IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PAUL J. MCLAUGHLIN and LISA C. MCLAUGHLIN, JOSEPH S. HANDLER and SUSAN E. K. HANDLER, D. CHRISTOPHER ROE and KAREN M. BLOCH,	:	
Appellants,	:	C. A. No. 07A-07-003 (CHT) (Consol. Apps.)
v.	:	and
BOARD OF ADJUSTMENT OF NEW CASTLE COUNTY, RONALD FULLER and KRISTINE FULLER, JEFFREY MARTIN and VALERIE MARTIN,	:	C. A. No. 06A-11-001 (CHT)
Appellees.	:	

OPINION AND ORDER

On the Appeal from the Decision of the Board of Adjustment of New Castle County

Submitted: February 1, 2008
Decided: December 15, 2008
Amended: January 14, 2009 (Cover Page)

Lisa C. McLaughlin, Esquire, PHILLIPS, GOLDMAN, and SPENCE, P.A., 1200 North Broom Street, Wilmington, DE 19806, Attorney for Appellants

Joseph S. Handler and Susan E. K. Handler, 107 Lands End Road, Wilmington, DE 19807, *Pro Se*

D. Christopher Roe and Karen M. Bloch, 108 Lands End Road, Wilmington, DE 19807, *Pro Se*

William J. Rhodunda, Jr. Esquire and Karen V. Sullivan, Esquire, WolfBlock, LLP, 1100 N. Market St., Suite 1001, Wilmington, DE 19801, Attorneys for Appellees

TOLIVER, JUDGE

Before the Court is a consolidated appeal brought by Paul and Lisa McLaughlin, D. Christopher Roe, Karen M. Bloch and Joseph and Susan Handler from two determinations of the New Castle County Board of Adjustment granting variances in favor of Ronald and Kristine Fuller and Jeffrey and Valerie Martin. Having reviewed the arguments of the parties, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

The Fullers began their occupancy of the property which they seek to develop, 4915 Threadneedle Drive, in 1997. The property consists of a wooded 1.85 acre lot located in the Sedgely Farms Development in Wilmington. Threadneedle Drive is a public roadway that actually ends one lot before the Fuller property begins. The Fuller property is accessed from the aforementioned roadway by means of a private lane extending between Treadneedle Drive and the property itself.[1] No traffic can pass

[1] There are no allegations that the Fuller property, prior to the instant application for a variance, failed to conform with the

beyond that point.

The Martin property, also the subject of subdivision efforts by its owners, is located in the Sedgely Farms development at 111 Lands End Road. The Martins have resided there since 1999. Lands End Road terminates at the Martin lot which consists of a 2.35 acre wooded parcel of land. The property has twenty-five feet of frontage on Lands End Road. It appears that a variance was obtained in 1979 which allowed the property as it is presently configured with less frontage than was then required by the applicable zoning classification of the New Castle County Unified Development Code ("UDC").[2]

On July 14, 2006, the Fullers filed an application with the New Castle County Board of Adjustment requesting a dimensional/area variance as a precursor to subdividing

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applicable zoning.

[2] *See* Decision of the New Castle County Board of Adjustment, Application No. 2007-0091-A (June 22, 2007) at 1. (For ease of reference, citations to the record in the Fuller and Martin appeals, including the decisions of the Board of Adjustment, shall hereinafter be made respectively to the appendices to the opening briefs filed by the McLaughlin Appellants in Civil Action Nos. 06A-11-001 ("Fuller R., McLaughlin App. at A-___") and 07A-07-003 ("Martin R., McLaughlin App. at A-___").)

their property into three smaller lots.[3] They intend to remain in their current home which will be situated on the largest of the three which is to measure .88 acre. Two new homes will be built on the remaining lots created by the subdivision. One of the lots will measure .52 acre with a 4,560 square foot home. The other, upon which a 3,600 square foot home would be situated, will cover slightly less territory at .43 acre.

The Fuller application contained two requests for variances to allow the subsequent creation of two lots that would not meet the requirements of the zoning applicable to Sedgely Farms. In relevant part, they asked for a "variance from the required 100' lot frontage from a public street to 0' to support subdivision plan."[4] Their goal in seeking to subdivide their property is to offset rising financial hardship related to the progression of multiple sclerosis from which Mrs. Fuller suffers. The lots would otherwise comply with the zoning

[3] Application No.06-0677-A. This application as well as that filed by the Martins, was submitted pursuant to § 1313(a)(3) of Title 9 of the Delaware Code. Fuller R., McLaughlin App. at A-60.

[4] Fuller R., McLaughlin App. at A-61.

applicable to Sedgely Farms.

On January 31, 2007, the Martins petitioned the Board of Adjustment for dimensional variances for their property as a precursor to its subdivision into four lots upon which new homes were to be built. To be specific, they applied for a variance from the:

> Required lot width (frontage) of 100' existing non-conformity on lot 1 of 25' requested variance on lots 2, 3 & 4 of 0'.

That request was subsequently modified while the matter was being reviewed by the Department of Land Use to the three lot proposal presented to the Board seeking a variance to create "3 lots with 25 feet of lot width for Lot 1 and 0 feet of lot width for Lots 2 and 3."[5]

The new lots would be accessed by a private drive. Two of the three would each measure .75 acre. The remaining lot upon which the current Martin home sits, would cover .85 acre. That structure would be demolished and the new homes constructed on each of the subdivided

[5] Martin R., McLaughlin App. at A-142.

lots.[6]

The UDC establishes and governs the zoning classifications in New Castle County including Sedgely Farms. Sedgely Farms, which consists of 104 lots of single family homes, is bounded by the north side of Lancaster Pike, the south side of Barley Mill Road and the east side of Centreville Road. It is currently zoned NC-15. That classification requires a minimum lot size of 15,000 square feet, frontage on a public street, 100 feet of lot width, 40 foot front and rear yard setback and 12 foot side yard setback.[7] Section 40.02.241(A) of

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[6] The record is not clear concerning the specific design and/or dimensions of the houses that would be constructed on the resulting properties. There was testimony, however, that the housing contemplated would have a footprint measuring at least 3,500 feet and would sell for in excess of $1 million. In any event, it is undisputed that the subdivision would otherwise conform with the applicable zoning classification, NC-15, which will be defined *infra*.

[7] The parties to this appeal as well as the Board, have used the terms "frontage" and "width" interchangeably to apply to that portion of a lot that must abut a street in an area zoned NC-15. However, none have referenced a specific provision of the UDC which links the two or which requires one hundred feet of width and frontage as opposed to having one hundred feet of lot width and an unspecified amount of "frontage along . . . a street" as per Articles 40.04.110 and 40.40.220 of the UDC. Notwithstanding the lack of citation in support of that usage, given the absence of any controversy between the litigants in this regard and any discernible impact on the instant dispute, the Court will employ the "term width/frontage" to avoid any confusion from this point

the UDC states the purpose of this classification in relevant part as follows:

> These districts protect the residential character of existing neighborhoods or planned subdivisions that were or are being developed under previous zoning restrictions.

The plan for the layout of Sedgely Farms was first approved in part by County Council's predecessor, the New Castle County Levy Court, in 1941. The remainder appears to have been approved between that point in time and 1954, when the UDC was adopted. From 1979 through the end of 2006, there were at least nine requests to subdivide existing lots excluding the Fuller application. Of that number, seven were approved and two were pending "SLD review".[8] The twenty-five parcels so created ranged in size from .41 acre to 3.192 acres.[9] Two of the

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forward.

[8] *See* Fuller R., McLaughlin App. at A-150. Exactly what "SLD" means is unclear from the record in this case but appears to refer to Subdivision Land Development. *See* New Castle County Code § 40 app. 2.

[9] From July 1979 thru December 1996, out of four applications, twelve lots were created ranging in size from 1 acre to 3.192 acres. However, from that point in time thru 2006, ten of the thirteen lots created ranged from .41 to .68 acre. The

subdivisions that were approved involved variances from the 100 foot lot width/frontage requirement.[10]

Apparently in response to those subdivisions, a group of Sedgely Farms homeowners in 2004 sought to restrict the size and/or characteristics of lots as well as the overall development of the community. That effort resulted in the submission of a proposal to New Castle County Council to change the applicable zoning classification from NC-15 to NC-40.[11] On January 27, 2005, the New Castle County Department of Land Use recommended conditional approval of the proposed change while the New Castle County Planning Board took no formal

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remaining three measured .784 acre, .79 acre and .934 acre. The Fuller and Martin lots that would be created if the Board's decisions were upheld are not included in this summary. Martin R., McLaughlin App. at A-100 to 101.

[10] The record does not reveal whether the other subdivisions involved relief from any of the requirements of NC-15. The Court will therefore assume, in absence of any information to the contrary, that the subdivisions referenced above otherwise complied with the requirements of NC-15.

[11] The NC-40 zoning designation requires a minimum lot size of 40,000 square feet 125 feet of lot width/frontage, 40 foot front and rear yard setbacks and a 15 foot side yard setback. By law, all changes to the UDC must be submitted to and approved by County Council. New Castle County Code §40.04.110.

position.[12] Notwithstanding that recommendation, on February 8, 2008, County Council rejected the proposal after a hearing by a vote of nine to one.[13]

Proceedings Before The Board

A hearing was held before the New Castle County Board of Adjustment on August 24, 2006 to address the Fuller application. On that occasion, Mr. Fuller testified about the need to use the land to alleviate financial hardship described above.[14] The Fullers presented evidence that any drainage and/or landscape issues presented by the subdivision would be fully addressed in order to mitigate any possible negative impact on the surrounding

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[12] The Land Use Department enforces compliance with the UDC while the Planning Board reviews proposed zoning changes and recommendations to County Council whether the requested action should be adopted or rejected. *See* 9 *Del. C.* §s 1301 and 1304.

[13] The sole vote in favor of the proposed change was Councilman William Tansey of the Third Council District which includes Sedgely Farms.

[14] Evidence was submitted as well concerning other lot subdivisions within Sedgely Farms and the prices of any of those lots sold following the subdivision. Although the size of the lots in question were not revealed, it appears that recent sales (from August 2003 to August of 2006) of developed lots, all with homes, were increasing and ranged from $375,000 to $1,583,000. Fuller R., McLaughlin App. at A-151 to 160.

properties. They also agreed, should the variances be granted, to adopt deed restrictions that would prohibit any additional subdivision or development of this property.[15] Finally, the Fullers presented evidence that their proposed subdivision was supported by members of the Sedgely Farms community[16] and would otherwise conform with the applicable zoning ordinances.

Seven of the Fullers' neighbors testified and presented evidence at the hearing in opposition to the granting of the variances including Appellants Lisa McLaughlin and Joseph Handler. Twenty-six, including the seven who testified, submitted written opposition. Their objections were centered on concerns that the proposed development would exacerbate ongoing drainage problems in the area, decrease the privacy and/or the secluded nature of its lots as well as be out of character with the

[15] The proposed developer and resident of Sedgely Farms, Philip Manalakos, along with John Garvin, the engineer hired by the Fullers, testified in these regards. In addition, Mr. Manalakos had likewise agreed via deed restriction to prohibit further subdivision when he purchased a neighboring lot measuring 1.7 acres.

[16] Thirty-five letters were submitted in support of their petition, including the owners of one of the lots adjacent to the Fuller property.

neighborhood. They also expressed concerns that the variances would result in over development with large houses on smaller lots which would in turn have a detrimental impact on the community.

A similar hearing regarding the Martin property was held on April 12, 2007. Ms. Martin testified that their current home is not adequate to meet the family's needs and is in need of repair. As a result, like the Fullers, the Martins sought to realize a financial gain from the subdivision sufficient to build a new home. The Martins also presented evidence that the proposed development was structured so as to minimize the impact on the surrounding properties in particular and on the character of the Sedgely Farms neighborhood in general.[17] Twenty-three letters in support of the proposed development were

[17] The evidence indicated that the Martins planned to increase the buffer between the private driveway and the property line to ten feet instead of the required two feet, where possible. They presented the testimony of a landscape architect to address preserving the arboreal nature of the property and a registered professional engineer to address drainage and/or water management concerns associated with the proposed new construction. Several residents also testified on behalf of the Martins, including the Fullers' developer and Sedgely Farms resident, Mr. Manalakos, who appeared to have some connection with the Martin project and their builder, Greenville Custom Homes. Martin R., McLaughlin App. at A-2 and 14.

submitted.

As was expected, the Martin application evoked a spirited response. Eleven of their neighbors and/or their representatives, owners of eight lots in Sedgely Farms, testified at the hearing against the granting of the variances. Among them were Appellants Roe, Bloch, Ms. McLaughlin and Ms. Handler. That opposition contended that the proposed development would be detrimental to the neighboring properties by reducing property values and would be inconsistent with its character, i.e., creating smaller lots and decreasing the existing house to lot size ratio.[18] They further described what they felt would be the negative impact on the private character of the community and increase problems with drainage in the area. Lastly, it was argued that the Martins had failed to demonstrate the existence of any hardship suffered as a result of the existing zoning or, to the extent any existed, it was self-created. Forty letters were submitted

[18] That evidence included photos as well as engineering and arborist reports relative to the Martin and surrounding properties. Apparently the neighbors were concerned that the proposed subdivision would increase traffic and noise as well as negatively impact neighborhood safety.

in opposition to their application.

In support of their position with respect to both the Fuller and Martin properties, the Appellants submitted an excerpt from the January 27, 2005 report issued by the Department of Land Use referred to above.[19] The language in question reads:

> The continued subdivision of the larger parcels into lots as small as 1/3 and ½ acre will significantly alter the long-term, historical open area character of the neighborhood . . . Sedgely Farms has no community or public open space. Open space is provided on lot and the sense of privacy created by large lots will be diminished as smaller lots with larger homes are developed.

Given this pronouncement, the Appellants argued that the decision to grant variances in favor of the Fullers and the Martins was contrary to the historical open area character of Sedgely Farms.

The Board's Decisions

On October 10, 2006, the Board rendered a decision approving the Fuller application. The McLaughlins

[19] *See* pp. 7-8 *supra.*

appealed that decision to this Court. On June 22, 2007, the Board responded affirmatively and approved the variance sought by the Martins. Shortly thereafter, the McLaughlins, this time joined by the Handlers, Ms. Block and Mr. Roe, instituted a similar challenge to that result. The appeals were subsequently combined and briefed.

The Appellants contend that the Board erred as a matter of law by failing to correctly apply the controlling legal authority governing the approval of variance applications as enunciated by the Delaware Supreme Court. They also contend that the decisions in question are not supported by substantial evidence in the record. Their arguments may be summarized as follows:

> (1) The requested variances were not minimal and that the harm to the property owners if the variances are denied would not be greater than the probable effect on the neighboring properties if the variances are granted.
>
> (2) The Board should have included an analysis of the potential negative impact from granting the variances on the residential character of Sedgely Farms.

> (3) The Martins and the Fullers have failed to establish that they would suffer any exceptional practical difficulty if the requested variances were not granted or any such difficulty or hardship being experienced is self-created.
>
> (4) The proposed new homes would be out of character with the neighborhood generally and because of their large size relative to the lots upon which they are to be located.

Three other arguments, one specific to the Fuller application and the other two directed against the Martins, are also raised. As to the Fuller variance, the Appellants contend that there is additional evidence this Court may consider which was not initially presented to the Board which calls into question the validity of the representations made by the Fullers and further undermines the Board's decision in that regard. The Appellants argue that the Martin application should never have been considered since they are alleged to have been delinquent in the payment of certain taxes and/or financial obligations due New Castle County. They argue as well that because the notice of hearing of the Martin application indicated that four parcels were to be created

instead of the three lots that the Martins ultimately settled upon, the Board should not have heard or otherwise considered the matter.

DISCUSSION

Standard of Review - Generally

The Delaware Code provides that this Court may review decisions of the Board of Adjustment.[20] In order for the Court to do so, the Board must particularize its findings of fact and conclusions of law.[21] The scope of review in such circumstances is limited to correcting errors of law and determining whether or not substantial evidence exists on the record to support the Board's findings of fact and conclusions of law.[22]

The meaning of an error of law is self-evident,

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[20] *See* 9 *Del. C.* § 1314.

[21] *Jones v. Board of Adjustment of Sussex County*, 2007 WL 441942 at *3 (Del. Super. Jan. 26, 2007).

[22] *Janaman v. New Castle County*, 364 A.2d 1241, 1242 (Del. Super. 1976), *aff'd*, 379 A.2d 1118 (Del. 1977); *See also Holowka v. New Castle County Board of Adjustment*, 2003 WL 21001026 at *3 (Del. Super. Apr. 15, 2003).

however the definition of substantial evidence is more complex. "Substantial evidence is that evidence from which an agency fairly and reasonably could reach the conclusion it did.[23] It is more than a scintilla but less than a preponderance."[24] When such evidence exists, the Court may not re-weigh it and substitute its own judgment for that of the Board.[25]

The Code further provides that this Court "may reverse or affirm, wholly or partly, or may modify the decision brought up for review."[26] The burden of establishing that the decision of the Board was arbitrary and unreasonable rests with the party seeking to overturn the decision of the Board.[27] Since the Appellants are challenging the Board responses to the Fuller and Martin applications, they must establish that granting the variances in question run afoul of the law and/or are not supported by

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[23] *Mellow v. Board of Adjustment of New Castle County*, 565 A. 2d 947, 954 (Del. Super. 1988).

[24] *Id.*

[25] *Janaman*, 364 A.2d at 1242.

[26] 9 *Del. C.* § 1314(f).

[27] *Mellow*, 565 A.2d at 955.

substantial evidence.

Standard of Review - Variances

The general definition of a variance has been described as relief or excuse from an application of the letter of a zoning ordinance but which remains consistent with the underlying purpose and/or intent of the ordinance as well as in the public interest.[28] Variances are a means of alleviating hardships that can result from the blanket application of zoning ordinances without consideration of special circumstances. A property owner may petition for a variance when their use and/or quiet enjoyment of their property has been significantly or adversely impacted by the restrictions contained in a zoning ordinance. There are two types of zoning variances, use and area.[29]

A use variance allows a property owner to enjoy his property in a manner inconsistent with or prohibited by

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[28] 8 Patrick J. Rohan, Zoning and Land Use Controls §43.01[3][a] at 43-8,9 (2007).

[29] *Wawa, Inc. v. New Castle County Board of Adjustment*, 929 A.2d 822, 830 (Del. Super. 2005); 8 Patrick J. Rohan, Zoning and Land Use Controls §43.01[3][a] at 43-9 (2007).

the applicable zoning ordinance. It changes the essential character of the district by permitting a use other than those prescribed for that geographic area.[30] Such a variance is subject to the stringent "unnecessary hardship of ownership" test.[31]

An area or dimensional variance allows a property owner to make use of his property in conformance with the uses allowed by a zoning regulation or code provision but in a manner that would be contrary to specific spatial definitions or restrictions, e.g., building setback or height limitations.[32] This category of relief concerns the practical difficulty of using the property for an otherwise permitted activity. The question to be asked is whether a literal interpretation of the applicable zoning law would result in exceptional practical difficulty of

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[30] *Dexter v. New Castle County Board of Adjustment*, 1996 WL 658861 at *2 n.4 (Del. Super. Sept. 17, 1996); *Profita v. New Castle County Board of Adjustment*, 1992 WL 390625 at *2 (Del. Super. Dec. 11, 1992); *Marriott Corp. v. Concord Hotel Management, a Div. Of Concord Towers*, 578 A.2d 1097 (Del. 1990).

[31] *Lewis v. New Castle County Board of Adjustment*, 601 A.2d 1048, 1049 (Del. Super. 1989).; *See* 9 *Del. C.* §1313(a); *Wawa* 929 A.2d at 831.

[32] *Brown v. City of Wilmington Zoning Bd. of Adjustment*, 2008 WL 2943390 at *5 (Del. Super. Jul. 21, 2008).

ownership.[33] That standard is less burdensome than that applicable to use variances.[34]

When presented with a petition for a use variance and applying the exceptional practical difficulties test, the Delaware Supreme Court has determined that the following factors be considered:

> 1. The nature of the zone in which the property lies.
>
> 2. The character of the immediate vicinity and the uses contained therein.
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> 3. Whether, if the restriction upon the applicant's property was removed, such removal would seriously affect such neighboring property and uses.
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> 4. 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 on the character of that use of the property which is a permitted use under the use provisions of the

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[33] *Profita*, 1992 WL 390625 at *3; *Dexter*, 1996 WL 658861 at *2; *Holowka v. New Castle County Board of Adjustment*, 2003 WL 21001026 at *5 (Del. Super. Apr. 15, 2003); *Gilani v. Board of Adjustment of New Castle County*, 2001 WL 946511 at *3 (Del. Super. 2001).

[34] *Dexter*, 1996 WL 658861 at *2; 8 Patrick J. Rohan, Zoning and Land Use Controls §43.01[3][a] at 43-10 (2007).

ordinance.[35]

In *Kwik-Check,* the petitioners owned two convenience stores which were located in unincorporated New Castle County. Both properties were zoned C-2 and as such were permitted to have self-service gasoline stations located on the properties. However, neither property met the spatial requirements of the C-2 zoning designation for self-service gas stations.

The Supreme Court affirmed this Court's judgment granting the requested variances and defining the factors which are relevant for purposes of reviewing applications for area versus use variances. In doing so, the Court specifically declined to hold that economic considerations alone are not sufficient to justify the granting of an area variance using the exceptional practical difficulties test.[36] Nor did the Court exclude or limit the viability of economic considerations as a

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[35] *Board of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978) ("*Kwik-Check II*"), *aff'g Kwik-Check Realty Co., Inc. v. Board of Adjustment of New Castle County*, 369 A.2d 694 (Del. 1977) ("*Kwik-Check I*").

[36] *Id.*

basis for a variance where the change is deemed to be minimal. As subsequent decisions have held, it is simply one of the factors to be weighed when addressing the issue.[37]

It is in light of these factors that the decisions to grant variances to the Fullers and Martins must be examined.

The Fuller Variances

In ruling in favor of the Fullers, the Board addressed several factors which it deemed relevant to their application. At the outset, it noted that the authority to grant an area variance is contingent upon a finding that the property owner is ". . . experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standard of the Zoning Code applicable to the subject property."[38]

The Board went on to reference the character of the

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[37] *Dexter*, 1996 WL 658861 at *7 n.8 (quoting *Doebling v. Board of Adjustment*, 1987 WL 10274 (Del. Super. Apr. 20, 1987)).

[38] Fuller R., McLaughlin App. at A-62.

area, the recent subdivision history of Sedgely Farms, the increase in prices of lots sold during that period of time and the restrictions against further subdivision to which the Fullers had agreed. The Board noted as well that the subdivision planned by the Fullers would keep as much of the current landscaping as possible to maintain the privacy of the area. It also included, the Board recognized, steps designed to improve stormwater management that had been problematic over the course of the development of Sedgely Farms.

After acknowledging the concerns of the Sedgely Farms residents opposed to granting the variances in question,[39] the Board concluded:

> The Board votes to grant the requested variances,[40] with three conditions, that: (1) there will be no further subdivision of the Fullers' lot (lot1A); (2) a comprehensive stormwater management plan will be submitted by the Applicant for review by New Castle

[39] The concerns specifically so recognized included possible diminution of property values, stormwater management, a denigration of the private nature of lots and a reduction of the average lot size in the Sedgely Farms community. Fuller R., McLaughlin App. at A-63.

[40] The actual vote was four members of the Board in favor of granting the Fuller application versus two against it.

> County; and (3) landscaping will be provided between the newly created lots and the property owned by the Malatestas. Development in New Castle County is in transition, and in-fill is preferred over further suburban sprawl. The proposed lot sizes are legitimate and meet the zoning class requirements. . . .
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> . . .
>
> The Applicant and the homeowners are willing to agree to conditions to satisfy concerns voiced by Sedgely Farms residents. The proposal is not out of character with the community as there [are] as many lots in the neighborhood that are similar in size. Further, there are other lots in the development that do not have the 100' of lot frontage. The harm to the Applicant if the variances were denied would be greater than the probable effect on the neighboring properties if the variances were granted. The granting of these variances will not cause substantial detriment to the public good, nor will it substantially impair the intent and purpose of the zoning code.[41]

There is little doubt that the Board correctly applied the appropriate legal standards as set forth by the Delaware Supreme Court in *Kwik-Check II.*

The Board considered the nature of the zone where the

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[41] Fuller R., McLaughlin App. at A-64.

property is situated, NC-15, as well as the uses and character of the area immediately surrounding the Fuller property. Based upon that evaluation, the lots for the variances were sought were deemed to be consistent in size and character with other lots in the Sedgely Farms development.

In terms of the character of the community, the evidence before the Board established that the three lots to be created fit within the range of size of the lots created by subdivision in Sedgely Farms since 1998. In addition, it appears that there are other lots that existed with less than the required one hundred feet width/frontage on a public street or roadway. The private character of the lots was to be maintained by eliminating only as much of the existing trees and/or vegetation as necessary to complete the proposed construction and adding to that where needed. And, since Threadneedle Drive ended prior to the Fuller property, there would be no increase in traffic to the rest of the development as would be if the proposed variance created or otherwise affected an existing thoroughfare.

Although it was not specifically noted, the Board's characterization of the size and/or scope of the changes which would result from the granting of the variance can only be described as minimal. The Board did recognize that the square footage of the lots that would result from a subdivision following that event, would significantly exceed the minimum square footage required by NC-15. The new construction would not result in any change in the present use of the property and the resulting houses would be consistent in style and size with the existing residences. Most significantly, the Board noted that the change sought was consistent with the intent and purpose of NC-15, particularly in light of the rejection by County Council in 2005 of the attempt to rezone Sedgely Farms from NC-15 to NC-40.

The Fullers' request, as the Board's decision reflected, was not likely to negatively impact the neighborhood. First, the prices of lots following the most recent subdivisions in Sedgely Farms had been increasing. Second, the Fullers agreed to take, and the Board's decision was made contingent upon those

concessions, certain measures to address the concerns of neighbors opposed to the variance, i.e., imposing stormwater management controls, landscape preservation and granting deed restrictions against further subdivision. The information presented by the opposition was at best, anecdotal.

Lastly, the Board found that the Fullers were experiencing exceptional practical difficulty in attempting to maximize legitimate use of 4915 Threadneedle Road. That difficulty arose after their 1997 purchase of that property. It was not self-created by affirmative act of the Fullers which they are now attempting to remedy. Nor does the difficulty relate to a condition of which the Fullers were aware prior to 1997.

The Board also concluded that the harm to the Fullers if the variance were denied in the present circumstances would be greater than that which would result to the neighborhood if it were granted. Simply put, the evidence presented established that the Fullers could not make a legally permissible use of 4915 Threadneedle Road

without the variance and that the need to do so was precipitated by Mrs. Fuller's worsening medical condition. On the other hand, the neighbors' concerns were addressed by the concessions made by the Fullers and upon which the Board's decision was made contingent.

The Martin Variances

As it did when addressing the Fuller application, the Board followed the same process. To be specific, in reviewing the evidence submitted in response to the Martin application, the Board summarized the history of the development of Sedgely Farms, its zoning and the nature of the relief sought, i.e., an area or dimensional variance based upon the unusual configuration and location of the Martin lot. It recognized that the lot as it is presently configured, only has twenty-five feet of width/frontage on Lands End Road allowed by virtue of a 1979 variance. However, if the requested variances were granted, each of the three subdivided lots would have one hundred feet of area along the private drive to be constructed.

The Board noted the recommendation of the Department of Land Use in favor of granting the variances sought by the Martins, the unsuccessful attempt to change the zoning from NC-15 to NC-40 and the applicable legal standards set forth in *Kwik-Check I & II.* It also recognized that the variance would allow a subdivision of the property into lots that would be twice the minimum size required by NC-15 and would also be greater in size than all but one of the lots which resulted from subdivisions since 1998.

Lastly, the Board addressed the evidence submitted both in opposition to and in favor of the Martin application, including the steps the Martins proposed be taken to address and/or ameliorate the concerns of some of their neighbors.[42]

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[42] Those concerns the Board identified were:

> The neighbors in opposition raised concerns about stormwater drainage, streambed flooding, safety on a narrow street, adequacy of off-street parking, injury to existing landscaping, reduction in property values, increased noise and impact on the character of the community.

Martin R., McLaughlin App. at A-143.

In response, the Board recognized that the Martins had:

In approving the request by a vote of three to one, the Board opined:

> The Board votes to grant the requested variance, as amended. The Applicants' exceptional practical difficulty is not self-created and is a result of the unusual configuration and location of their parcel. Without obtaining a variance, it is not possible to subdivide this 2.35 acre parcel, even though the zoning classification of this community allows for lots that are .34 acres [sic] in size. The acreage of the proposed three lots will be in keeping with the size of the other lots in the community, and will be larger than many lots in the subdivision. There are other lots in the community that do not meet the lot width or frontage requirement in the Code. The proposed private drive will have the physical appearance of many of the roads that

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> . . . retained the services of engineers, architects, landscapers and other experts so that they can more than adequately resolve the issues surrounding drainage and stormwater management. In addition to meeting or exceeding the County stormwater and drainage code requirement, the Applicants are proposing on-lot water storage and controlled water release for the new lots. Currently, the lot has uncontrolled drainage, as do most of the lots in Sedgley Farms. The Applicants will maintain most of the existing landscaping . . . [and] have also proposed additional landscaping . . . to provide impacted neighboring properties with attractive buffering and shielding.

Id.

> already exist in Sedgley Farms. The Applicants will provide landscaping and stormwater control measures, as required by the County through the subdivision approval and construction process. This proposal represents in-fill development that is appropriate for the community. It is not out of character with the community. The harm to the Applicants if the variance was denied would be grater than the probable effect on neighboring properties if the variance were granted. The granting of this variance will not cause substantial detriment to the public good, nor will it substantially impair the intent and purpose of the zoning code.[43]

Again, the Appellants do not argue that the Board, in employing the exceptional practical difficulty test and the factors referenced in *Kwik-Check I* and *II* erred as a matter of law. They contend once more that the Board failed to correctly apply that standard. They are mistaken.

The record reflects that the Board reviewed the nature of the zone where the property was located along with the character of the Sedgely Farms development *vis a vis* the relief sought and determined that the variance would not result in changes that would negatively affect

[43] Martin R., McLaughlin App. at A-145.

the surrounding properties.

In this regard, the Martin property has existed with twenty-five feet on Lands End Road without having to comply with the 100 foot width/frontage requirement of NC-15 since 1979. However, the lots that are to be created would have 100 feet of width/frontage on what would become an extension of the aforementioned roadway. That route would also be similar in appearance to other dead end streets or roads in Sedgely Farms. There would be no through traffic and efforts to maintain the privacy of nearby housing would be undertaken. The lots would otherwise comply with, if not exceed, the NC-15 zoning that applies. The housing types that exist are mixed and the proposed construction as generically described, would be consistent with that mix.

In terms of the stormwater and drainage management, the evidence put before the Board reflected the steps to be taken by the Martins to control and improve that which is not being managed as the situation presently exists. The complaints by the Appellants as well as the testimony submitted to the Board in support thereof, addressed the

changes that they believed might result from the proposed development. However, the Appellants did not contend that the measures the Martins intended to take were not reasonable or appropriate given the concerns identified or the character of the neighborhood.[44]

It is clear that without the variance the Martins are suffering exceptional practical difficulty in utilizing their property as permitted by law. But for the dimensional constraints occasioned by the shape of the property, the Martins would be able to subdivide the property which otherwise complies with NC-15 classification. In that respect, the "exceptional practical difficulty" intrinsically relates to the property itself.[45] This difficulty has not resulted from

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[44] Particular note is taken of the information presented by Richard E. Franta, Esquire on behalf of Appellants Roe and Bloch which included reports authored by an arborist and engineering firm. The arborist indicated that the possibility of damage to two large trees on their property could be avoided or minimized. The engineer commenting on the stormwater/drainage issues concluded that the steps to be taken by those acting on behalf of the Martins in that regard, while preliminary and in need of further analysis, appeared to be reasonable under the circumstances. Martin R., McLaughlin App. at A-179 to 184.

[45] *See Liarakos v. New Castle County Board of Adjustment*, 1998 WL 437135 at *2 (Del. Super. Jul. 23, 1998).

any affirmative act by the Martins.[46] Nor is it an effort to remedy an ultra vires act by them. If they are not able to obtain a variance, they will not be able to make normal improvements in the property which are otherwise permitted in an area zoned NC-15 as well as meet the needs of their family.

The Court notes that in addition to being consistent with the character of the Sedgely Farms community as well as the intent and purpose of the applicable NC-15 zoning, the changes being sought can only be deem as "minimal". Given the shape of the lot which had, since 1979, existed with less than the width/frontage required by NC-15, the relief being sought can not reasonably be otherwise described. The concerns of the Appellants along with their efforts to describe them differently, would be significant if the applicable zoning were NC-40, but it

[46] While the Martins may have known of the requirements of NC-15 when they purchased their lot, knowledge of the constraints of the applicable zoning does not equal a self-created hardship. *Mesa Communications Group v. Kent County Board of Adjustment*, 2000 WL 33110109 at *6 (Del. Super. Oct. 31, 2000); *McKinney v. Kent County Board of Adjustment*, 2002 WL 1978936 at *8 (Del. Super. Jul. 31, 2002). In addition, it appears that the Martin family has grown in size since the family originally joined the Sedgely Farms community which necessitated in part the desire to subdivide the property.

is not.

The Board's Decisions Must Be Upheld

The Board's decisions granting both the Fuller and the Martin variance applications are supported by substantial and competent evidence. Both were supported by evidence that included testimony by builders and/or developers with personal and professional experience in the Sedgely Farms neighborhood along with engineers and other experts who outlined measures to be taken to address concerns regarding any possible negative impact the variances and resultant subdivisions might have. That evidence included concessions by both the Fullers and the Martins restricting further subdivision as well as taking steps to maintain the private character of the community and to ease existing drainage/runoff problems unrelated to the current ownership of the properties.

Neighbors in favor of the variances voiced their support for both applications. Those opposed to those applications were afforded and availed themselves of the opportunity to do the same in response. However, their

concerns and objections are more of a dissatisfaction with the application of the NC-15 zoning classification, versus NC-40, to Sedgely Farms. That is a battle that was lost in 2005 when County Council rejected the effort to rezone Sedgely Farms to the higher classification notwithstanding the recommendation by the Department of Land Use in favor of the change. The Fullers and the Martins should not now be made casualties of that conflict.

The factors outlined in *Kwik-Check I* and *II* along with their progeny, were properly applied by the Board to the evidence put before it in both cases. As discussed above, the evidence was thoughtfully reviewed in light of the applicable legal standard. Nothing more is required in so far as either application is concerned.

The exceptional practical difficulty test does not require that the applicants demonstrate that the property could not be put to any reasonable use without a variance or that because the properties are being permissibly used without a variance, the hardship is self-created and the applications should be denied. Again, a self-created

hardship is present when the hardship is personal to the property owner or resulted from an affirmative act of that individual or entity.[47] To the extent the Appellants cite legal authority to the contrary, it is not the law in this State and it is not otherwise persuasive.

The fact that there are financial considerations motivating both applications does not change the Court's view of the matter. The case law is clear, the applicants do not have to establish that the scope of the change sought falls within certain parameters or that the underlying rationale was not economically motivated.[48] As the Delaware Supreme Court noted in *Kwik-Check II*, exceptional practical difficulty can be found to exist where economics are the motivating factor and the change in minimal. However and again, the scope of the change is simply one of the factors to be considered. Even if one were to view either or both applications as having been triggered by financial concerns alone or a

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[47] *Mesa Communications Group*, 2000 WL 33110109 at *6 (Del. Super. Oct. 31, 2000).

[48] *See Kwik-Check II*, 389 A.2d 1289.

combination of financial and familial concerns, the result would be the same.

The concerns raised by the Appellants in both cases do not directly address how the relief sought, i.e., a waiver of the 100 foot lot width/frontage for the lots to be created by the Fullers and the Martins, negatively affect the neighborhood or how the harm to the neighborhood would be greater to either applicant if the relief were granted. Their focus is on what they consider to be the negative impact of the subdivisions which will result if the variances are upheld. They fail to acknowledge that if the width/frontage requirement were not applicable, both properties could be subdivided consistent with the NC-15 zoning applicable to Sedgely Farms. They also fail to substantively dispute the efficacy of the steps that are to be taken by the Fullers and the Martins along with the conditions attached by the Board of Adjustment to its approval of the applications in addressing those concerns.

The Appellants would like the Court to ignore the number of subdivisions since 1998, the number and size of

the lots created as a result, fact that the lots to be created if the Fuller and Martin variances are upheld fall within that range along with the increases in the value of Sedgely Farms properties in recent years. They would also have the Court ignore New Castle County's policy of preferring "in filling" developments and the rejection of the attempt to change the Sedgely Farms zoning from NC-15 to NC-40 in 2005. All of that information was properly considered by the Board of Adjustment in granting the Fuller and Martin variances given the *Kwik-Check* decisions and the lines of cases following them. To do otherwise would be contrary the law and lacking support in the records created in response to both applications.

The Court Need Not Consider Additional Evidence

The Appellants have suggested that the Court go outside the record that was before the Board in response to the Fuller application and consider the affidavit of Bruce W. Jones executed on February 21, 2007. For reasons which are not clear, Mr. Jones' testimony was not

presented to the Board when the Fuller application was heard. His views which the Appellants now seek to put before the Court, call into question whether the subdivision that is contemplated if the decision of the Board in this regard is upheld, would exacerbate existing stormwater management problems, cause a reduction in property values and otherwise negatively impact the privacy of the neighborhood.

In support of that argument, they rely upon *Mellow v. Board of Adjustment.*[49] Unfortunately for the Appellants, that reliance is misplaced. Additional evidence is unnecessary where, as is the case with both the Fuller and Martin applications, the Board's decisions are supported by substantial evidence and free from legal error. Moreover, if the evidence in question, which was not subject to adverse examination, was that critical, the Appellants fail to state why it could not have been presented before the Board when the applications were heard. In short, there is no legally cognizable reason for this Court to consider that evidence.

[49] 565 A.2d 947 (Del. Super. 1988).

The Board Was Not Prohibited From Considering The Martin Application

Finally, the two arguments raised by the Appellants concerning the impact of the alleged failure of the Martins to have paid all applicable "county and school taxes" due New Castle County at the time they filed their variance application and the failure to correctly notice that the variance concerned three, not four lots as originally posited, are simply not persuasive.

First, as the Martins point out, the 2007 New Castle County real estate taxes were not due at the time their application and the record put before the Board and subsequently presented to this Court is silent concerning whether any taxes due New Castle County for either year were in fact delinquent.[50] Furthermore, had the issue been raised at the hearing or otherwise put before the Board prior to the filing of the Appellants' opening

[50] The only information in this regard is the allegation by the Appellants that the taxes due New Castle County for 2006 and 2007 from the Martins were unpaid when they filed their application on January 31, 2007. That allegation is supported by what purports to be a unverified copy of a document obtained from the internet via the New Castle County governmental website on May 31, 2007, one month after the Martin hearing before the Board.

briefs, the matter could have been addressed and/or cured. The failure to do so until the filing of their opening brief must be deemed as a waiver of any rights to now complain about the alleged slight.[51]

Second, the character of the notice given was sufficient notwithstanding the fact that the Martins were reducing the scope of their request. The character of the relief sought had not changed nor had the basis upon which the Martins were asking the Board to respond in their favor. In addition, none of those who appeared, including the Appellants, complained or in any way referenced the change, obviously being concerned with the merits of the application before the Board. Any deficiency was therefore harmless and of no legal consequence.[52]

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[51] *Bethany Beach Vol. Fire Co. v. Board of Adjustment of Town of Bethany Beach*, 1998 WL 733788 at *5 (Del. Super. Sept. 18, 1998).

[52] *Id.*

CONCLUSION

For the foregoing reasons, the Court finds that the decisions of the Board of Adjustment of New Castle County in Application Nos. 06-0677-A (Fuller Application) and 2007-0091-A (Martin Application), are supported by substantial and competent evidence. Those decisions are also free from legal error. As a result, they must be, and hereby are, **affirmed.**

TOLIVER, JUDGE