

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: ***Gutierrez v. Sussex County Board of Adjustment***
C.A. No. S09A-09-004 RFS

*Upon an Appeal of a Decision of the Board of Adjustment
of Sussex County. Affirmed.*

Submitted: July 12, 2010
Decided: July 16, 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 Jose Gutierrez and Mary Gutierrez ("the Applicants"). The

¹See 9 Del. C. § 6918 (1989).

Board is the Respondent. The Board granted the Applicants' special use exception with a stipulation, as explained more fully below. The Applicants ask the Court to modify the Board's decision and permit the special use exception without stipulation. In the alternative, the Applicants seek a hearing to offer additional evidence. The Board's decision is affirmed, and the motion for a hearing is denied.

Facts. In May 2009, the Applicants filed an application with the Board for a special use exception to retain a mobile home on less than 10 acres of land.² The mobile home, which was in place when the Applicants bought the property in 2000, was located on a narrow parcel land measuring approximately 15 acres outside Bridgeville, Delaware. The property is zoned AR-1, Agricultural-Residential. The Applicants had previously applied to the Sussex County Planning and Zoning Commission for a subdivision of the 15-acre parcel of land. Preliminary approval was received for a subdivision of three lots, and a 50 foot by 1,800 foot ingress/egress easement to serve the three lots. The approval was subject to the condition that the Applicants obtain a special use exception from the Board of Adjustment if the mobile home would be retained on the allotted parcel of approximately 4.3 acres. A reduction in the lot size from 15 acres to a lot of less than 5

²The Court notes differences in the record concerning the property size. The Request for a Special Use Exception stated that the Applicants requested an exception to retain a mobile home on less than 10 acres of land. (Record at 1.) Article XXVII of the Sussex County Code of Regulations permits a mobile home to remain on a property of less than 5 acres if a special use exception is granted by the Board of Adjustment. At the hearing, the evidence showed that the total size of the Applicants' property was approximately 15 acres, and that following the desired subdivision the mobile home would be on a lot approximately 4.3 acres.

acres would not conform with Sussex County Code of Regulations, as explained below.

At the public hearing before the Board on July 6, 2009, Ms. Gutierrez testified that the reason for the subdivision was economic and that two of the three lots would eventually be sold for retirement income. The Applicants spent approximately \$15,000 on interior improvements to the mobile home. The mobile home had been rented by the same tenants for the last three years. Ms. Gutierrez stated that at the Planning and Zoning hearing she had testified that only stick-built homes would be put on the subdivision lots to be in keeping with the surrounding homes.

Three neighbors testified in opposition to the application. David Esch lives on an adjoining property. He testified that Mr. Gutierrez had assured him that the mobile home would be removed and stick-built homes would be placed on all three lots. He believed that the existing, single-wide mobile home on an undersized lot measuring less than 5 acres would have a detrimental effect on his property value. He was also concerned about additional mobile homes being placed on the other two lots in the future. Richard Auscin voiced his objection to the fact that the mobile home is occupied by tenants rather than by its owners. Terry Lowe testified that the Applicants had indicated that they would remove the mobile home if they obtained approval for the subdivision and that he objected to them changing their position.

On rebuttal, Ms. Gutierrez testified that she had stated to the Planning and Zoning Commission “that if the property was sold and we did put [in] homes, that then the mobile

home would be removed at that time.”³ The Board tabled the case until its next hearing date of July 20, 2009.

At the second hearing, the Board decided to grant the special use exception but with a stipulation that the mobile home be removed if the property is ever subdivided. A written decision followed. The Board found that retaining the mobile home on the existing parcel did not *per se* adversely affect surrounding properties, but that the Applicants had not met their burden of showing that there would be no adverse effect if the Applicants proceeded with the subdivision. The Board granted the special use exception with a stipulation that the manufactured home be removed if the property is subdivided.

The parties’ contentions. The Applicants argue that the Board’s decision constitutes legal error because the Board did not address the governing law. The Sussex County Code of Regulations, Article IV, § 115-23C provides as follows: “A mobile home, used as a single-family dwelling, and originally placed and permitted on a property of five acres or more prior to March 25, 1997, may be permitted on a property of less than five acres pursuant to Article XXVII, § 115-210A(3)(q).”⁴

The preamble to Article XXVII, § 115-210, Special Exceptions, states that “[t]he

³Transcript (July 6, 2009) at 16.

⁴The Court notes that the record shows that the mobile home was present on the property when the Applicants purchased the property in 2000. However, there is no evidence that the mobile home was placed on the property prior to March 25, 1997.

following buildings and uses are permitted as special exceptions if the Board finds that, in its opinion, as a matter of fact, such exceptions will not substantially affect adversely the uses of adjacent and neighboring property.” One of the special exceptions, set forth in § 115-210A(3)(q), reiterates the language of Article IV, § 115-23C: “A mobile home, used as a single-family dwelling, and originally placed and permitted on a property of five acres or more prior to March 25, 1997, may be permitted on a property of less than five acres pursuant to Article IV, § 115-23C.” Thus, in order to grant the special use exception, the Board had to find that it would not substantially affect adversely the uses of neighboring properties.

The Applicants correctly point out that the Board made no reference to Sussex County Code of Regulations at either of the two hearings or in the written decision. The Applicants argue that the Board’s failure to address the pertinent Regulations constitutes error of law. They ask that this Court grant the special use exception without the stipulation that the mobile home be removed if the property is subdivided.

The Applicants also argue that there is not substantial evidence to suggest that the special use would adversely affect neighboring properties.

Finally, the Applicants argue that the Board’s decision does not adequately state its rationale for purposes of appellate review and ask that this Court hold a hearing to take further evidence.

The Board argues that the Applicants fail to acknowledge that in order to obtain a

special use exception under Sussex County Regulation § 115-210, the Applicants bore the burden of affirmatively proving the lack of any adverse effect on other properties.

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 Board's factual findings and whether the Board's decision is free of legal error.⁵ Substantial evidence is such relevant evidence that a reasonable person might accept as adequate to support a conclusion.⁶ Where substantial evidence exists, this Court will not re-weigh the evidence and substitute its own judgment for that of the Board.⁷ The burden of persuasion rests with the party seeking to overturn a Board decision to show that the decision was arbitrary and unreasonable.⁸ This Court is authorized to "reverse or affirm, wholly or partly, or may modify the decision brought up for review."⁹

Discussion. In *Ganski v. Sussex County Zoning Bd. of Adjustment*,¹⁰ this Court

⁵*Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. Ct. 1976), *aff'd*, 379 A.2d 118 (Del. 1977).

⁶*Cingular Pennsylvania, LLC v. Sussex County Bd. of Adjustment*, 2007 WL 152548 (Del. Super.).

⁷*McLaughlin v. Bd. of Adjustment of New Castle County*, 984 A.2d 1190 (Del. 2009).

⁸*Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947, 955 (Del. Super. Ct. 1988).

⁹Title 9 Del. C. § 6918(f).

¹⁰2001 WL 282887 (Del. Super.).

affirmed the Board’s denial of a petition for a special use exception because the applicant “failed to present evidence that his application would not substantially affect adversely the uses of neighboring and surrounding properties as required by Sussex County Code § 115-210.”¹¹ In *Rollins Broadcasting of Delaware, Inc. v. Hollingsworth*,¹² our Supreme Court found that the effect a special use exception will have on neighbors and property values must be considered, and that “[t]he burden of proof in such a request is on the applicant to produce substantial evidence to demonstrate that the proposed use complies with the standards of the Zoning Ordinance.”¹³

In this case, both parties are correct in their arguments. The Applicants are correct that the Board did not identify or discuss the pertinent Sussex County Regulations. The Board is correct that it applied the appropriate burden of proof borne by the Applicants. Thus, the first question before the Court is whether the Board’s failure to discuss the Sussex County Code of Regulations is fatal to its decision in light of the fact that the Board accurately stated the burden of proof and based its decision on the Applicants’ failure to meet that burden. The language in question from the Board’s decision states as follows:

The Board determined that retaining the manufactured home on the existing parcel did not, *per se*, affect adversely surrounding uses since it had been

¹¹*Id.* at *4.

¹²248 A.2d 143 (Del. 1968).

¹³*Id.* at 145.

there for some time, but that the Applicant had not met its burden of showing that the same condition would be true in the event the Applicants went forward with their subdivision and the resulting smaller lots.

The Court notes first that the Board did address the question of adverse effects on surrounding uses, which is drawn from the Preamble to Article XXVII, § 115-210, Special Exceptions. Thus, the Board considered the right question, even though there is no reference to the source of that question being the Sussex County Code of Regulations. The Board summarized the evidence presented by the Applicants, as well as evidence presented by individuals who testified in opposition.

Implicit in the Board's decision is the finding that the Applicants had not met the burden of showing no adverse effect if the property was subdivided and the mobile home was retained on a lot less than five acres. The Court concludes that because the Board applied the correct burden of proof and addressed the appropriate question, albeit without mention of the Regulations, its decision does not warrant reversal.

The next question is whether the Board's factual findings are supported by substantial evidence. Here again, the parties disagree. The Board stated that the Applicants had not borne their burden of showing that the special use exception would not adversely affect surrounding uses and property. The record shows that the Applicants were given the chance to offer rebuttal to the objections voiced by the three neighbors.

In rebuttal, Ms. Gutierrez stated that there were other mobile homes in the area and

that one of the witnesses was only concerned that the proposed subdivision would interfere with his hunting. She also stated that the interior of the mobile home had been completely remodeled and a new heating/air conditioning system had been installed. Finally, she stated that the current tenants had resided in the mobile home for three years. None of this information pertains to the question of an adverse effect on neighboring properties or uses if the mobile home remained on a 4.3-acre parcel of land. The Court finds that the Board's conclusion that the Applicants did not carry their burden of showing that there would be no adverse effect on surrounding property is supported by substantial evidence.

In their Reply Brief, the Applicants argue that the Board did not articulate its findings sufficiently for appellate review and, for this reason, ask that the Court open the record to receive additional evidence. The Applicants rely on *Petrucelli v. New Castle County Board of Adjustment*,¹⁴ where this Court opened the record for evidence on the legal issues of whether a variance was necessary and whether a variance, if necessary, should be granted.

In this case, there is no uncertainty about the subject of a special use exception, and the Court has found that the Board's legal reasoning was not in error. The request for a hearing pursuant to 9 *Del. C.* § 6918 (e)¹⁵ is denied.

¹⁴1997 WL 817891 (Del. Super.).

¹⁵Title 9 *Del. C.* § 6918(e) provides as follows:
If, upon the hearing, it shall appear to the Court that testimony is necessary for the proper

Conclusion. The decision of the Board of Adjustment is **AFFIRMED**, and the motion for a hearing before this Court is **DENIED**.

IT IS SO ORDERED.

Richard F. Stokes

cc: Prothonotary

disposition of the matter, it may take evidence, or appoint a referee to take such evidence as it may direct and report the same to the Court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the Court shall be made.