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

CECELIA HOEY AND JEWEL HOEY,	)	
	)	
Petitioners,	)	
	)	
v.	)	C.A. No. N11A-04-010 WCC
	)	
CITY OF WILMINGTON ZONING BOARD OF ADJUSTMENT, BEING DAVID BLANKENSHIP, HAROLD LINDSAY AND MARK PILNICK, AND MINISTRY OF CARING, INC., a Delaware Corporation,	)	
	)	
Respondents.	)	

Submitted: August 24, 2011
Decided: December 9, 2011

OPINION

Upon Petitioner's Complaint for Writ of Certiorari
AFFIRMED IN PART. REVERSED IN PART.

Cecelia Hoey, 1000 Kirkwood Street, Wilmington, DE 19801. *Pro se* Petitioner.

Jewel Hoey, 1018 Kirkwood Street, Wilmington, DE 19801. *Pro se* Petitioner.

Gregory V. Varallo, Esquire, Sara T. Toner, Esquire, A. Jacob Werrett, Esquire, Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, DE 19801. Attorneys for Respondent The Ministry of Caring, Inc.

Martin C. Meltzer, Esquire, City of Wilmington Law Department, 800 N. French Street, 9th Floor, Wilmington, DE 19801. Attorney for Respondents City of Wilmington Zoning Board of Adjustment, David Blankenship, Harold Lindsay, and Mark Pilnick.

CARPENTER, J.

Before this Court is a Complaint for a Writ of Certiorari submitted by Petitioners Cecelia and Jewel Hoey ("Petitioners"). Petitioners ask the Court to review and reverse the decision of the City of Wilmington Zoning Board of Adjustment ("the Board") to grant four zoning variances to Respondent, the Ministry of Caring, Inc. ("Ministry of Caring"). Upon review of the record, the decision of the Board is hereby affirmed in part and reversed in part.

Facts

Ministry of Caring is a non-profit corporation organized under the laws of Delaware and committed to serving disadvantaged Delawareans. They own land located at 625 E. 10th Street in Wilmington, Delaware ("the property"), and this case concerns Ministry of Caring's evolving plans for developing the property. Petitioners live adjacent to the property.

Ministry of Caring purchased the property in 2007, when an abandoned school building still occupied the site. They determined that renovation would not be economically feasible and ultimately razed the school building. They initially drafted plans to develop the property as townhouses for low-income first-time homeowners ("the townhouse project") which would have been consistent with the zoning requirements. However, in light of the recent economic downturn, Ministry of Caring was unable to secure funding for the townhouse project, even

from lenders with whom Ministry of Caring enjoyed positive, long-term relationships. After considering alternative uses for the property, Ministry of Caring decided to build a three-story, 25-unit residential facility for low-income seniors ("the senior housing facility"). Given Ministry of Caring's record of success in building and managing senior housing facilities, public institutions and private lenders expressed interest in funding or otherwise supporting the new project.

Because Ministry of Caring's property was zoned for single family row houses, they petitioned the Board for a use and three area zoning variances to build the facility.[1] Ministry of Caring needed the use variance in order to use the property for a purpose not permitted in the R-3 zoning district, specifically, to use the property for a multi-story apartment building in an area zoned for single family row houses.[2] In addition, they had to obtain the area variances in order to physically fit the senior housing facility on the site.[3] On December 23, 2010,

[1] *See* Wilm. C. § 48-133 (zoning the R-3 district for one-family row houses).

[2] *See Kostyshyn v. City of Wilmington Zoning Bd. of Adjustment,* 1990 WL 58226, at *1 (Del. Super. Apr. 12, 1990) ("[V]ariances are classified under two distinct categories: 'use' and 'area'. A 'use' variance allows the land to be used for a purpose which is not permitted within the zoning regulations applicable to a specific area. An example of a use variance is one which permits a commercial use in a residential district.")(citations omitted).

[3] *See id.* ("An 'area' variance . . . 'concerns only the practical difficulty in using the particular property for a permitted use.' Examples of area variances include modifications of setback lines and yard requirements.") (citations omitted).

Ministry of Caring applied to the Board for the variances. The Board held a public hearing on the matter on January 26, 2011.

At the hearing, Ministry of Caring's counsel and representative told the Board about their plans for the property. They explained that they sought to build the facility because the townhouse project was economically unfeasible. The Board questioned counsel about the proposed project's financing requirements and how the facility would fit with the surrounding community, both aesthetically and logistically. The Board also heard from members of the community who both voiced support for, or concern with, the project. Petitioner Cecelia Hoey addressed the Board and argued that the facility's location would be disruptive in a neighborhood zoned for single family houses.

At the hearing's conclusion the Board unanimously approved Ministry of Caring's application for all four zoning variances. In approving the application, the Board cited the need for senior housing, the sympathetic appearance of the proposed facility, and the neighborhood's capacity to accommodate the facility. The Board issued a written decision on March 17, 2011, stating in relevant part:

> "And the Board having held a public hearing and having heard all the testimony and considering the location, is of the unanimous opinion that the application could be granted without substantially impairing the general purpose and intent of the Building Zone Ordinance and that it would not adversely affect the character of the neighborhood, and there being

> circumstances of hardship or exceptional practical difficulties in that the property has historically been used for institutional purposes . . . [t]herefore, it was ordered that the application be granted . . .”[4]

Petitioners submitted a Complaint for a Writ of Certiorari on April 15, 2011, pursuant to 22 *Del. C.* § 328. Petitioners allege that the Board made errors of law in reaching its decision and assert that the Board did not find that Ministry of Caring faced circumstances of hardship or exceptional practical difficulty in complying with the applicable zoning ordinances.

Standard of Review

The Delaware Code states that the Court “may allow a writ of certiorari directed to the board to review such decision of the board.”[5] Certiorari is a common law writ that “lies from the Superior Court to inferior tribunals, to correct errors of law, to review proceedings not conducted according to law, and to restrain an excess of jurisdiction.”[6] The Court will reverse a decision due to errors of law where, on the record, it appears that the inferior tribunal acted illegally or where “there is irregularity in the proceedings normally required to create a proper

[4] Record of the Board Hearing, tab 2.

[5] 22 *Del*. C. § 328.

[6] 1 WOOLEY, DELAWARE PRACTICE § 896 (1906).

record."[7] In addition, the Court will reverse a decision for excess of jurisdiction where evidence of jurisdiction does not appear on the record.[8]

Under the standard for common law writ of certiorari, this Court has consistently held that it may not weigh evidence or review the lower tribunal's factual findings.[9] This standard of review differs from the Court's normal review of administrative appeals and the Court historically has not, on a writ of certiorari appeal, determined whether substantial evidence exists to support the Board's findings of fact.[10]

However, this historic standard of review on certiorari has been expanded to include a substantial evidence analysis for appeals from decisions made by a Board of Adjustment.[11] The Supreme Court and the Superior Court have found that it was the "intent and purpose of the legislature, in enacting this provision [Section 328] for a statutory certiorari" to in effect create a form of appeal similar

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[7] *Handloff v. City Council of Newark*, 2006 WL 1601098, at *7 (Del. Super. June 8, 2006).

[8] *See id.* ("[A] decision will be reversed for excess of jurisdiction 'where the evidence of jurisdiction is not spread upon the record.'").

[9] *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830, at *2 (Del. Super. Dec. 16, 2004) (TABLE).

[10] An excellent explanation of the differences between appeal processes is found in Judge Cooch's opinion in *Handloff v. City Council of Newark,* 2006 WL 1601098 (Del. Super. June 8, 2006).

[11] *See Searles v. Darling*, 46 Del. 263, 268-270 (Del. 1951) (noting that authorities differ as to the standard of review for proceedings before the Board of Adjustment, but adopting the view held "in a majority of states and favored by the textbooks" that the Court must sustain the Board's decision "if the record below shows that there was substantial evidence upon which the Board could properly have based its decision, while correctly applying the law to the facts."), *and Nepi v. Lammot*, 52 Del. 281, 284-285 (Del. Super. 1959) (finding that the statutory certiorari from Board of Adjustment decisions is, in effect, in the nature of an appeal), *and Cooch's Bridge Civic Ass'n v. Pencader Corp.*, 254 A.2d 608, 609-610 (Del. 1969) ("The determinative question before us is whether there was substantial evidence before the Board of Adjustment to support its finding. . .").

to that from other administrative boards, and for courts to likewise use a standard of review similar to the standard used for those appeals.[12] The present distinction appears to be that the substantial evidence standard will be applicable to cases that are given a statutory right of appeal, even if the statute reflects it is only through the granting of a writ of certiorari. In cases where no statutory right of appeal exists, the historic certiorari review will apply.

Petitioners have a statutory right to appeal the Board's decision.[13] Thus, the Court's review is "limited to correction of errors of law and to determining whether or not substantial evidence exists on the record to support the Board's findings of fact and conclusions of law."[14]

Section 327 provides the law the Board must apply to authorize zoning variances. The Board may grant zoning variances "where, owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances . . . will result in unnecessary hardship or exception practical difficulties to the owner of the property."[15] The category of variance at issue dictates the specific standard the Board must use.[16] To grant a use variance, the

[12] *Nepi,* 52 Del. at 284-285.
[13] *See* 22 *Del. C.* § 328 (providing that any person aggrieved by a Board decision may present a petition to the Superior Court setting forth that such decision was illegal).
[14] *Janaman v. New Castle County Bd. Of Adjustment,* 364 A.2d 1241, 1242 (Del. Super. 1959).
[15] 22 *Del. C.* § 327.
[16] *Kostyshyn*, 1990 WL 58226, at *1 (explaining the different findings required by the Board in order to grant area and use variances).

Board must find that the applicant demonstrated unnecessary hardship.[17] On the other hand, to grant an area variance, the Board must find a showing of exceptional practical difficulties.[18]

The Court must decide whether the Board's decision to grant the variances conforms to Section 327's requirements. After reviewing the record and considering the arguments of the parties, the Court finds that, on the face of the record, the Board's decision to grant the use variance was not contrary to the law; was supported by substantial evidence; and that the Board committed no legal errors in reaching that decision. However, the Court finds that the Board's decision to grant the area variances failed to comply with the legal requirements for granting such variances. As such, for the reasons discussed below, the Board's decision will be affirmed in part and reversed in part.

Discussion

1. The Use Variance

Section 327 authorizes the Board to grant a use variance if the application of a zoning ordinance would otherwise result in unnecessary hardship to the property owner.[19] The applicant bears the "heavy burden of showing unnecessary

[17] *Id*.
[18] *Id*.
[19] 22 *Del. C.* § 327.

hardship since it is recognized that a prohibited use, if permitted, would result in a use of the land in a manner inconsistent with the basic character of the zone."[20] To obtain a use variance, the Supreme Court in *Baker v. Connell* articulated that the applicant must prove (1) that the property cannot yield a reasonable return if used for a permitted purpose; (2) that the applicant's need for the variance is due to unique circumstances; and (3) that the use sought will not alter the essential character of the locality.[21]

a. Reasonable Return

To satisfy the first element of *Baker*, Ministry of Caring must show that their property cannot yield a reasonable return if used for single family row houses.[22] It is worth noting that Ministry of Caring, a 501(c)(3) non-profit entity, develops property not with the goal of "a reasonable return," but rather with the goal of serving the public to the extent the organization's budget allows. Nevertheless, Ministry of Caring presented evidence that they will draw *no* return if the property is developed for purposes permitted under its present zoning.

When Ministry of Caring purchased the property at 625 E. 10th Street, the property was occupied by a severely dilapidated historic school building. After

[20] *Baker v. Connell*, 488 A.2d 1303, 1307 (Del. 1985).
[21] *Id.* (citing *Homan v. Lynch*, 147 A.2d 650 (1959)).
[22] *See* Wilm. C. § 48-133 (zoning the R-3 district for one-family row houses).

the purchase, it soon became apparent that restoring and renovating the school building would be significantly costly and economically infeasible, and would limit Ministry of Caring's use of the property to serve the community. As a result, Ministry of Caring decided to demolish the building and attempt to build seven townhouses on the property. Under this plan, Ministry of Caring projected that they would still lose approximately $30,000 per unit even if they sold all seven townhouses. In spite of this grim economic forecast, Ministry of Caring proceeded with the townhouse project because of the pressing need for affordable housing. They demolished the school building, prepared the lot for development, and drafted architectural plans for the townhouses. It appears that the surrounding community universally accepted the townhouse project. But Ministry of Caring's attempts to secure funding, even from institutions with whom they had long and productive relationships, were unsuccessful.

Without the necessary funding for the townhouse project, Ministry of Caring has few alternative options for using the property that comply with applicable zoning laws. As such, it appears that the property will simply sit vacant and will yield no return. The Court is convinced, therefore, that the evidence presented on Ministry of Caring's need for a use variance is consistent with the

findings required under *Baker*.[23] Ministry of Caring proved that their property cannot yield a reasonable return if used for a permitted purpose, and as such, the Court finds that the Board's decision was not arbitrary or contrary to the law, and that there is substantial evidence to support the Board's findings as to this requirement.

b. Unique Circumstances

The second element of *Baker* requires Ministry of Caring to show that their need for a use variance is due to unique circumstances "and not general conditions in the neighborhood which reflect the unreasonableness of the zoning ordinance itself."[24] In other words, the property owner must show that, due to their unique situation, they cannot reasonably conform to the zoning laws. Ministry of Caring presented two conditions that they assert satisfied this requirement.

First, Ministry of Caring cites the unique condition of the property when they purchased it. Ministry of Caring had to demolish a dilapidated school building at significant cost. This expense, when added to the cost of the original townhouse project, would have resulted in a debilitating economic loss exacerbated by the fact that no lenders were willing to fund the project.

[23] *See Baker*, 488 A.2d at 1307 (requiring a variance applicant to show that their property cannot yield a reasonable return if used for a permitted purpose).
[24] *Id*.

The second unique circumstance Ministry of Caring points to is its ability, as a non-profit entity, to obtain federal and state funding to use the property to improve the community and, in particular, our less fortunate senior population. It is their track record of community service and a previous record of success that has generated a unique circumstance that would be unavailable to a private investor. While it is true that economic hardship alone will not normally justify a variance, this is not a situation where the owner of the property simply wishes to receive a variance from the zoning ordinance to gain an additional economic benefit. Here, without a zoning change, Ministry of Caring has no viable alternative. It is their unique non-profit status that allows Ministry of Caring access to state and federal funding to build the senior housing facility that generally would be unavailable.

Based upon the record, the Court again finds there was substantial evidence to support the Board's decision and that no legal error occurred.

c. Essential Character of the Locality

To satisfy the third and final element of *Baker*, Ministry of Caring must prove that developing a senior housing facility on their property would not alter

the essential character of the locality. In other words, the property's use must be consistent with the "basic character" of the R-3 zone.[25]

Speaking to the physical character of the locality, Ministry of Caring advised the Board that the senior housing facility would be sympathetic with the neighborhood in terms of the building's proportions, materials, and other structural details. Ministry of Caring presented to the Board the architectural plan for the facility, which projects that all of the exterior facades of the building that face the street will be brick. In this way, Ministry of Caring demonstrated their intent that the facility blend and be in harmony with other neighborhood buildings. In addition, the architectural plan reflects an attempt to match the style of the neighborhood's windows and cornice details.

At the hearing, Board members expressed concern that the senior living facility would lead to parking problems for current and prospective residents of the neighborhood. Ministry of Caring responded by noting that most of the residents in its other senior housing facility do not own vehicles and that the facility as planned includes adequate parking for staff and residents consistent with Ministry of Caring's experience accommodating vehicles at a similar facility.

[25] *See CCS Investors, LLC v. Brown*, 977 A.2d 301, 318 (Del. 2009) (noting that prohibited uses in certain zones are inconsistent with the basic character of the zone).

The respondent also pointed out that, while senior housing facilities are not expressly permitted in the R-3 zoning district, analogous facilities with similar residential restrictions—such as nursing homes, convalescent homes and type II group homes—are permitted.

On the basis of this evidence, the Board concluded that the variance "would not adversely affect the character of the neighborhood." The Court can find no legal basis to disturb this finding and substantial evidence was presented in support of this conclusion.

Because the Ministry of Caring complied with the requirements set forth in the *Baker* decision, the Court finds it has no basis to hold that the Board acted contrary to the law by approving the use variance for the proposed senior housing facility.

2. The Area Variances

Ministry of Caring also applied for three area variances in order to accommodate the senior housing facility on the property. The variances requested shorter building setback and side yards requirements and to provide for a long loading berth. In order to obtain these variances, Section 327 requires Ministry of Caring to show that compliance with the applicable setback, side yard, and loading berth requirements would present exceptional practical difficulties in building the

facility.[26] The Court has reviewed the application filed by Ministry of Caring, its various attachments, and the transcript of the hearing before the Board. Other than an indication that they are seeking area variances, Ministry of Caring presented nothing to justify their need for these variances.

At the hearing, Ministry of Caring said—and the Board asked—little to nothing about exceptional practical difficulties that might result if the Board denied the area variances. Instead of addressing the technical aspects of the area variance requests, Ministry of Caring and the Board spent the majority of the hearing discussing whether the senior housing facility would benefit the community. In fact, members of the public—including Petitioner Cecelia Hoey—were the first and only hearing attendees to comment on the size of the facility relative to the size of the property.

In spite of this deficiency, the Board found "circumstances of hardship or exceptional practical difficulties in that the property has historically been used for institutional purposes."[27] The Board's finding seems to imply that, if the site was not used for row homes before, it need not be used for row homes now. This is not the justification required by Section 327 to grant an area variance. To approve

[26] *See* 22 *Del. C.* § 327 (granting the Board authority to permit variances from zoning ordinances where, owing to special conditions, a literal interpretation of the ordinance would result in exceptional practical difficulties to the property owner).

[27] Record of the Board Hearing, tab 2.

an area variance, the Board must find that a literal interpretation of the applicable zoning ordinances would result in exceptional practical difficulties to the property owner.[28]

The Board's decision does reference an earlier finding related to a variance application Ministry of Caring submitted while still pursuing the townhouse project. The decision indicates that "the proposed setbacks and building mass are consistent with those recently granted for a proposed townhouse development on the site and with those of other properties in the vicinity."[29] While there may have been another variance request that the Court is unaware of, unlike use variances, area variances are unique to the structure being built. A variance granted for one type of structure on Ministry of Caring's property does not "carry over" to a different structure. The Board's decision seems to imply that the granting of a previous variance on the property eliminates the need to consider a similar variance now. That reasoning is not only illogical but also inconsistent with the legal mandates the Board must comply with. Regardless of whether the lack of evidence justifying Ministry of Caring's need for the area variances was due to an oversight or due to a belief that no evidence was necessary, Ministry of Caring's

[28] 22 *Del. C.* § 327.
[29] Record of the Board hearing, tab 2.

failure to present any evidence on the subject cannot support the Board's decision to grant the area variances.[30]

When there is no evidence of exceptional practical difficulties for the Board to weigh, it is difficult for the Court to find that the Board has undertaken the process of "winnowing or sifting" the facts to make its decision.[31] It is an error of law to draw conclusions concerning matters upon which nothing has been presented and clearly substantial evidence does not exist in the record to support the Board's decision. The Court appreciates that building a senior housing facility in a residential community is a controversial topic and it certainly was logical and appropriate for Ministry of Caring to address that controversy in their presentation. This does not mean, however, that an area variance is simply a given that will naturally flow from the granting of a use variance. The Court finds that the Board's decision regarding the area variance is unsupported by even a scintilla of justification and therefore was erroneous and must be reversed.[32]

[30] The Court also notes, as to the area variance request before the Court, that there was no evidence of the granting of similar variances for other properties in the area as stated by the Board.
[31] *Willdel Realty, Inc. v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. 1970).
[32] Nothing in this decision should be construed as preventing Ministry of Caring from again filing for an area variance before the Board and to present appropriate justification of exceptional practical difficulties.

Conclusion

The work and goals of Ministry of Caring's various projects throughout Delaware are admirable, and their commitment to help those in our community who are less fortunate is worthy of support. However, neither the Board nor this Court may circumvent Delaware law to facilitate an altruistic project, even when that project is strongly supported by the public. For the reasons stated above, the Court concludes that the decision of the Board to grant the use variance conformed with the law and will not be disturbed. However, the Board's decision regarding the area variances is not consistent with the requirements of the Delaware Code and must be reversed.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.