

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

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

May 4, 2005

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RE: *Linda Kulin Living Trust v. Board of Adjustment of the Town of Fenwick Island*
C.A. No. 04A-03-003 (THG)

DATE SUBMITTED: April 14, 2005

Dear Counsel:

This is the Court's decision on the appeal by Linda Kulin Living Trust from a Board of Adjustment decision regarding the interpretation of a Fenwick Island zoning ordinance.

Petitioner, Linda Kulin Living Trust, owns the real property located at 907 Bunting Avenue, Fenwick Island, Delaware. At the time she purchased the property, two detached single family residences existed on the lot. One of the houses was set back sixteen (16) feet from Bunting Avenue, the other ninety-six (96) feet from Bunting Avenue.

Kulin applied for a building permit, requesting permission to begin new construction on the lot. She contends that upon applying for the building permit, her agent, Greg Hastings, was told by Patricia Schuchman, Fenwick Island's Building Official (hereinafter "Building Official"), that the applicable front building limit line for her property was twenty-five (25) feet from

Bunting Avenue. Thereafter, Kulin caused the two existing structures on her property to be demolished and staked out the empty property for new construction. Kulin contends that the Building Official later approached Mr. Hastings and informed him that the setback was actually forty (40) feet, not twenty-five (25), based on the setbacks established by the other residences on the 900 block of Bunting Avenue.

The Building Official determined that the ordinance required a forty (40) foot setback from Bunting Avenue by averaging the setback distances of the structures existing on Kulin's block in 1956, the year the zoning ordinance was enacted, and still existing at the time of her application. In figuring the setback calculation, the Building Official included the building lines of **all** structures on the relevant lots, including the building lines of second structures built on the back of the lot. The calculation resulted in an average setback that exceeded forty (40) feet, but the ordinance contains a provision setting the maximum setback requirement at forty (40) feet. Kulin objects to the building official's calculation, and insists that the setback requirements established by the existing structures must be determined by using only the setback distances of the most forward sitting structures.

Kulin stopped any further construction on the property and filed a complaint with the Fenwick Island Board of Adjustment. Kulin asked the Board to review the Building official's interpretation of the zoning ordinance, and, alternatively, to permit a variance for Kulin's property from the 40 foot front yard setback to a 30 foot setback. The Board of Adjustment agreed with the building inspector's interpretation of the zoning ordinance and denied Kulin's request for a variance. Kulin appealed the Board's interpretation of the zoning ordinance to this Court. Kulin did not appeal the variance denial.

Delaware courts have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. A reviewing court's sole function is to determine whether substantial evidence exists on the record to support the Board's findings of fact and to correct any errors of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² If the requisite evidence exists, the Court may not reevaluate the evidence and substitute its own judgment for that of the Board.³ If the Court finds an error of law or a lack of substantial evidence in the Board's findings, the Court may not remand the matter for further proceedings.⁴ Instead, the Court "may affirm, reverse or modify the decision of such body and the decision of the court shall be final."⁵

The interpretation of a zoning ordinance is a question of law, and, therefore, subject to *de novo* review by this Court.⁶ A Board decision which reviews a clear and unambiguous zoning ordinance, but misinterprets the language, may be subject to reversal as an error of law. In that case, "it is the intent of the ordinance and the plain meaning of its language that are controlling."⁷

¹*Hellings v. City of Lewes Board of Adjustment*, 734 A.2d 641 (Del. 1999)(Table), 1999 WL 624114 (Del.Supr.).

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

³*Hellings v. City of Lewes Board*, 1999 WL at *2, *citing Janaman v. New Castle Cty. Bd. Of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. Ct. 1976), *aff'd*, 379 A.2d 1118 (Del. 1977).

⁴*Id.*

⁵*1001 Jefferson Plaza Pshp., L.P. v. New Castle County Dep't of Fin.*, 695 A.2d 50, 51 (Del. 1997).

⁶*Di's, Inc. v. McKinney*, 673 A.2d 1199, 1204 (Del. 1996).

⁷*4th Generation, Ltd. v. Board of Adjustment*, 1987 Del. Super. LEXIS 1205 (Del. Super. 1987), at *7.

Whereas, the Board’s interpretation of an ambiguous zoning ordinance “should be given great weight and should not be overturned unless contrary to law.”⁸ An ambiguous ordinance is one that is reasonably interpreted two different ways or renders an absurd or unreasonable result.⁹

Section 160-4(C)(2) of the Fenwick Island Zoning Ordinances states the following:

Front Building Limit Line. The building limit line shall be set back from the front lot line not less than 25 feet, provided that when a majority of the lots on one side of a street between two intersecting streets are occupied by structures existing on the date of enactment of this chapter and a front building limit line of less than 25 feet has been thereby established, buildings hereafter erected on the same side of the street and between the same two intersecting streets shall not be required to be set back farther from the front lot line than the front building setback line which has been established by the existing structures, and further provided that when the majority of buildings built on one side of a street between two intersecting streets have been built with a front building line setback which is greater than the minimum twenty-five-foot front building line setback requirement, no building hereafter erected or altered on the same side of the street between the two intersecting streets shall project beyond the front building setback line which has been established by the existing buildings, provided further that no dwelling shall required by this chapter to be set back more than 40 feet from the front lot line, and provided further that this chapter shall not reduce to less than 24 feet the buildable width of a corner lot. If there are no two intersecting streets, then the street in issue between the one intersecting street and the end of the street in issue. If there are no intersecting streets, then the above criteria shall apply to the lots or buildings on the one side of the street in issue and located between the two ends of the street in issue.

While dissecting the ordinance may require a few readings, I find that the ordinance is not ambiguous on its face. It is complex. But the Court also acknowledges that two different

⁸*Id.*

⁹*Dir. of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003).

interpretations of the ordinance have been proffered. That, alone, does not render the ordinance ambiguous.¹⁰ Instead, the town's interpretation of the ordinance, and its adoption by the Board, reveals a latent ambiguity in its application, despite the ordinance's plain language. The ordinance employs clear and unambiguous language, but becomes unclear when applied.

Numerous lots in Fenwick Island contain more than one building or structure. Therefore, the ordinance's reference to setback lines established by "buildings" or "structures" on one side of the street could, theoretically, apply to all buildings, not just the front buildings. This fact pattern has allowed the plain language of the ordinance to be applied in a way that renders it ambiguous.

Since the purpose of the front setback line ordinance is to establish a boundary line for the most forward sitting structure, a reasonable interpretation would focus on the buildings from which the front setback line is measured. By interpreting buildings to mean **all** buildings on the lot, which includes everything from front dwellings to rear dwellings to outbuildings, the common sense interpretation is thrown to the wayside. Because the formula for determining the setback line is based on the number of buildings to be included and two methods of determining the number of relevant buildings exist, then the ordinance must be deemed ambiguous.

Once the Court establishes that an ordinance is unclear or ambiguous, the Court uses statutory construction to "ascertain and give effect to the intent of the legislature."¹¹ In its review of Board of Adjustment decisions, the Court must give great weight to the Board's interpretation

¹⁰*Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 175-76 (Del. 2001).

¹¹*Dir. of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003).

of an ambiguous zoning ordinance. However, the Court is free to correct a clear error of law. Furthermore, when ambiguities arise, the Court “must keep in mind that zoning laws are to be interpreted in favor of the occupants of the land.”¹² With these factors in mind, the Court finds that the plain language of the ordinance, the practical effects of the two interpretations and the purported goal of the zoning ordinance support Kulin’s interpretation.

The ordinance refers repeatedly to front building lines in establishing set-back requirements. The ordinance uses the heading “Front Building Limit Line.”¹³ Throughout the ordinance, the word “front” is used to refer to building limit lines and setback requirements. The ordinance states that no building shall project beyond the “front building set-back line which has been established by the existing buildings....” The Court’s reading of the ordinance is that only front buildings can establish the “front building setback line.” The Court finds that the plain language of the ordinance establishes that only front buildings on a lot are to be included in the calculation of proper setback requirements.

Common sense reinforces the exclusion of the back buildings in calculating a front building line setback. To require the inclusion of all buildings would mean that some lots that have more than one building would have both a front “front building line” and a rear “front building line.” Additionally, if such a lot had storage or outbuildings, which are included in the zoning code’s definition of “building”,¹⁴ then, according to the town’s interpretation, those

¹²*Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972).

¹³Fenwick Island Zoning Ordinance, Section 160-4(C)(2).

¹⁴Fenwick Island Zoning Ordinance, Section 160-2. According to the zoning codes, a “building” is defined as a

outbuildings, in the rear of the property, would also be used to calculate the “front building limit line.” This is an illogical result and erroneous application of the code’s language. This code language is to set a front setback line and should be construed in a reasonable manner to accomplish its goal.

Moreover, the goal of the code language is to limit non-conforming houses from being built considerably out of line with existing structures. By tying the appropriate setback distance to the existing houses, the ordinance ensures that new buildings preserve the continuity and “character” of Fenwick Island. The fact that numerous lots on Bunting Avenue were improved with more than one house in 1956 indicates that the drafters knew that a lot could contain “front” and “back” structures. The reference to a “front building” setback line is sufficient to find that the drafters intended to refer to the limit line established by the front house on a lot.

At least three other lots on Kulin’s block had improvements placed closer than fifteen (15) feet from Bunting Avenue in 1956. Also, when Kulin purchased the lot, it was improved with a property built approximately sixteen (16) feet from Bunting Avenue.¹⁵ But, under the town’s interpretation of the ordinance, Kulin will be required to build his house at a forty (40) foot setback distance. This case indicates that rather than achieving the town’s goal of

structure having a roof supported by columns, posts or walls which is utilized for the shelter, support or enclosure of persons, animals or chattels, provided that this definition shall not be construed so as to include a trailer, travel trailer, recreational vehicle or mobile home, irrespective of whether or not the trailer, travel trailer, recreational vehicle or mobile home is mounted on wheels or otherwise supported.

¹⁵ While Kulin’s destruction of that property obviates use of the sixteen (16) foot setback, the property is still entitled to have its setback determined by the average setback of the other houses on the block.

consistency in zoning and character, the town's calculation results in increasingly varied setback distances between existing and newly constructed homes.

The town contends that its use of back structures in calculating minimum and maximum setbacks for other lots should establish some precedential value for its application of the ordinance. The town further argues that changing the zoning standards now will impair Fenwick Island's character, look and feel due to a rise in non-conforming structures. At oral argument, town counsel suggested that the Building Official and the Board of Adjustment both had a discretionary right to apply the standard as they interpreted it.

But the fact that Fenwick Island has employed its setback standards widely and that the Building Official and Board did not find error in that application does not affect the Court's obligation to correct an error of law. The zoning ordinance was incorrectly interpreted and applied by Building Official, constituting a clear error of law.

Finally, the town's interpretation denies Fenwick Island property owners the right to make full use of their property. When interpreting zoning ordinances, it is well settled in Delaware that the Court is to err on the side of the landowner's full enjoyment and use of his land. The restriction the town is attempting to place on Kulin is unnecessary and senseless given the closer setbacks established by other homes on Bunting Avenue.

Despite the ambiguity in application, the plain language of the ordinance indicates that only front structures should be included in a calculation of the front building setback line. The Building Official's application of the ordinance and the Board's review of its application constitute a clear error of law. For these reasons, the Board's decision is REVERSED.

Finally, in postscript, this decision holds that, based on the language of the present zoning code in Fenwick Island, it is unreasonable to conclude that the setback ordinance refers to every building on every lot in the block to determine the front setback line. If that is what the town wants, then there is nothing in this decision that prevents the town from amending its code, stating clearly that all buildings are to be included in setback calculations and applying it prospectively.

Very truly yours,

T. Henley Graves

THG/jfg
oc: Prothonotary