SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

August 20, 2009

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Re: ***Rehoboth Art League, Inc. v. Board of Adjustment of the Town of Henlopen Acres***
C.A. No. 08A-01-004 THG

Date Submitted: **June 25, 2009**

Dear Counsel:

This matter is before the Court on an appeal of a decision of the Board of Adjustment of the Town of Henlopen Acres. For the reasons that follow, the Board's decision is affirmed in part and denied in part.

PROCEDURAL AND FACTUAL BACKGROUND[1]

Rehoboth Art League ("RAL") owns and occupies Lots 1 and 2, Block J, within the Town of Henlopen Acres ("Town"), a chartered municipality of the State of Delaware. RAL engages in a host of activities on its residentially-zoned lots in several structures which have been on the lots for many years. As such, the uses of the property in the Town, as well as the multiple structures, are considered non-conforming as to both use and area/dimension.

[1] The history of the RAL, its expansion of activities and programs offered, and the procedural backdrop to this appeal are essentially undisputed by the parties.

Several years ago, RAL determined that it needed additional space for its ongoing and expanding activities. After being advised that renovating existing structures was not economical, RAL decided on a plan to demolish an existing structure known as the Chambers Building, and to construct a significantly larger building in its place. Because that plan would disrupt the existing non-conforming use of the property, the plan required several variances. In addition, during the planning process, an issue arose regarding whether or not RAL's two lots should be considered a single lot under the current code, an issue which would primarily affect the calculation of setbacks. The Town's zoning official (and town manager) determined that there were two separate lots and that the lots needed to considered as such. By letter dated October 20, 2006, RAL, through counsel, appealed the administrative decision to the Board.

The appeal and the two variances determined to be necessary were advertised and considered at a pubic hearing on August 21, 2007. At the close of the hearing, several board members asked for additional information on a number of issues, and as a result, the record was left open in order for the Board's counsel to obtain additional information. In addition, closing statements and legal argument were submitted in writing after the hearing by the parties.

The Board reconvened on November 7, 2007, after having reviewed those written submissions, and at which time they also received answers to the questions raised earlier. Following deliberation, the Board affirmed the decision of the building official regarding the "one lot/two lot" issue, and voted to deny the two variance requests. A written decision was subsequently approved by the Board. This appeal followed.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of a Board of Adjustment is limited to whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] It merely determines if the evidence is legally adequate to support the agency's factual findings.[5] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[6]

DISCUSSION

I. The Board's Decision and Prejudgment of the Issues.

The first issue in this case is whether the Board prejudged the issues before it, preventing any thoughtful analysis of the facts and law. This Court has routinely determined that a Board of Adjustment is a quasi-judicial agency:

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[2]*Janaman v. New Castle Co. Bd. Of Adj.,* 364 A.2d 1241, 1242 (Del.Super.Ct.1976); *aff'd* 379 A.2d 1118 (Del.1977); *General Motors Corp. v. Freeman,* 164 A.2d 686 (Del.1960).

[3]*Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892, 899 (Del.1994); *Battisa v. Chrysler Corp.,* 517 A.2d 295, 297 (Del.Super.Ct.1986), *app. dism.,* 515 A.2d 397 (Del.1986).

[4]*Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del.1965).

[5]29 *Del. C.* § 10142 (d).

[6]*Dellachiesa v. General Motors Corp.,* 140 A.2d 137 (Del.Super.Ct.1958).

> The power granted to the Board can only be exercised within the spirit of the Ordinance and 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 the 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. (Citations omitted). 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.[7]

In the case at hand, RAL argues that the Board prejudged the matters before it. RAL argues that two of the Board members essentially denied the case before hearing anything substantive about it when the following dialogue occurred:

> BOARD MEMBER SMITH: I don't think it is a legal argument. Do you, Peter?
> BOARD MEMBER KENNEY: I think there are issues that should be raised on the one lot-two lot.
> COUNSEL: Well, I'm certainly going to address those, and I think we can do it through legal arguments that show why you are all bound to find that it actually must be considered one property.
> BOARD MEMBER KENNEY: I don't agree.
> COUNSEL: Well, you know. I have to object to that statement because you haven't even heard my argument, and if you are going to state on the record that you've already made up your mind, that's a problem.
> BOARD MEMBER KENNEY: No. The facts indicate otherwise, but go ahead.

RAL argues that Mr. Kenney's and Mr. Smith's statements tainted the entire proceedings, as evident from their participation in the deliberation prior to the Board's vote. RAL relies on the November 7, 2007, meeting transcript to prove that Mr. Smith and Mr. Kenney were the primary participants in the discussion leading to the denials of RAL's appeal and variances, and that their statements supporting their subsequent votes against RAL were relied upon by the other members to support their own votes.

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[7] *Mackes v. Bd. of Adj. of Fenwick Island,* 2007 WL 441954 (Del.Super.Ct.2007).

RAL relies on *Mackes v. Board of Adjustment of the Town of Fenwick Island*[8] in support of its argument. There, the Court found that one Board member had a fundamental objection against variances on the property at issue, and that nothing submitted by the application would have been fairly considered. In the instant case, there was no such predisposition stated or implied.

The Board argues that it is worthwhile to note remarks made by the Board's counsel at the commencement of the November 7, 2007, hearing relating to conflicts of interest. It was pointed out that it was unreasonable to think that the Board's members would know nothing of the case. It was assumed that the members of the Board would have some knowledge of RAL's prior application, and they certainly had knowledge of the current application and the issues to be addressed. Certain information, including the application under consideration and the Board's 2003 decision, was made available to the members for background purposes. So long as the members had no pecuniary interest in the application, and so long as they were capable of making a fair decision based on the evidence free of outside influence, there was no conflict of interest.

RAL's attorney then proceeded to deliver his opening remarks, which included a review of the exhibits that he was placing on the record. Rather than calling a witness, RAL's attorney proceeded to commence an argument that the "one lot/two lot" issue was strictly a legal question, and should be considered as such by the Board. Two board members, Smith and Kenney, disagreed, expressing their beliefs that there were facts that needed to be considered and resolved before the issue was ready for legal determination.

There was subsequently an inquiry from Mr. Hill as to the procedure the Board would follow with respect to the appeal and the variances, and a lengthy discussion by the Board ensued.

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[8] *Id.*

Eventually, the Board determined to entertain each of the three issues separately. RAL's counsel chose to confine his presentation relating to the appeal to his own remarks and legal arguments. The Town Manager's attorney called Town Manager Tom Roth as a witness in order to place certain facts in the record, and Mr. Hill also chose to present opening remarks and argument without calling any witnesses.

When reviewing the isolated remarks of the two Board members in the proper context, it is clear that they were not expressing an opinion as to the merits of the appeal. Rather, they were expressing their understanding that facts (separate from attorneys' legal argument) should be presented relative to the issue, and that their decision would be based on full presentations, consistent with their concept of a fair hearing. Therefore, the Court is satisfied that there is substantial evidence to support that the Board's contention that it did not prejudge the issues when denying RAL's application for a variance.

II. <u>The Board's Decision On the Appeal of Whether RAL Property is One Parcel.</u>

The Board argues that Section 130-61 of the Zoning Code of the Town of Henlopen Acres supports a conclusion that RAL's property is two lots. However, a reasonable interpretation Section 130-61 and the intention of the parties confirms that the property is one lot.

Section 130-61 provides:

> **<u>Section 130-61A:</u>** If any lot, or two or more lots, or combination of lots and portions of lots, with continuous frontage and single ownership are of record at the time of the original passage of the Zoning Ordinance (1973) or at the time of the original amendment of this section (1998), the lands involved shall be considered to be an undivided parcel for the purposes of this chapter, and no portion of said parcel shall be used or sold which reduces the size of said parcel. Any variance granted from the terms of this section shall not permit a side boundary line which is not a continuous straight line between

> the rear property line and the front property line, which side boundaries shall be lines projecting the shortest distance in order to reach from said rear property line to said front property line.
>
> **Section 130-61A:** Any change in the dimensions or boundary lines of any lot or any combining of lots or portions of lots in the Town shall require review, consent and approval by the Commissioners of the Town of Henlopen Acres. Any such permission may be subject to conditions placed by the Commissioners relating to streets, utilities, sidewalks, ground area and the like and the approval of any improvement plans including a performance bond or other guaranty for any improvements thus required.

A simple breakdown of Section 130-61 shows its effect on properties within the Town of Henlopen Acres. The first sentence of Part A states that "If any lot, or two or more lots, or combination of lots and portions of lots, with continuous frontage and single ownership are of record in [in 1973 or 1998]" they "shall be considered an undivided parcel..." There is not any consent required, nor is there any approval necessary from the Town to accomplish the merger caused by this first sentence of Section 130-61A; the merger into an "undivided parcel" automatically happens. Once merged pursuant to Section 130-61A, Section 61B states that any subsequent "change in the dimensions or boundary lines of any new lot or any combining of lots or portions of lots in the Town shall require review, consent and approval by the Commissioners of the Town of Henlopen Acres." Thus, there is only one reasonable interpretation of the effect of Section 130-61: If a property owner owns two separate but adjacent lots as originally plotted as of 1973 or 1998, those properties are automatically merged for zoning purposes and cannot be re-separated into two building lots without appropriate approvals from the Town to accomplish that goal.

While it may be true, as the Board argues, that this is the Subdivision Ordinance for the Town of Henlopen Acres, it is also the Ordinance that merges two lots of common ownership prior to 1998

into one parcel. RAL's argument in this regard is hardly farfetched, considering the Town's Solicitor, the Board of Adjustment, and the Town Manager all previously agreed with this interpretation of Section 130-61. Considering the plain language and reasonable interpretation of Section 130-61, as well as the parties' interpretation of the Section up to the July decision, the parcel should be considered one parcel, not two parcels.

Therefore, the Court is not satisfied that the Board's decision is supported by substantial evidence and free from legal error, and as such, the evidence is not legally adequate to support the Board's finding that RAL property is two parcels. As such, this Court finds that RAL property is one parcel. The parties, at oral argument, advised the Court that if the property was deemed to be one lot no remand was necessary as the one lot/two lot issue didn't effect the variance issue.

III. The Board's Decision To Deny RAL's Request For Use And Area Variances.

The third issue before the Board was RAL's request for a use variance to expand the Chambers Building and RAL's request for an area variance to permit more parking than is allowed by Code. The Board denied both of RAL's requests.

a. The Board's Denial of RAL's Request For A Use Variance.

Reduced to its basics, RAL's argument is that it has outgrown the physical structure it has utilized for the last 75 years, and that those structures cannot be modernized rendering RAL in need of the variances. A variance application seeks permission to use property in a manner otherwise forbidden or restricted by applicable zoning regulations or laws.[9] A use variance permits a particular piece of property to be used in a manner otherwise prohibited by applicable law or zoning

[9] *Bd. of Adj. of New Castle County. v. Kwik-Check Realty, Inc.,* 389 A.2d 1289 (Del.Supr.1978) ("*Kwik-Check II"), aff'g* 369 A.2d 694 (1977) ("*Kwik-Check I").*

regulation.[10] A use variance is subjected to the "unnecessary hardship" test.[11] The elements of the use variance standard of "unnecessary hardship" are: (1) the land cannot yield a reasonable return if used only for the permissible use, (2) the need for the variance is due to unique circumstances and not general conditions in the neighborhood which reflect unreasonableness of the zoning itself, and (3) the use sought will not alter the essential character of the locality.[12]

RAL has not shown that it cannot derive a reasonable return without a variance. Indeed, the fact that RAL has not only survived, but has flourished, since its inception in the late 1930's, militates against such a proposition. The structures are no more functionally or structurally obsolete now than they were when RAL was first formed. RAL argues that it should be granted a use variance because the buildings cannot be renovated to support its current needs; however, the fact that the buildings cannot be renovated is not dispositive. RAL has known since its inception that its existing structures were less than ideal for its purpose. In fact, it was RAL that pushed to have its "Homestead" placed on the National Historic Registry, thereby consigning it to its inherent limitations.

In addition, an application for a use variance must show that all uses permitted on the land are economically unfavorable, a jurisdictional prerequisite which RAL does not address.[13] RAL has grown steadily and increased its activities and membership over time, which is evidence that it has

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[10]*Matthew v. Smith,* 707 S.W.2d 411, 420 (Mo. 1986) (citing A. Rathkopf, 3 The Law of Zoning and Planning § 38.01 (1979)).

[11]*Council of Civil Organization of Brandywine Hundred v. New Castle County Bd. of Adj.,* 1995 WL 717202 (Del.Super.), at *11.

[12]*Baker v. Connell,* 488 A.2d 1303 (Del.Supr.1985).

[13]*Baker v. Connell, supra.*

been successful in its use of the property. The Court recognizes the significant benefit RAL brings to the community, but the Court must also recognize that RAL is physically located in a residential community.

Therefore, the Court is satisfied that there is substantial evidence in the record to support the Board's decision to deny RAL's use variance application, and that the Board's decision is free from legal error.

b. The Board's Denial of RAL's Request For An Area Variance Regarding Parking.

RAL's request for an area variance to permit more parking than is permitted by Code (three parking spaces per lot) was denied by the Board. An area variance is the relaxation of incidental limitations to a permitted use.[14] Generally, it allows deviations from zoning restrictions relating to the use of the property itself, such as the height, size or extent of lot coverage, size of the buildings, placement of the building on the site or other restrictions relating to the physical characteristics of the site.[15]

Regarding the current application, RAL argues that the Board denied the parking variance as a "moot issue" based upon its improper denial of the Chambers Building variance. RAL asserts that both applications were carefully considered and designed by RAL after taking into account all relevant factors, including their impact on neighboring and adjacent properties. RAL argues that a reconfiguration would cause less of an impact on neighbors and the community than what currently occurs with the legal nonconforming buildings and parking.

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[14] *Matthew v. Smith,* 707 S.W.2d 411, 416 (Mo. 1986).

[15] *Kwik-Check II,* 389 A.2d at 1291.

However, the evidence tended to support the assertion that some 40 spaces have been available on the premises and utilized over the years, relative to RAL's non-conforming use of the property. The demolition of the Chambers Studio and construction of a new building would essentially eliminate the non-conforming use, and parking would have reverted to the three parking spaces per lot.

When the Board denied the requested use variance, RAL was left with its 40 parking spaces and previous non-conforming use, and hence, there was no longer a need for the parking-related area variance. As a result, the Board denied the area variance as it was no longer necessary.

Once the primary use variance was denied, the parking issue essentially became moot, as the property was still entitled to the *status quo*, which included the 40 parking spaces. Only if RAL modifies the existing uses of the property so as to disrupt its non-conforming status will it be necessary for the parking issue to be reconsidered. Under the circumstances of this case, the Court is satisfied that the Board's decision to deny the use variance was appropriate, as it is supported by substantial evidence and is free from legal error.

CONCLUSION

The Court is not satisfied that the Board's decision regarding the "one lot/two lot" issue is supported by substantial evidence and free from legal error, and therefore is reversed.

The Court finds that the Board's decision to deny RAL's request for use and area variances was supported by legally substantial evidence and is hereby affirmed.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

cc: Prothonotary
Tempe Brownell Steen, Esquire