SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0203-16T1

HENRY YU,

Plaintiff-Appellant,

v.

TOMS RIVER PLANNING BOARD,
TRACIE SCHOELEN and
DANA SCHOELEN,

Defendants-Respondents.

Argued November 27, 2017 – Decided January 18, 2018

Before Judges Accurso and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2104-15.

Terry F. Brady argued the cause for appellant (Brady & Kunz, PC, attorneys; Terry F. Brady, on the brief).

Gregory P. McGuckin argued the cause for respondent Toms River Planning Board (Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors, attorneys; Gregory P. McGuckin, of counsel; Martin J. Buckley, on the brief).

Michael B. York argued the cause for respondents Tracie Schoelen and Dana Schoelen (Novins, York & Jacobus, attorneys; Michael B. York, on the brief).

PER CURIAM

In this prerogative writs matter, objector Henry Yu appeals from a Law Division judgment affirming the Toms River Planning Board's approval of defendants Tracie and Dana Schoelen's application for a minor subdivision with bulk variances. Because both the Board and the Law Division failed to correctly apply the law relating to self-created hardship, we reverse.

This is not a particularly well-developed record. Plaintiff was not represented at the Planning Board meeting at which the subdivision was approved, and none of the parties included the Schoelens' application in the appendix. We only acquired the map of the proposed subdivision after requesting it at oral argument. Nevertheless, the essential facts are undisputed.

The properties were originally part of a single, seven-acre parcel owned by the Schoelen family on Old Freehold Road.[1] The entire parcel is an irregularly shaped rectangle, roughly twice as deep as it is wide, with one of the narrow ends lying along Old Freehold Road and the other bordering preserved County

[1] The Schoelens' lawyer and planner both stated on the record at the Planning Board hearing that the seven-acre parcel was part of a larger tract owned by the Schoelen family, which included the adjacent lot to the north, now occupied by Kremer Auto Body. Counsel stated the tract "was subdivided years ago as part of a plan for the family."

lands. The parcel is bordered to the north by the Kremer Auto Body business and, behind that, a nine lot subdivision off a cul-de-sac where the objector resides. Another cul-de-sac subdivision lies to the south.

The seven-acre parcel was subdivided several years ago into two lots; lot 10.02, a conforming square-shaped lot consisting of 1.7 acres fronting on Old Freehold Road in the northeast corner of the rectangle, and lot 10.03, an irregularly shaped non-conforming flag lot of almost 5.4 acres, making up the remainder. The lots, both owned by members of the Schoelen family, are improved with single family dwellings and garages. The lots share a driveway, which comes off Old Freehold Road to the south of lot 10.02 and runs up the "staff" of lot 10.03. The family keeps horses on lot 10.03, where there is a stable and two fenced pastures.

In 2014, the Schoelens applied to the Planning Board for a minor subdivision with bulk variances to create a building lot for another family member from their two existing lots. They proposed to shift lot 10.02 approximately 40 feet south, reducing the frontage of lot 10.03 by a third, and extending the line dividing the two lots for the entire length of lot 10.03, jogging it north around the existing dwelling on lot 10.03, and reducing that lot to just over three acres. Those changes

permitted creation of a new non-conforming flag lot 10.06, with a driveway coming off Old Freehold Road to the north of proposed lot 10.04, formerly lot 10.02, and running up the "staff" to a roughly two acre "flag," bordered on the east by proposed lot 10.04 and the south by proposed lot 10.05, formerly lot 10.03.

The Schoelen property is located in Toms River's Rural Residential Zone, which provides for one acre lots. Although the three proposed lots each exceed one acre, all required bulk variances as follows:

Proposed lot 10.04

Rear yard accessory structure setback: 30 feet required, 4.9 feet proposed.

Side yard accessory structure setback: 20 feet required, 11.8 feet proposed.

Accessory structure distance from other buildings: 5 feet required, 0 feet and 2 feet proposed.

Proposed lot 10.05

Minimum lot width: 150 feet required, 106.2 feet proposed.

Proposed lot 10.06

Minimum lot width: 150 feet required, 44.48 feet proposed.

Minimum lot frontage: 75 feet required, 44.48 feet proposed.

> Accessory structure distance from other buildings: 5 feet required, 0 feet proposed.

In essence then, the Schoelens were proposing to take their two lots, one of which was a non-conforming flag lot, and make three lots, all of which would be non-conforming, and two of which would be flag lots. They sought a "hardship" variance pursuant to N.J.S.A. 40:55D-70(c), claiming it was the property's "unique shape and existing structures" that "trigger[ed]" the variances. They did not address that the configuration of the lots and location of the existing structures were as a result of their prior subdivision. Their planner testified they had "seven acres which, at one acre zoning in the right geometry, could yield seven lots. We don't have geometry to get three conforming lots. So, in that respect, it is unusual. It's more than twice deep as it is wide, so that's why we have our width and frontage concerns."

The Schoelens' proofs on the negative criteria were limited to their planner's single word affirmative response to their counsel's question as to whether "these variances [can] be granted without substantial detriment to the zone plan and the master plan of the Township of Toms River" and his opinion that there was "no negative impact to this lot line change."

Plaintiff and another neighbor objected to the subdivision plan. Plaintiff complained about the creation of a new flag lot and driveway abutting his property. The neighbor behind him complained the applicant was relocating the horse stable and buildings closer to the neighbors living in the subdivision behind Kremer Auto Body, interfering with the quiet use and enjoyment of their backyards. The Schoelens' counsel acknowledged the Board's planner had suggested eliminating the new driveway and tying it into the existing one. The Schoelens' planner noted, however, that the driveway on proposed lot 10.06 was an existing dirt and gravel drive used to access the barn and horse pastures, and that the family desired to keep the driveway "along the commercial site, not between the two [existing] residences."

The Board voted unanimously to grant the application without any discussion of self-created hardship. The resolution notes the Board's finding "that the variance relief requested is due to the unusual shape of the parcel . . . and how it has been previously developed," and further notes "the applicant could, if the geometry was changed, construct seven single family residential dwellings on one acre lots, all of which would be conforming with the zoning requirements[,] while all of the lots proposed herein are all oversized." The Board concluded "the

applicant has submitted sufficient reasons to grant the relief requested and there will not be any substantial detriment to the Township's zoning plan or neighborhood scheme as a result of the granting of the variance relief sought."

Plaintiff filed an action in lieu of prerogative writs, claiming the Schoelens had not demonstrated hardship, that there was no need to have drawn new lot lines so as to require variances for existing sheds, and that any hardship was self-created. He further argued that flag lots were not permitted by the zoning ordinance, were completely out of character for the area and negatively affected neighboring properties.

The Law Division judge rejected plaintiff's claim of self-created hardship, finding in the cases applying the doctrine that "creation of the hardship was done either in completely bad faith or at least unnecessarily for reasonable development of the property." The judge found that neither applied here as "the previous construction upon the property was reasonable as is the current request to subdivide the property to allow for further development."

The judge found the "subdivision merely required a variance on small zoning issues, most of which do not substantially affect the property." Acknowledging the Schoelens "could have originally made a road to divide the property into various neat

lots," he found their failure to do so did not equate to self-created hardship, relying on Jock v. Zoning Board of Adjustment of Wall, 184 N.J. 562, 592 (2005) (holding that "parties who purchase non-conforming property and do not take affirmative steps to render it conforming are [not] complicit in creating the hardship"). Finally, the judge found the Board could have also granted the application under N.J.S.A. 40:55D-(c)(2), based on "allowing proper population density" and "hav[ing] a nicer lot for raising of horses," notwithstanding that "the Board's deliberations do not clearly delineate these points."

Plaintiff contends both the Board and the Law Division failed to properly apply the doctrine of self-created hardship. We agree.

N.J.S.A. 40:55D-70(c)(1),[2] is the provision of the Municipal Land Use Law providing for what is commonly referred to as a

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[2] The statute provides:

> Where: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of

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hardship variance. The statute "permits a variance from a bulk or dimensional provision of a zoning ordinance, such as frontage, when, by reason of exceptional conditions of the property, strict application of a bulk or dimensional provision would present peculiar and exceptional practical difficulties or exceptional hardship to the applicant," and the applicant can prove the variance can be granted without substantial detriment to the public good or impairment of the zone plan, the negative criteria. Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 29-30 (2013); see also Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 61 (1999) (permitting a hardship variance based on the unusual narrowness of the property and existing structures). Whether such exceptional conditions of the property will entitle the owner to a hardship variance, depends

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> any regulation pursuant to [N.J.S.A. 40:55D-62 to -68.61] would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, [the Zoning or planning board, as appropriate, shall have the power to] grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship . . . .

on the owner's role in creating the non-conformity. Ten Stary Dom P'ship, 216 N.J. at 30.

Stated differently, "[t]he availability of a hardship variance depends on how the hardship was created." Jock, 184 N.J. at 590. If the applicant, or its predecessor in title, has by some affirmative act brought "an otherwise conforming property into non-conformity," making the hardship one of its own making, "relief will normally be denied." Id. at 591.

That is precisely the situation here. It is undisputed that the Schoelens previously subdivided their seven-acre parcel, creating the two lots that now exist. The two lots are thus configured exactly as they designed. When they applied to further subdivide the property, seeking hardship variance relief based on the placement of the existing homes, sheds and driveways, it was incumbent on the Board to consider whether the claimed hardship was one of the Schoelens' own making. See ibid. The resolution's vague reference to the applicant needing "variance relief . . . due to the unusual shape of the parcel . . . and how it has been previously developed," is inadequate. The Board's failure to apply the correct legal standard deprives its decision of the deference to which it would ordinarily be entitled. See Lang, 160 N.J. at 58-59.

We also agree with plaintiff that the Law Division judge erred in dismissing its claims of self-created hardship on the basis that the Schoelens had not engaged in bad faith. "[T]here is nothing in the Supreme Court's opinion in Jock to support the assertion that there must have been some sort of misconduct or bad motive on the part of the person creating the non-conforming lot." Egeland v. Zoning Bd. of Adjustment of Colts Neck, 405 N.J. Super. 329, 334-35 (App. Div.), certif. denied, 199 N.J. 134 (2009).

That the Schoelens might have been able to have configured the seven-acre parcel to create seven conforming lots is also irrelevant in light of the undisputed fact that they had within the last few years obtained approval to subdivide the property into two lots, one a non-conforming flag lot. While the otherwise underutilization of the land may have justified the creation of the first flag lot, see Cox & Koenig, N.J. Zoning & Land Use Administration, § 29-2.9 (2017), the application for a (c)(1) variance to further subdivide the property, creating yet another flag lot, could not have been granted or affirmed without consideration of the doctrine of self-created hardship, see Green Meadows at Montville, LLC v. Planning Bd. of Montville, 329 N.J. Super. 12, 22 (App. Div. 2000). Because the Schoelens took affirmative steps to create the non-conformity,

the court's reliance on Jock to sustain the Board's grant of the variances was error. See 184 N.J. at 591 (distinguishing between the failure to correct a non-conformity and the affirmative act of "bring[ing] an otherwise conforming property into non-conformity").

The Law Division judge's conclusion that the Board could have alternatively granted the variance pursuant to N.J.S.A. 40:55D-70(c)(2), requires only brief comment. See R. 2:11-3(e)(1)(E). Although the Supreme Court in Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 564 (1988), sustained the grant of a subdivision with bulk variances under N.J.S.A. 40:55D-70(c)(2), for a reason not articulated by the Board, that is that the proposed development would render the land more in conformity with the actual development and planning applicable to the zone, it could do so because the record sustained such a conclusion. Here, there were simply no facts in the record created before the Planning Board sufficient to sustain a (c)(2) variance. Board counsel's argument for an alternative basis to sustain the Board's action in the Law Division cannot suffice for facts in the record. See Antonelli v. Planning Bd. of Waldwick, 79 N.J. Super. 433, 440-41 (App. Div. 1963).

Reversed.