

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

BERNARD S. DEMPSEY, ET AL)	
Appellants,)	
)	
v.)	C.A. No: 01A-10-004 RSG
)	
NEWCASTLE COUNTY BOARD OF)	
ADJUSTMENT,)	
AND CHABAD OF DELAWARE,)	
AND CONECTIV,)	
Appellees.)	

Submitted: March 22, 2002
Decided: April 17, 2002

Upon Appeal from a Decision of the New Castle County Board of Adjustment.
*Decision **AFFIRMED**.*

ORDER

Having reviewed the parties' submissions in this appeal of a decision of the New Castle County Board of Adjustment ("Board") to grant five variances on two parcels of land located off of Silverside Road in Wilmington (Tax Parcel Nos. 06-081.00-177 ("Connectiv property") and 06-081.00178 ("Chabad property")) so that Chabad can build a 6,000 square foot Jewish Enrichment Center ("JEC"), the Court concludes as follows:

1. Since 1988, Rabbi Chuni Vogel has operated Chabad, a local affiliate of a centuries -old

movement “dedicated to strengthening Jewish awareness [and] Jewish identity,” out of his Green Acres home, about 600 feet from the location of the proposed JEC. Many Chabad supporters have moved to nearby neighborhoods due to proximity to the Chabad synagogue because of a prohibition under Jewish law against driving on the Sabbath or holidays.

2. As Chabad’s programs (which include education classes, Sabbath and holiday religious services, holiday celebrations, and numerous off-site services, such as hospital and nursing home visitations), and the Vogel family grew, it became essential to find a new location within walking distance. Chabad entered into an agreement to purchase its parcel in 1998 and went to settlement on the parcel in 1999.

3. The Chabad property is slightly over one acre in size, but due to land use restrictions under the Unified Development Code (“UDC”), the portion of the Chabad property that can be used to calculate lot size for zoning purposes is slightly over one half acre.

4. Since the property did not meet the one acre threshold for the proposed use as zoned, Chabad obtained a commitment to be able to lease a portion of the adjoining Conectiv property from Conectiv; Conectiv will not consider selling its property to Chabad.

5. Several area variances were required for the desired use despite the fact that the combined acreage of the proposed leased property and the Chabad parcel increased the acreage for the proposed use over one acre.

6. In May 2001, the New Castle County Department of Land Use received a joint application from Chabad and Conectiv for six variances¹ on the aforementioned parcels fronting Silverside Road

¹The variances sought were:

- (1) Relief from required 30' side yard to provide minimum of 0' (Chabad Property)
- (2) Relief from required 10' paving setback (Conectiv Property)

so that the JEC could be built.

7. On August 9, 2001, after a public hearing, the Board voted 4-1 to grant the requested variances. The Board concluded that with the combination of the Conectiv parcel, the Chabad site essentially meets all of the Code's requirements for the proposed use. The Board also stated in its decision that: "The variance is conditioned upon the availability of the parking on Lot 178 for Lot 177 remaining in existence for Chabad through either lease or ownership."

8. Petitioners appealed the Board's decision to the Superior Court on October 5, 2001, and filed their opening brief on December 27, 2001. The answering brief by Chabad was filed on January 25, 2002.

9. Petitioners contend that the variances granted by the Board should be reversed because (1) any difficulty in the use of the site for the JEC is a self-created hardship by Chabad, (2) the Board did not address whether or not exceptional practical difficulties exist with respect to the variance granted for the Conectiv parcel, (3) the variance from the one acre minimum lot size should have been considered as a use variance rather than an area variance, with the tougher undue hardship standard, (4) the variances were not conditioned on Chabad obtaining a lease of any definitive duration for the Conectiv parcel and the Board improperly merged the two parcels (that were not in

(3) Relief from required 100' riparian buffer to provide minimum of 65' (Chabad Property)

(4) Relief from required 100' riparian buffer to provide minimum of 80' (Conectiv Property)

(5) Relief from required 150' minimum lot width to provide minimum lot width of 110' Property)

(6) Relief from required minimum lot area excluding protected lands of one acre to provide minimum lot area of 0.504 acre (Chabad Property)

At the Board of Adjustment hearing, variance # 4 above was withdrawn by Chabad, who agreed to redesign the parking lot so that the riparian buffer would not need to be paved.

common ownership) to reach the one acre threshold for this use in NC-15 zoning classification, and (5) the exceptional practical difficulty presented by Chabad to the Board consists of personal hardships not related to the property, and the grant of a variance on this premise was in error.

10. Chabad asserts that Petitioners' appeal relies on mischaracterisations of the Board decision, misreadings of legal authorities, and misunderstandings of the Board's role in the planning process. Chabad contends that each basis of Petitioner's appeal is devoid of merit, that the Board properly held that Chabad and Conectiv were entitled to the requested variances: it applied the correct standard, properly found "exceptional practical difficulty," did not treat the lots as "merged," and reasonably conditioned the variances on the formalization of arrangements relating to use of the parking lot. Therefore Petitioner's appeal should be dismissed and the Board's decision upheld.

11. Chabad filed a request for oral arguments on February 22, 2002. Petitioners opposed Chabad's request for oral argument, stating in a letter dated February 25, 2002, that "oral argument would provide the Court with very little new insight as to the issues relevant to the appeal."

12. The Court granted Chabad's request for oral argument, which was held on March 22, 2002, and during which both parties reiterated the arguments stated in their briefs.

13. The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.² Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support

² *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

a conclusion.³ The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁴ It is within the exclusive purview of the Board to determine and weigh the credibility of witnesses and the Court will not disturb these findings.⁵ The Court merely determines if the evidence is legally adequate to support the agency's factual findings.⁶

14. The central issue in the case at bar is whether the variances requested by Chabad and granted by the Board are "area" variances or "use" variances. The importance of this issue stems from the fact that different tests are applied to the two types of variances, "area" variances and "use" variances, that Delaware law recognizes.

15. A use variance "changes the character of the zoned district by permitting an otherwise proscribed use," while an area variance "concerns only the practical difficulty in using the particular property for a permitted use."⁷ A tough "undue hardship standard" needs to be met for obtaining a use variance, while a lesser standard of the owner's "exceptional practical difficulties" is appropriate for obtaining an area variance.⁸

16. "Exceptional practical difficulties" exist "where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable

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

⁴ *Johnson v. Chrysler*, 213 A.2d at 66.

⁵ *Starkey v. Unemployment Ins. Appeal Bd.*, 340 A.2d 165, 166 (Del. Super. 1975), *aff'd* 364 A.2d 651 (1976).

⁶ 29 Del. C. § 10142(d).

⁷ *Bd. of Adjustment v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978).

⁸ *Id.*

effect on neighboring properties if the variance is granted.”⁹

17. The Delaware statute defining the relative jurisdiction of the Board and the County Council defines a “use” variance as one “which permits a use otherwise prohibited by any zoning ordinance, code or regulation ...”¹⁰ The fact that a limited use is subject to different requirements other than uses does not make it a prohibited use. The Zoning Code considers limited uses such as Houses of Worship to be permitted uses.¹¹

18. In the case at bar, the Board concluded from the discussion in its decision that the requested variances, each of which relates to setback, lot width or lot area requirements, are “area” variances rather than “use” variances. It appeared so clear to the Board that the variances requested are area variances that the question of whether they are area or use variances was not specifically discussed in detail.

19. The Board’s conclusion that the requested variances are area variances rather than use variances is entitled to great deference, since courts generally give great deference to an administrative agency’s construction of its own regulations and statutes, provided the agency’s construction is not clearly erroneous.¹²

20. As for granting the requested variances: whether or not a variance is granted “depends upon the circumstance of the particular case and the Board is in the best position to make such a

⁹*Id.*

¹⁰9 *Del.C.* §1313(b).

¹¹UDC Table 40.04.110.

¹²*King v. Bd. of Pension Trustees*, Del. Super., C.A. No. 96A-07-001-WCC, 1997 Del. Super. LEXIS 478, at *11-12, Carpenter, J. (Aug. 29, 1997).

determination.”¹³ A challenge must fail if a Board decision “is the product of reason and logical deduction supported by substantial evidence in the record.”¹⁴

21. A look at the Board’s August 9, 2001, decision reveals that there was logic and reason behind the granting of each variance, and the Board evaluated and granted each variance rather than treating the Chabad and the Conectiv parcels as merged. Also, a separate parking lot on a separate lot does not constitute a merger; the UDC permits Houses of Worship to use off-site parking “on land zoned for the use which the parking lot is intended to serve.”¹⁵ In the case at bar, therefore, the Board did not err in applying the applicable law, and its decision meets the criteria of reason and logical deduction supported by substantial evidence in the record.

22. The Board clearly took into account Petitioners’ concern that the variances should be conditioned on Chabad obtaining a lease of definitive duration for the Conectiv parcel. In its August 9, 2001, decision, the Board stated that “The variance is conditioned on the availability of the parking on Lot 178 for Lot 177 remaining in existence for Chabad through either lease or ownership.”

23. As pointed out by Chabad, the Board’s decision probably took into account the issue raised by Petitioners that Chabad acquired the parcel of land with the knowledge of the applicable restrictions, in making their decision. That, however, was only one of the factors that needed to be

¹³*Schramm v. New Castle County Bd. of Adjustment*, Del Super., C.A. No. 95A-08-003, 1996 Del. Super. LEXIS 161 at *18, Toliver, J. (Apr. 24, 1996).

¹⁴*Id.*

¹⁵UDC §40.22.611(J).

considered in their determination of hardship.¹⁶

24. The Board, in voting to grant the requested variances stated: “These dimensional changes are minimal and the harm to the applicant if the variances are denied would be greater than the probable effect on neighboring properties if the variances are granted.” This is the standard used by the Supreme Court in explaining the situations where “exceptional practical difficulties” that pertain to area variances, exist.¹⁷

25. The legislative policy underlying Delaware’s zoning laws leaves “primary decision-making power to the body with the recognized expertise in the area -- the Board,”¹⁸ Also, the Court gives great deference to the Board, requiring only “evidence from which an agency could fairly and reasonably reach the conclusion that it did.”¹⁹

26. In the case at bar, the Court finds that the Board’s decision is supported by substantial evidence. The record reflects that evidence was presented relating to and the Board took into consideration, the character of the area as well as the concerns of Petitioners. The Board commented in its August 9, 2001, decision, that the JEC was “clearly a moderate to low intensity use,” a use that is “encouraged by the Code to locate in communities.” The Board then concluded that: “The granting of these variances would not cause substantial detriment to the public good, nor

¹⁶*Hanley v. Wilmington Bd. of Adjustment*, Del. Super., C.A. No. 99A-12-004, 2000 WL 121173 at *3,5, Quillen, J. (Aug. 3, 2000).

¹⁷*Kwik-Check Realty, Inc.*, 389 A.2d at 1291.

¹⁸*Mellow v. Bd. of Adjustment*, 565 A.2d 947, 951 (Del. Super. 1988), *aff’d* 567 A.2d 422 (1989).

¹⁹*Mettler v. New Castle county Bd. of Adjustment*, Del. Super., 1991 Del. Super LEXIS 340, C.A. No. 91A-02-3-1-AP, Gebelein, J. at *6 (Aug. 21, 1991); *See also Fantasia Rest. & Lounge v. Bd. of Adjustment*, 735 A.2d 424, 429 (Del. Super. 1998).

would they substantially impair the intent and purpose of the zoning code.”

Based on the foregoing reasons, the decision of the New Castle County Board of Adjustment to grant five variances on two parcels of land located off of Silverside Road in Wilmington, so that Chabad can build a 6,000 square foot Jewish Enrichment Center, is AFFIRMED.

IT IS SO ORDERED.

The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: M. Edward Danberg, Esquire
Max B. Walton, Esquire
1220 Market Street
P.O. Box 2207
Wilmington, DE 19899
David J. Margules, Esquire
Joanne P. Pinckney, Esquire
Bouchard Margules & Friedlander, P.A.
222 Delaware Avenue, Suite 1102
Wilmington, DE 19801
New Castle County Board of Adjustment