SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

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Re: ***H. P. Layton Partnership v. Board of Adjustment of Sussex County***
C.A. No. S09A-10-003 RFS

Upon a Petition for Review of a Decision of the Sussex County Board of Adjustment. ***Reversed.***

Submitted Date: May 10, 2010
Decided Date: May 27, 2010

Dear Counsel:

This is the Court's decision on a Petition filed pursuant to the issuance of a Writ of Certiorari to review a decision of the Sussex County Board of Adjustment ("Board").[1] The Petition was filed by H.P. Layton Partnership, Patricia Thompson and Linda Madrid ("Petitioners"). The Respondents are G. Anthony Keen and Jacqueline R. Keen and Flexera, Inc., ("Respondents" or "Applicants"), as well as the Board itself. The Board granted the Respondents' Application for a special use exception and an area variance to place a pole-top

[1] *See* 9 *Del. C.* § 6918 (1989).

windmill in the setback on their lot in Broadkill Beach. For the reasons explained below, the Board's decision is **REVERSED.**

Facts

In June 2008, Respondents were granted a special use exception by the Sussex County Board of Adjustment to place a windmill on the roof of their property in Broadkill Beach. On May 22, 2009, the Respondents, through their contractor, Flexera, Inc., requested another special use exception in order to move the existing windmill from its location on the roof to a freestanding pole. The Respondents also sought a three-foot variance from the required five-foot side yard setback. Respondents' property is zoned GR – General Residential. In GR zoned properties, a special exception permit is required for windmills and wind powered generators on less than five acres of land.[2]

A public hearing was advertised and held on July 6, 2009. Robert Light of Flexera, Inc. testified on behalf of Respondents, who were not present at the hearing. Light explained that because the roof-mounted windmill causes significant noise and vibration in Respondents' residence, a decision was made to move the windmill from the roof to a free-standing pole. Light contacted the County's Planning Office and was allegedly told that there was no prohibition against placing the pole within the five-foot side yard setback. Erection of the pole proceeded. However, it was discovered that because the pole would be used to support a windmill, a variance was necessary if the pole was located within the setback.

As of the date of hearing, the windmill had not been place upon the pole. Light stated that DNREC had approved the installation. Mr. Light also submitted engineering documents

[2] *See* Section 115-40(C) of the Sussex County Code.

prepared by George, Miles & Buhr to be included as part of the Application. The engineering drawings show a 45-foot pole, 10.5 feet of which would be below ground, resulting in a pole 34.5 feet above ground. The pole is designed to withstand winds approximately 180 miles per hour.

Mr. Light testified that the windmill would have no effect on neighboring properties for several reasons. First, several other antennas and telephone poles are present in the surrounding area, as well as an old mobile home on pilings. Second, he stated that the new windmill would generate no more than five to ten decibels of noise, which he equated to a common whisper. Third, because the property is close to the Delaware Bay, the new location of the of the windmill would be ideal for utilizing wind resources.

In addition to Mr. Light's testimony, the Board received into evidence 13 letters of support from neighboring owners. These documents were form letters sent to neighbors by Respondents.

Two witnesses testified in opposition to the application. Sam Burke, testifying on behalf of his family's H.P. Layton Partnership, Inc, stated that the current windmill is very noisy, and suggested that the Board members visit the site and listen to it for themselves.[3] He also objected to the lack of engineering reports, although he was present for the discussion of technical report and data submitted by Respondents. He voiced concern that the exact height of the pole had not been determined and asserted that the foundation would encroach upon neighboring properties. He also testified that the pole would block beach views, cast shadows and adversely affect beach

[3]While a Board member's site visit is not inherently inappropriate, it cannot substitute for the Board's consideration of the evidence presented by the parties or serve as the basis for the Board's decision. *See Cooch's Bridge Civic Association v. Pencader Corporation*, 254 A.2d 408 (Del. 1996)(facts learned by members of the Board on a site visit may not be considered upon appellate review as support for factual findings.).

goers who enjoy the pristine condition of Broadkill Beach. He asserted that Respondents had not met the requirements for the granting of a variance.

Linda Madrid, who also testified in opposition, owns undeveloped property immediately behind Respondents' lot. Her main concern was the interference with the beach view if she ever were to build a home on her lot, which she bought primarily for its bay view and natural beauty. She stated that the structure will cast unreasonable shadows on the beach and that the wind generator emits a very loud noise when the wind blows. She objected to the noise of the existing windmill and asserted that her property value would be detrimentally affected by placing the windmill on top of a pole. She stated that the people who submitted form letters in favor of the application live on lots facing other areas of the beach that will remain unaffected if the Application were approved.

Letters written in opposition from two unidentified individuals were received into evidence. The first letter objected to both the pole being placed within the setback and the disturbance caused by the tower and the generator. The second letter objected to the size of the windmill, the possibility of additional windmills on Broadkill Beach and the negative aesthetic impact on the entire community.

In rebuttal, Light asserted that there is no encroachment on any other property and clarified the height of the pole as being 45 feet, 10.5 feet of which would be below grade, according to the engineering reports. The result would be a 34.5-foot- pole. He explained that placing the pole in the rear of the property would be considered even more intrusive and that to place the pole on the other side of the house would require the removal of a number of trees.

At the conclusion of the public hearing, the Board voted to table the case. Prior to the

next hearing, one Board member visited the site. The Board convened for a second hearing on July 20, 2009, and accepted the observations of the Board member Mr. John Mills. He stated that the pole is not taller than the house and that he had no concern about shadows. He could not hear any noise from the existing windmill. He stated that the pole is no different from a telephone pole except that it is closer to the beach. The transcript of the hearing shows that an unidentified speaker made a comment and Mr. Berl, the Board's attorney, responded by saying "We don't take additional public comments." (Tr. July 20, 2009 at p. 7.) The Board again tabled the case until its next regularly scheduled meeting.

The Board met again on August 2, 2009. The Board rejected the admission of a memorandum and report submitted by Linda Madrid, who had testified in opposition to the variance at the first hearing. The Board's position was that because the case had been tabled, it would not accept any further evidence. The Board's discussion centered on the personal impressions of three additional Board members who had visited the site since the second hearing. Mr. Brent Workman testified that he saw no real difference between having the windmill on top of the house or on top of the pole. He stated that he had heard more noise from nearby air conditioning units than from the rooftop windmill. Mr. Dale Callaway and Mr. Ronald McCabe, who had also visited the site, agreed with the statements of Mr. Workman. A vote was taken, and the application was unanimously approved. Standards for special use variances or area variances were not addressed.

In its written decision, dated September 25, 2009, the Board briefly summarized the evidence and concluded by granting "the special use exception as well as the variance, finding that it would not affect adversely the uses of neighboring and surrounding properties." No reason

was given.

Issues

In regard to the special use exception, Petitioner argues that the Board erred both factually and legally in granting the application. Specifically, Petitioner argues that the Applicants did not meet the burden of proof; that the Board erred by approving the Applicant's application which was inaccurate as to structural height; that the Board erred in failing to accept Linda Madrid's Memorandum after the issues were tabled; and the Board failed to articulate its rationale for granting the special exception.

In regard to the variance, Petitioner argues that the Applicant did not meet the burden of proof; that the Board failed to articulate its rationale in granting the variance; and the Board failed to vote on the variance application.

Respondents argue that the Board's decision is supported by substantial record evidence and is free from legal error.

Standard of Review

In reviewing a decision of the Board of Adjustment, this Court is limited to a determination of whether substantial evidence on the record supports the factual findings and whether the Board's decision is free of legal error.[4] Substantial evidence is such relevant evidence that a reasonable person might accept as adequate to support a conclusion.[5] Where

[4] *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. Ct. 1976), *aff'd* 379 A.2d 1118 (Del. 1977).

[5] *Cingular Pennsylvania, LLC v. Sussex Co. Bd. of Adjustment*, 2007 WL 152548 (Del. Super.).

substantial evidence exists, this Court will not reweigh the evidence and substitute its own judgment for that of the Board.[6] The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable.[7] This Court is authorized to "reverse or affirm, wholly or partly, or may modify the decision brought up for review."[8]

Discussion

Respondents' application sought approval for both an area variance and a use exception. A variance from a setback requirement is an area variance that addresses the exceptional practical difficulty in using a particular property for a permitted use.[9] An exceptional practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted.[10] An applicant for a special use variance bears a heavy burden of showing unnecessary 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.[11] There is no *per se*

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[6]*McLaughlin v. Bd. of Adjustment of New Castle County*, 984 A.2d 1190 (Del. 2009).

[7]*Mellow v. New Castle Bd. of Adjustment*, 565 A.2d 947, 955 (Del. Super. Ct. 1988).

[8]Title 9 *Del. C.* § 6918 provides that "[t]he court may reverse or affirm, wholly or partly, or may mdify the decision brought up fo rreview."

[9]*Mackes v. Bd. of Adjustment of t he Town of Fenwick Island*, 2007 WL 441954 (Del. Super.)(citing *Holowka v. New Castle County Bd. of Adjustment,* 2003 WL 21001026 (Del. Super.)).

[10]*Id.*

[11]*Jenney v. Durham,* 707 A.2d 752 (Del. Super. Ct.), *aff'd,* 696 A.2d 396 (Del. 1997)(citing *Baker v. Connell*, 488 A.2d 1313, 1307 (Del. 1985)).

bar against a variance for a self-imposed hardship.[12]

While Petitioner raises numerous arguments, the Court's initial focus is per force on the final argument, which asserts that the Board's written decision states no rationale for granting the application. The Board set forth a brief and incomplete summary of the evidence, foregoing any reference to the evidence presented by Robert Light, who testified on the Applicants' behalf. Mr. Light was a representative of a technology company that had installed the rooftop windmill and the pole for the new windmill. He described in detail the existing windmill and its problems with vibrations. He also explained the plan for the pole-top windmill. None of his testimony was presented or discussed in the Board's decision.

The Board accomplished even less in regard to analysis. The decision states in conclusory fashion that the Board "believed" that the Applicant had met the standard for a variance. It did not set forth the standard either for a special use exception or for an area variance. It did not identify any evidence that might meet either standard. Instead, the Board simply granted the application, finding that it would not adversely affect the uses of neighboring properties. The Board must articulate its reasoning in sufficient detail to provide this Court with a basis for appellate review.[13]

The record is further tarnished by the fact that four Board members visited the site after the first hearing to assess the situation, made personal observations on the record and questioned one another on their impressions of the situation. Such "field trips" to a location under consideration for a variance are only permissible for the purpose of better understanding the

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[12] *CCS Investors, LLC v. Brown*, 977 A.2d 301, 314 (Del. 2009).

[13] *Cingular Pennsylvania, LLC v. Sussex co. Bd. of Adjustment*, 2007 WL 152548, at *4 (Del. Super.).

June 1, 2010 Amended Pg. 10. Amending the last paragraph on this page pursuant to Petitioners' May 28, 2010 letter request to the Court.

evidence.[14] The Board members are not witnesses and their observations are not evidence.[15] The transcript from the third and final hearing in this case shows that the Board's primary consideration was what they themselves had seen and concluded, as opposed to the evidence adduced by the parties and their witnesses. Facts or opinions of Board members may not be considered upon appellate review as support for factual findings.[16] As noted in *Cooch's Bridge*, such tours of sites are uncontrolled and are conducted without benefit of counsel's presence.[17]

At the final hearing, there was no discussion of whether the evidence supporting the use variance met the unnecessary hardship test or whether the requested area variance proposed the least possible variance.[18] The discussion focused on the Board members' personal observations, and the Court can only conclude that Board's ultimate decision was based on those subjective observations. The written decision, bereft of fact-finding or legal discussion, confirms this conclusion. The Board failed in its duty to particularize its findings of fact and conclusions of law to enable this Court to perform its function of appellate review.[19] If the record is deficient

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[14]*Cooch's Bridge Civic Assoc. v. Pencader Corp.*, 254 A.2d 608, 610 (Del. 1964).

[15]*Id.*

[16]*Id.* at 611.

[17]*Id.* at 610. *See also New Castle Dev't Co., LLC v. New Castle Co. Bd. of Adjustment*, 1996 WL 659481, at *3 (Del. Super.)(finding that "it was improper to rely upon such personal trips and observations" to a site under consideration by the Board).

[18]*Mackes v. Bd. of Adjustment of the Town of Fenwick Island*, 2007 WL 441954, at *4 (Del. Super.).

[19]*Cingular Pennsylvania, LLC v. Sussex Co. Bd. of Adjustment*, 2007 WL 152548, at *4 (Del. Super.).

June 1, 2010 Amended Pg. 10. Amending the last paragraph on this page pursuant to Petitioners' May 28, 2010 letter request to the Court.

the appellate court cannot properly perform its duty and must reverse the Board's decision.[20]

If the Court had authority to remand the cause to the Board, it would do so, since the Board hears the evidence and is the fact-finder in the first instance. Unfortunately, no remand is possible.

The Board did not assess the evidence before it, apply the legal standards to the two zoning requests, or vote on or otherwise discuss the request for an area variance. Moreover, the decision is based, as shown by the transcript of the third hearing, on the personal observations and opinions of the Board members. Having found that the Board's decision cannot stand, either factually or legally, it must be reversed, and the Court need not reach Petitioners' remaining arguments.

For these reasons, the decision of the Board of Adjustment granting the special use exception application and variance application as applied for in Case No. 10434, by Anthony Keen and Jacqueline Keen, et al., is **REVERSED.**

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv
cc: Prothonotary

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[20] *Id.*(citing *Brittingham v. Bd. of Adjustment of Rehoboth Beach*, 2005 WL 170690 (Del. Super.) (observing that "in Delaware in cases involving boards of adjustment, the Superior Court does not have the freedom to remand the case in order to allow the Board to hold further hearings, to make specific factual findings or to reconstruct the record").

June 1, 2010 Amended Pg. 10. Amending the last paragraph on this page pursuant to Petitioners' May 28, 2010 letter request to the Court.