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RE: Steven Rogers and Patricia Staby Rogers v.
Board of Adjustment of the City of Lewes, and Daniel Boxler
and Dorothy Boxler,
C.A. No. 00A-08-004

Date Submitted: July 10, 2001
Date Decided: October 31, 2001

Dear Counsel:

This is the Court's decision on the appeal by Steven Rogers and Patricia Staby-Rogers (the "Rogers") of the decision by the Board of Adjustment of the City of Lewes (the "Board") to grant a variance from the eight foot side-yard setback requirement to Daniel and Dorothy Boxler (the "Boxlers") for their proposed sunroom.

BACKGROUND

The Boxlers own that house and lot located at 326 West Market Street, Lewes, Delaware. The Rogers live next door at 328 West Market Street. When the Boxlers purchased the house, it was a two story structure with an unfinished attic. The house sits on a lot containing 2,663 square feet with a frontage of 29.50 feet and a depth of 90.37 feet. The lot size is less than the minimum lot size currently required in what is known as the "Old Town District." On the east side of the lot, the house conforms to the eight foot side-yard setback requirement. However, the west side of the house, which adjoins the Rogers' property, encroaches 4.3 feet into the eight foot side-yard setback. When the Boxlers purchased the house, they were aware that it was too small for their family of four and needed to be renovated and expanded.

After purchasing the house, the Boxlers hired Jim Darley of Darley Construction Company to renovate and expand it. The Boxlers also hired John Lester, a local architect, to design the renovations and expansion. The renovations include a new sunroom that is at the center of this litigation. The original plan for the sunroom complied with the eight foot side-yard setback requirement on the west side of the Boxlers' property. Using that plan, Mr. Darley applied for and received a building permit.

Sometime after the original plan was prepared, the Boxlers, along with Mr. Lester, altered the sunroom's design to follow the line of the house on the west side. The redesigned sunroom, which is 17 feet wide and 12 feet, 4 inches long, conforms to the line of the house on the west side. However, the redesigned plan violates the eight foot side-yard setback requirement, encroaching 4.3 feet into the side-yard setback at the front of the proposed sunroom and 4.2 feet at the rear of the proposed sunroom. Moreover, the redesigned plan was never

submitted for approval and a variance was not sought before construction began on the foundation for the sunroom. The Boxlers testified that Mr. Darley dug and poured the foundation for the redesigned sunroom without first applying for a variance.

During an on-site inspection, William Massey, a Lewes building official, discovered that the foundation for the sunroom encroached into the eight foot side-yard setback and that no variance had been granted. At that point, construction of the sunroom was halted. The Boxlers fired Mr. Darley and hired a new contractor, John Zacharias. The Boxlers applied for a building permit based on the redesigned plan for the sunroom. The Boxlers' application was denied because the redesigned plan for the sunroom required a variance. The Boxlers then applied for a variance.

At the variance hearing, the Boxlers argued that the failure to apply for a variance before construction began was Mr. Darley's fault. They also argued that removing and relocating the foundation for the sunroom would result in further expense. Finally, the Boxlers argued that the redesigned sunroom felt more natural, that it would create more comfort for their family, and that it would look historically proper.

The Rogers attended the hearing to oppose the Boxlers' variance application. They were concerned by the loss of privacy that would result from the construction of the sunroom so close to their home. They also argued that the view from their kitchen window would be lost.

The Board granted the variance, reasoning that forcing the Boxlers to remove and relocate the new foundation for the sunroom would result in an exceptional practical difficulty. The Board also found that the Boxlers' problem was not self-created, but rather the result of the original contractor's negligence. The Court must now decide the validity of that decision.

DISCUSSION

I. *Superior Court Review*

When reviewing an appeal from a decision of a Board of Adjustment the Superior Court is limited in its review to correcting errors of law and determining whether or not substantial evidence exists on the record to support the Board of Adjustment's findings of fact and conclusions of law. *Janaman v. New Castle County Board of Adjustment*, Del. Super., 364 A.2d 1241 (1976); *aff'd without opinion* Del. Supr., 379 A.2d 1118 (1977). Substantial evidence is defined as that evidence from which an agency reasonably and fairly could reach its conclusion. *Profita v. New Castle County Bd. of Adjustment*, Del. Super., C.A. No. 92A-08-013, Barron, J. (Dec. 11, 1992) (Order).

It is the Board's duty to "particularize its findings of fact, as well as conclusions of law, to enable this Court, in the exercise of its function of appellate review, to determine if substantial evidence supports such findings." *Kwik-Check Realty Co. v. Board of Adjustment*, Del. Super., 369 A.2d 694, 699 (1977), *aff'd* Del. Supr., 389 A.2d 1289 (1978). This does not mean, however, that the Board may reach *any* conclusion, so long as it supports its decision with substantial evidence. In other words, the Board's discretion is not so wide that it may do whatever it deems equitable without regard to statutory requirements and the need for substantial evidence to meet statutory requirements. *Mavrantonis v. Bd. of Adjustment*, Del. Super., 258 A.2d 908 (1969).

II. *Areas Variances*

When reviewing an application for an area variance[1], the Board, and this Court, must determine if denial of the variance would result in "exceptional practical difficulties" for the applicant. *Bd. of Adj. v. Kwik-Check Realty*, Del. Supr., 389 A.2d 1289, 1291 (1978). When applying the "exceptional practical difficulties" test, the Board must determine if the difficulties presented by the owner are practical rather than theoretical, and exceptional rather than routine. *Bd. of Adj. of New Castle Co. v. Henderson Union Association*, Del. Supr., 374 A.2d 3 (1972). The Board should consider the following factors:

> 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 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 or the property which is a permitted use under the use provisions of the ordinance*. (Emphasis added).

Kwik-Check at 1291.

III. *The Board's Decision*

The Board's decision is neither in accordance with the applicable law or supported by substantial evidence in the record. The Board's six-page written decision consists of three sections, "Findings of Fact," "Conclusions," and "Decision." The "Findings of Fact" section consists of 23 separate findings of fact. The "Conclusions" section consists of eight separate

[1]Examples of area variances include modifications of setback lines and yard requirements. *Kostyshyn v. City of Wilmington Bd. of Adj.*, Del. Super., C.A. No. 89A-DE-1-1-AP, Del Pesco, J. (Apr. 12, 1990).

conclusions. The "Decision" section is very brief. It essentially says that based on the "Findings of Fact" and "Conclusions," as well as the evidence presented at the hearing, the Board is going to grant the variance. The Board's written rationale for granting the variance is not clear. It would have been very helpful for the Court if the Board had more completely explained the relationship between its Findings of Fact, Conclusions, Decision and the applicable law.

There were four factors that the Board had to take into consideration when deciding whether or not to grant the Boxlers' request for a variance. *Bd. of Adj. v. Kwik-Check Realty*, Del. Supr. 389 A.2d 1289, 1291 (1978). While all of these factors are important, the critical factor for resolving this appeal is whether or not the Boxlers faced an exceptional practical difficulty in constructing their sunroom in accordance with the eight foot side-yard setback requirement. The Board's finding that the Boxlers did face such an exceptional practical difficulty must be supported by substantial evidence in the record. *Profita v. New Castle County Bd. Of Adj.*, Del. Super., C.A. No. 92A-08-013, Barron, J. (Dec. 11, 1992)(Order).

Although the Board cited many Findings of Fact and Conclusions in its written decision, only a few of them touch on this critical factor. These are Findings of Fact 8, 16, 17, 18, 21 and 22 and Conclusions 2 and 3. They are set forth below:

Findings of Fact

8. The lot itself is 2,663 square feet with a frontage on Market Street of 29.50 feet and a depth of 90.37 feet, that is, less than the minimum lot size in the OT - Old Town District.

16. The building contractor for the Applicant dug the foundation prior to receiving a permit and was stopped by the Building Official; after this point, because of errors and omissions, the Applicants terminated the services of said building contractor.

17. There will be a 31 foot rear yard after the proposed sunroom is added and

a minimum of 8 foot set back on the east side of this property.

18. To reconfigure the sunroom addition in order to meet the setbacks will reduce the size of the rear yard.

21. The Applicants testified that the design and aesthetic historic nature of the structure will be maintained by a grant of the variance.

22. The Applicants testified that there would be further expense to redesign the sunroom without the variance, to relocate it and to remove the foundation where they have already expended sums of money to redesign the second floor in order to meet the neighbors' objections.

Conclusions

2. The preexisting house is extremely small and old requiring renovation and expansion in order to provide adequate living space.

3. The problem was not created by the Applicants; rather, the problem was created by an irresponsible building contractor who has been removed from the project by the Applicants.

Conclusions two and three are unrelated and based on different Findings of Fact and evidence in the record. Conclusion two appears to be based on Findings of Fact 8, 17, 18 and 21. It reflects what appears to be the Boxlers' need to both expand their house and the difficulty they may face in doing so because their house is on a small lot. Conclusion three appears to be based on Findings of Facts 16 and 22. It reflects the fact that it may be expensive for the Boxlers to remove the foundation for the sunroom that was installed in violation of the eight foot side-yard setback requirement and to redesign a sunroom that complies with it.

Conclusion two, when combined with Findings of Fact 8, 17, 18 and 21, does suggest in

a conclusionary manner that the Boxlers may face an exceptional practical difficulty in constructing a sunroom in accordance with the eight foot side-yard setback requirement that is aesthetically pleasing to them and does not encroach too deeply into their backyard. However, it does not necessarily follow from this that the Boxlers are, without establishing more, entitled to a variance. Instead, the Boxlers had to offer substantial evidence of the exceptional practical difficulty they faced in constructing a sunroom in accordance with the eight foot side-yard setback requirement.

It is clear, based on the Board's comments during the hearing, that the Board believed that the Boxlers could construct a sunroom in accordance with the eight foot side-yard setback requirement simply by making the sunroom narrower and longer.[2] When the Board asked the Boxlers what sort of hardship this would cause them, the Boxlers testified that the sunroom, as designed, would be more aesthetically pleasing and allow them to use more of their backyard. However, there was no explanation by the Boxlers as to why a sunroom designed in accordance with the eight foot side-yard setback requirement could not be built in an aesthetically pleasing

[2]It certainly appears, as the Board suggested, that the Boxlers could have constructed a sunroom that was 12 feet 4 inches wide and 17 feet long instead of one that was 17 feet wide and 12 feet 4 inches long. The reconfigured sunroom, in addition to giving the Boxlers the space they wanted, would comply with the eight foot side-yard setback requirement on both sides of the house and take up only five more feet of the back yard, leaving the Boxlers with a backyard that was 26 feet long instead of 31 feet long. Of course, what the Boxlers lost in the backyard they gained in the side-yard.

manner, or why a 26 foot long backyard could not meet their needs as well as a 31 foot long backyard.

It appears that the Boxlers designed the sunroom in such a manner that would provide them with the space they wanted, use as little of their backyard as possible, and be aesthetically pleasing to them. While this is understandable, the Boxlers had to give consideration to doing this in accordance with the eight foot side-yard setback requirement. If they had tried to do this and encountered an exceptional practical difficulty in doing so, then they may have been entitled to a variance. However, the Boxlers offered no evidence of any such effort or difficulty. The Board's decision, to the extent that it is based on a finding that the Boxlers would have faced an exceptional practical difficulty in constructing a sunroom in accordance with the eight foot side-yard set back requirement because of aesthetic reasons and the size of their lot, is simply not supported by substantial evidence in the record.

In Conclusion three, the Board states that the "problem" was not created by the Boxlers, but by an irresponsible building contractor. The "problem" that the Board referred to is not the difficulty that the Boxlers may have had in constructing a sunroom on a small lot in accordance with the eight foot side-yard setback requirement. Obviously, a contractor could not have caused this problem. The problem that the Board referred to is that the Boxlers' former contractor built the sunroom foundation in violation of the eight foot side-yard setback requirement and that it may be expensive for the Boxlers to remove the offending foundation and redesign a sunroom that can be built in accordance with the eight foot side-yard setback requirement.

It is clear that the Board granted the Boxlers a variance because it did not want them to incur the expense of doing this. While this may be laudable to some extent on the Board's

behalf, it is not an exceptional practical difficulty. The Boxlers are responsible for the actions or inactions of their contractor. For whatever reason, a mistake was made and the foundation for the sunroom was constructed without a building permit and in violation of the eight foot side-yard setback requirement. It does not matter, for the purpose of resolving the issues before the Court, whether the fault for this lies with the contractor or the Boxlers. The Boxlers, as the property owners, must bear the consequences of it. The problem with the foundation for the sunroom is a self-created hardship. It has nothing at all to do with any exceptional practical difficulty that the Boxlers may have faced in building a sunroom in accordance with the eight foot side-yard setback requirement. As such, it is not in accordance with the applicable law and, therefore, cannot be a reason for granting the Boxlers a variance. *Matarese v. Board of Adjustment*, Del. Super., C.A. 84A-JA-14, Bifferato, J. (Feb. 12, 1985) (Order). In light of the foregoing, the July 13, 2000 decision of the Board of Adjustment of the City of Lewes is reversed.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary