SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
*Resident Judge*

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

February 10, 2005

Dennis L. Schrader, Esquire
Robert H. Robinson, Jr., Esquire
Wilson Halbrook & Bayard, P.A
P.O. Box 690
Georgetown, DE 19947

Richard E. Berl, Esquire
Smith O'Donnell Procino & Berl, LLP
406 South Bedford Street
P.O. Box 588
Georgetown, DE 19947

RE: Read v. Board of Adjustment of the Town of Dewey Beach
C.A. No. 04A-03-001(THG)

Date Submitted: February 9, 2005

Dear Counsel:

Following my November 22, 2004 decision the Reads filed a timely motion to reargue the Court's decision. Oral argument took place on February 9, 2005. I remain of the opinion that the Board of Adjustment was correct. I reissue the earlier decision, but with changes on Page 5.

**STATEMENT OF FACTS**

This is the Court's decision as to the appeal of Leonard and Sara Read ("Reads") of the decision of the Dewey Beach Board of Adjustment denying their application for a building permit.

The Reads' property in Dewey Beach contains a primary dwelling and a garage. The garage houses an apartment, which thereby classifies the garage as a dwelling unit. The Reads submitted

an application for a building permit for additions and modifications to their primary dwelling. The Reads' plans were submitted through their architect, Susan Frederick. The Dewey Beach town building official, William L. Mears ("Building Official"), denied the Reads a building permit based upon his finding that the Reads' entire property is nonconforming. The Reads requested a hearing before the Board of Adjustment to appeal the decision of the Building Official. A hearing was conducted on January 9, 2004, before the Board. The Board upheld the Building Official's decision and denied the Reads a building permit. The Reads are appealing the Board's decision.

The history of this property is ultimately dispositive to the holding of this case. In September of 1999, the Reads applied for and received a special exception from the Board of Adjustment to improve their garage apartment. The Reads claim that the building official who granted them the special exception specifically represented to them that the special exception would not prevent them from adding on to their primary dwelling at a later time. In February of 2000, the Reads were granted another building permit for an expansion of the primary dwelling. The Reads stated that Dewey Beach did not require a special exception for the 2000 expansion. The building official who presided over the Reads' 1999 and 2000 expansion is different from the current one.

The Reads' property is zoned NR (Neighborhood Residential). The permitted use of the dwellings in this zone is as detached single family dwellings. Garages are also allowed as an accessory use. In a letter to the Building Official, dated November 11, 2003, Ms. Frederick argues that the garage apartment should be an accessory building whose use is incidental to the primary dwelling. In reply to Ms. Frederick's letter, the Building Official sent a letter dated November 17, 2003, that stated that the Reads' entire property was non-comforming. The Building Official's finding was based upon the fact that the Reads' property contained two dwelling units, which make

it a multi-family dwelling in a residential zone that only allows single family dwellings. The Building Official also indicated that no expansions or alterations to either the garage or primary dwelling would be permitted in the future. In the Building Official's reply he also reminded the Reads that they had previously acquired and used their one time special exception as provided in § 14-1005(a)(5) of the Dewey Beach Zoning Code.[1] The Reads contend that only their garage is nonconforming, and as a result, the entire property should not be considered nonconforming.

**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

---

[1] Dewey Beach Zoning Code § 14-1004(a)(5) states that "(a) a nonconforming use of a building may be extended either on the same lot or a contiguous lot under the same ownership at the time of enactment of this Chapter if approved as a special exception by the Board of Adjustment as provided in Subchapter 1100 of this Chapter, subject to the following requirements: ...(5) Provided only one extension shall be permitted by the Board of Adjustment during the life of the non-conforming use."

[2] *Janaman v. New Castle Co. Bd. Of Adj.*, 364 A.2d 1241, 1242 (Del. Super. 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.), *app. dism.*, 515 A.2d 397 (Del. 1986).

[4] *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66 (Del. 1965).

factual findings.[5] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support it's conclusions.[6]

## DISCUSSION

### I. The Board's decision was based upon substantial evidence and it did not err as a matter of law in determining that the Reads' entire property was nonconforming in use.

The Board properly determined that the existence of two separate dwelling units, the garage apartment and the primary dwelling, makes the property nonconforming in use. The Reads argue that the garage apartment is the only nonconforming structure on the premises. The Reads state that the garage apartment is nonconforming because it encroaches on the rear setback and because it adds a second dwelling unit to the property. The Reads further state that the primary dwelling is a conforming structure in all respects, and that without the presence of the garage apartment, they would have been issued the building permit. As such, the Reads contend that they are entitled to a building permit for their primary dwelling.

The Building Official determined that the existence of both dwelling units on the Reads' property make the entire property nonconforming. The Read's property is located in the Single Family Residential District of Dewey Beach. The Dewey Beach Zoning Code specifically allows only detached single family homes in this district. It was the Building Official's finding that while the primary dwelling is conforming in its use, the presence of a second dwelling on the property makes the primary dwelling nonconforming. This is a reasonable interpretation of the Zoning Code.

The Board based its decision denying the Reads' a building permit upon substantial evidence.

---

[5] 29 *Del.C.* § 10142(d).

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

The Board is specifically empowered to determine questions of nonconforming use. The Dewey Beach Zoning Code, Chapter 14 § 14-1007 states that "[w]hether a nonconforming use exists shall be a question of fact and shall be decided by the Board of Adjustment...". The Board held a hearing and all of the parties were present. Both the Reads and the Town of Dewey Beach presented their factual and legal arguments to the Board. The Reads contended that the primary dwelling is conforming, while the Town argued that the whole property was nonconforming due to the existence of two single family dwellings on the property. The Reads' architect acknowledged that the garage apartment is considered, by definition, to be a single family dwelling.[7] After hearing all of the evidence, the Board denied the Reads a permit based upon their finding that the Reads' property is nonconforming in use and they had already been granted their one special exception. It was within the Board's discretion to affirm the decision of the Building Official.

The Reads contend that they are entitled to a building permit based upon previously receiving a building permit in 2000. The Reads' contention is misplaced. A review of the 2000 building permit is not before this Court. The Building Official may have incorrectly granted the Reads a building permit in 2000, however, that decision does not control the current decision of the Building Official. The Building Official was free to apply a reasonable construction of the Dewey Beach Zoning Code to the Reads' application. His interpretation results in an objective result as opposed to the subjective determination as to which of the two dwellings is the "non-conforming" one (i.e. which is to be deemed primary and which secondary). The non-conformity is not in the structure of either dwelling as both are deemed residential. It is the fact that two residential structures exist, which makes the use of the property non-conforming (i.e. the property is not single family

[7] Tr. at 21.

residential). The Board was within its discretion when it upheld the Building Official's interpretation, as long as it was based upon substantial evidence. The Reads argue that the primary dwelling is and has been conforming in its use and as a building. The Reads are correct that the primary dwelling by itself conforms to the zoning codes in all respects, but it is their contention that they can deal with the buildings individually rather than as a unit that is incorrect. The primary dwelling becomes nonconforming by its pairing with the garage apartment on the same residential lot. Due to the Reads' property being labeled as nonconforming, they would need a special exception to add on to the primary dwelling. The Reads obtained their one time special exception in 1999, and are now excluded from additionally expanding their primary dwelling. Substantial evidence exists to support the Board's finding that the Reads' property was nonconforming due to the existence of two dwelling units on the same parcel of land.

**II. The Reads had a full and fair opportunity to present their case to the Board.**

The Board was not prejudiced by and toward the Building Official's position by receiving the Building Official's argumentative letter dated November 17, 2003, without receiving the November 11, 2003, letter from the Reads' architect prior to the hearing. The Reads contend that since their November 11, 2003, letter was not received by the Board until the hearing on January 9, 2004, the Board was able to familiarize themselves with the Town's position but not that of the Reads. The Reads contend that this amounts to an ex parte communication. It is the Reads' position that if their letter was submitted at the same time to the Board, then no prejudice would have occurred. The Reads are correct in that "such actions implicate particularly serious concerns necessitating careful review of the surrounding facts and circumstances. But it does not follow that an ex parte communication automatically results in a due process violation requiring a further public

hearing before a vote may be taken."[8]

The Reads have not demonstrated to this Court that prejudice did in fact occur. The Board was aware of the Reads' position in this matter. The Reads' were appealing the decision of the Building Official, which implies that they believed they were unjustly denied a building permit. A review of the transcript reveals the Reads had a full and fair hearing before the Board. There is no information before the Court that the Board did not consider all of the facts and the evidence before it, nor is there any information that the Board was predisposed to decide this case in favor of the Town. During the hearing, the Reads' architect had an opportunity to present her letter dated November 11, 2003, to the Board, where she specifically went over portions of her letter in detail and read them into the record.[9] Mr. Read also had an opportunity to present his case to the Board. The Board considered the Reads' position that their property consisted of a single family dwelling with an accessory use building, and determined that it did not fit within the applicable code sections. The Board did nothing that might suggest its impartiality was impugned by not receiving the Reads' letter. While it would have been ideal for the Board to have had the letter from the Reads' architect prior to the hearing, nevertheless the facts of this case do not rise to a prejudicial level. There was not an objection at the hearing that the Reads were prejudiced in any way by the Board not receiving the November 11, 2003, letter.

---

[8] *Blake v. Sussex County Council*, 1997 WL 525844 at *6 (Del. Ch.).

[9] Tr. at 23-26.

## CONCLUSION

For the foregoing reasons, the decision of the Board of Adjustment is affirmed.

**IT IS SO ORDERED.**

Very truly yours,

T. Henley Graves

oc: Prothonotary
cc: Robert V. Witsil, Jr., Esquire