

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

SAMUEL TOLSON and :
CHARLENE JONES, : C.A. No: K11A-09-005(RBY)
: :
Appellants, :
: :
v. :
: :
KENT COUNTY DEPARTMENT OF__ :
PLANNING SERVICE, :
: :
Appellee. :

Submitted: February 13, 2012

Decided: May 22, 2012

*Upon Consideration of Appellants’
Appeal from the Kent County Board of Adjustment
AFFIRMED*

ORDER

Samuel Tolson and Charlene Jones, *Pro Se*.

Noel E. Primos, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for
Appellee.

Young, J.

SUMMARY

_____ Samuel Tolson and Charlene Jones appeal the decision of the Kent County Board of Adjustment denying Ms. Jones a variance to allow her to construct an addition on her home. In making that decision, the Board considered the impact the variance would have on the property and the neighboring property. Moreover, denial of the variance does not create unnecessary hardship nor exceptional practical difficulty. As such, the Board's decision is free from legal error, and is supported by substantial evidence. The Board's decision is **AFFIRMED**.

FACTS

_____ Samuel Tolson and Charlene Jones applied to the Kent County Board of Adjustment (the Board) for a zoning variance permitting Mr. Tolson to build onto Ms. Jones' home an addition that would otherwise violate Section 205-129(A)(3) of the Kent County Code. That provision requires principle structures located on property zoned Residential Manufactured Home (RMH) to abide by a 10 foot setback from the property line. Ms. Jones' property is zoned RMH. The proposed addition would encroach upon the property line up to 5.8 feet.

On August 18, 2011, the Board held a public hearing and business meeting on the matter. Prior to the hearing, the Department of Planning Services (the Department) issued a report recommending that the Board deny the application. In support of its recommendation, the Department cites the above referenced setback violation, septic system issues and certain Fire Marshall comments.

Regarding the septic system, Ms. Jones intended, initially, to make the addition a bedroom. Doing so would have required an updated septic system. Without the

Tolson, et al., v. Kent County Department of Planning
C.A. No: K11A-09-005(RBY)
May 22, 2012

ability to update the system, Ms. Jones decided to treat the new space as a living area.

According to the Fire Marshall, because of the lack of fire hydrants within 500 feet of the property, any wall facing a property line that is within 15 feet of the property line must be constructed with materials having a minimum fire resistance rating of one hour. The Department expressed concern regarding the close proximity that the addition would have to the structure existing on the neighboring lot.

Mr. Tolson testified at the hearing that he intended to install fire board on the wall along the property line as required. Additionally, he testified that Ms. Jones' would treat the space as a living area to accommodate her four foster children. His testimony was corroborated by Ms. Jones prior to the conclusion of the hearing.

Ultimately, the Board denied the application. The Board explained that its decision was based on the staff recommendation, testimony provided at the hearing, the proximity of the addition to the neighboring property, and concerns regarding the septic system and Fire Marshall comments. Moreover, certain members of the Board were concerned that the addition would be used as a bedroom. Mr. Tolson and Ms. Jones, together, appealed that decision to this Court, naming the Kent County Department of Planning as Appellee.

STANDARD OF REVIEW

_____An appeal from an administrative board's final order to this Court is restricted to a determination of whether the Board's decision is free from legal errors and whether the Board's finding of facts and conclusions of law are supported by

substantial evidence in the record.¹ Substantial evidence is that which “a reasonable mind might accept as adequate to support a conclusion.”² It is more than a scintilla, but less than a preponderance of the evidence.³ It is a low standard to affirm and a high standard to overturn. If the record contains substantial evidence, then the Court is prohibited from re-weighing the evidence or substituting its judgment for that of the agency.⁴ Questions of law are reviewed *de novo*.⁵

DISCUSSION

_____ Pursuant to 9 *Del. C.* § 4917(3), the Board may, under exceptional circumstances, authorize a variance from the strict application of zoning ordinances where such application would result in “peculiar and exceptional practical difficulties” or cause “exceptional and undue hardship upon” the property owner. In making this determination, “the Board should take into consideration 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

¹ 29 *Del. C.* §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)).

³ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 567 F. Supp. 110 (D. Del. 1983)).

⁴ *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 42 (Del. Super. 1976).

⁵ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154 (Del. 1998).

Tolson, et al., v. Kent County Department of Planning
C.A. No: K11A-09-005(RBY)
May 22, 2012

removed, such removal would seriously affect such neighboring property and uses; 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.”⁶

_____The Board considered the evidence presented in the context of the above referenced considerations. During the business meeting vote, members of the Board stated that their reluctance to approve the variance was based on the size of the lot. The Board was concerned with the placement of a structure so near to the structure existing on the neighboring lot. Although fire board could be installed, the close proximity of the buildings would create a fire hazard.

The Board was also concerned with the capacity of the septic system to accommodate additional inhabitants on the property. The Board found that, although, in this instance, Ms. Jones evidently did not intend to add persons upon completion of the proposed addition, the addition would remain on the property after Ms. Jones’ vacation thereof, potentially creating the risk for septic problems in the future.

_____Finally, there is no evidence that denial of the variance creates an unnecessary hardship or exceptional practical difficulty. Ms. Jones would like to have more space in her home. The Board legitimately determined that was insufficient to satisfy the variance requirements.

⁶ *Bd. of Adjustment v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978).

Tolson, et al., v. Kent County Department of Planning
C.A. No: K11A-09-005(RBY)
May 22, 2012

CONCLUSION

The Board's decision is free from legal error and supported by substantial evidence. The Board's decision is **AFFIRMED**.

SO ORDERED.

/s/ Robert B. Young

J.

RBY/sal