing to warrant the Board to permit Appellants to be heard at the Hearing. This distinction is confusing and inconsistent with the fact that Appellants were parties in interest entitled to be heard at the Hearing.

Appellees acknowledge that the Board's own Rules would seem to have afforded Appellants the right to testify at the hearing before the Board. However, Appellees allege that any such testimony would have been irrelevant to the issues

[16] Appellees' Ans. Br. at 11. As noted in Appellants' Opening Brief, the Bruhls failure to post the Building Permit at the Property concealed the true extent of the scope of the work to be performed on the Structure; thus, preventing Appellants from initiating a timely appeal of the Building Permit.

[17] Town Code § 185-65.

at hand, because they would have been limited to, among other matters, "the character of the construction." Contrary to Appellees' position, testimony regarding the character of the construction is directly on point where the Board was tasked with determining whether the construction resulted in the Bruhl's house being in "essentially the same" configuration. As such, that testimony may have had a direct bearing on the Board's interpretation of the statutes at issue.

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