

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

EASTWOOD CUSTOM HOMES, INC.,

Appellant,

v

File No. 07-26029-CE **AA**
HON. PHILIP E. ROGERS, JR.

THE VILLAGE OF KINGSLEY and THE
VILLAGE OF KINGSLEY ZONING BOARD
OF APPEALS,

Appellees.

Matthew D. Vermetten (P43425)
Attorney for Appellant

David A. Bieganowski (P55622)
Attorney for Appellees

DECISION AND ORDER ON APPEAL

This is an administrative appeal from a decision by the Appellee Village of Kingsley Zoning Board of Appeals denying the Appellant Eastwood Custom Homes, Inc.'s request for a variance. The Village of Kingsley is a duly authorized village, situated in Grand Traverse County, Michigan, with a zoning ordinance that was adopted pursuant to the Zoning Enabling Act, MCL 125.3201 (formerly MCL 125.581, *et seq*). The Appellant owns a lot in the Village of Kingsley that is zoned residential (R-1) and has a creek running through it. Because of street and stream setback requirements, the Appellant applied for variances in order to be able to build a house on the lot.¹ The Village of Kingsley Zoning Board of Appeals denied the request and this appeal followed.

Variances fall within one of two categories: use variances or non-use variances. Use variances permit a use of the land which the zoning ordinance otherwise proscribes. Non-use variances are not concerned with the use of the land but, rather, with changes in a structure's

¹ Setback regulations normally prescribe the distance between the fronts of buildings and abutting streets. Setback provisions accomplish their purposes by either requiring buildings to be set back a minimum distance or by prohibiting the construction of buildings within a minimum specified distance. Rohan, Zoning & Land Use Controls, § 42.04[1], p. 42-95.

area, height, setback, and the like. *Heritage Hill Ass'n, Inc v Grand Rapids*, 48 Mich App 765, 768; 211 NW2d 77 (1973). Since the Appellant's requested variance would not change the use of the land from its permitted residential use, the requested variance is of the non-use variety.

MCL 125.3604, provides in pertinent part, as follows:

(1) An appeal to the zoning board of appeals may be taken by a person aggrieved or by an officer, department, board, or bureau of the state or local unit of government. In addition, a variance in the zoning ordinance may be applied for and granted under section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and as provided under this act. The zoning board of appeals shall state the grounds of any determination made by the board.

* * *

(7) If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as is otherwise allowed under this act.

(8) The zoning board of appeals of all local units of government shall have the authority to grant nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements of the zoning ordinance or to any other nonuse-related standard in the ordinance.

MCL 125.3606 provides for the review of a decision of a Zoning Board of Appeals by this Court and states as follows:

(1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:

- (a) Complies with the constitution and laws of the state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

(2) If the court finds the record inadequate to make the review required by this section or finds that additional material evidence exists that with good reason was not presented, the court shall order further proceedings on conditions that the court considers proper. The zoning board of appeals may modify its findings and decision as a result of the new proceedings or may affirm the original decision. The supplementary record and decision shall be filed with the court. The court may affirm, reverse, or modify the decision.

(3) An appeal under this section shall be filed within 30 days after the zoning board of appeals certifies its decision in writing or approves the minutes of its decision. The court shall have jurisdiction to make such further orders as justice may require. An appeal may be had from the decision of any circuit court to the court of appeals.

The decision of a zoning board should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on record, or an abuse of discretion. *Reenders v Parker*, 217 Mich App 373; 551 NW2d 474 (1996). The function of this Court is to determine whether the Zoning Board of Appeals' decision was supported by competent, material, and substantial evidence on the whole record. *Schadewald v Brule* 225 Mich App 26; 570 NW2d 788 (1997). The Court does not sit as a superzoning commission, and will not substitute its judgment for that of the Township Board. *Spanich v Livonia*, 355 Mich 252; 94 NW2d 62 (1959). The reviewing court must defer to determinations of fact made by a zoning appeals board if those determinations are supported by competent, material, and substantial evidence on the record. *Jesus Center v Farmington Hills Zoning Bd. of Appeals*, 215 Mich App 54; 544 NW2d 698 (1996). In *Lamb v City of Monroe* (1959), 358 Mich 136; 99 NW2d 566, a unanimous Supreme Court adopted the following language from *Brae Burn, Inc v City of Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957):

It is not the function of this Court, or of any court, to approve or disapprove zoning ordinances as to wisdom or desirability. An appeal lies, it is true, from the legislative determination, but it is to the ballot box, not to the courts. If the legislative body has authority to act in the premises, and the requirements of administrative due process have been observed with respect to the adoption, interpretation, and administration of the ordinance, we will not disturb the legislative judgment or the executive action. In other words, if there is a debatable question, that debate is not for us. But if there is whimsical action, or

an arbitrary *Ipse dixit*, a legislative judgment has not, in the legal sense, been exercised at all, and we will protect against the arbitrary action.

In *Norman Corp and SL Realty, LLC*, 263 Mich App 194; 687 NW2d 861 (2004), building owners appealed the Zoning Board of Appeals decision that denied them a variance from the zoning ordinance which limited the size of any one sign on a building to 10% of building's facade or 100 square feet. The circuit court entered judgment for the building owners. The Court of Appeals denied the City's application for leave to appeal. The Supreme Court, in lieu of granting leave, remanded the case to the Court of Appeals for consideration on the merits. The Court of Appeals held that the ordinance was rationally related to the legitimate government interest of protecting the general welfare and that the owners were not entitled to a variance. Discussing the rationale for its decision that the ordinance was properly applied to deny the plaintiffs' request for a variance, the Court said in part:

Variations may be granted if a property owner might otherwise suffer a practical difficulty. *Nat'l Boatland, Inc v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387-388; 380 NW2d 472 (1985). This Court considers whether the denial deprives an owner of the use of the property, compliance would be unnecessarily burdensome, or granting a variance would do substantial justice to the owner. *Id.* Compliance with the sign ordinance here would not deprive plaintiffs the use of their property and would not be unnecessarily burdensome. Plaintiffs may still use their real estate for the same purpose as they had before the variance denial, and, although they may be burdened, plaintiffs are not burdened unnecessarily because the ordinance is in place to maintain the community's aesthetic value and ensure safety, which are cognizable necessities.

The Court further found that the zoning board's decision was the product of proper procedure, supported by competent, material, and substantial evidence on the record, and constituted a reasonable exercise of discretion.²

As mentioned at the outset, the Appellant requested a non-use variance from the Village Code setback requirements. The Board of Zoning Appeals correctly noted that a dimensional

² *Nat'l Boatland* was decided under the predecessor to the current zoning enabling act which did not clearly distinguish between use and non-use variances. MCL 125.585 allowed for variances when the ordinance created practical difficulties or unnecessary hardship, *Paragon Properties v City of Novi*, 452 Mich 568, 582; 550 NW2d 772 (1996). The current zoning enabling act clearly distinguishes between use and non-use variances. It allows non-use variances only when the ordinance creates "practical difficulties" and it allows use variances only when the ordinance creates "unnecessary hardship." MCL 125.3604(7).

variance may be granted only in cases where the applicant demonstrates that "practical difficulty" exists by showing all of the items found in Section 152.301(F)(2)(a). The Board made the following general findings of fact:

1. Application for a variance was received on May 10, 2007, we find the application to be complete.
2. A notice was sent on May 21, 2007 by first class mail, to property owners within 300 feet of the property.
3. Notice of this hearing was published in the Traverse City Record Eagle on May 22, 2007.
4. The application and site plan indicate that the house location shown on the site plan submitted does not conform to the required side yard setbacks found in Code § 152.039.
5. The application and site plan indicate that the house location shown on the site plan submitted does not conform to the required corner lot setbacks found in Code § 152.030(C). Applicant did not request a variance from this requirement.
6. The application and site plan indicate that the house location shown on the site plan submitted does not conform to the required waterfront setback found in Code § 152.232.
7. Site plan is not detailed. It does not accurately show the location of the stream or wetlands. Topographical elevations are shown very inadequately. It does show footage of the proposed home. It does not show whether a basement or second story is contemplated. Applicants [sic] representative could not verify if a basement or second story is contemplated.
8. The Zoning Board of Appeals finds that the property is a vacant, platted lot in Wynkoops 1st Addition to the Village of Paradise.
9. The Zoning Board of Appeals finds that the lot is zoned Residential (R-1).
10. The Zoning Board of Appeals finds that the Applicant purchased the property in 1997.
11. The Zoning Board of Appeals finds that the Applicant's soil erosion permit was denied by the County Drain Commissioner is a letter received on June 5, 2007, which supersedes an original denial letter received on May 17, 2007.

The Board made specific findings of fact as required by Section 125.301(G) of the Village Code for each of five standards listed in Section 152.301(F)(2)(a), as follows:

1. **That the need for the requested variance is due to unique circumstances or physical conditions of the property involved, such as narrowness, shallowness, shape, water, or topography and is not due to the applicants personal or economic difficulty.**

- a. The Zoning Board of Appeals finds that the property [is] a unique piece of property, although there are other lots in the Village with a stream running through them.
2. **That the need for the requested variance is not the result of actions of the property owner or previous property owners (i.e. self created).**
 - a. The Zoning Board of Appeals finds that the need for the requested variance is not self created.
3. **That strict compliance with regulations governing area, setback, frontage, height, bulk, density or other dimensional requirements will unreasonably prevent the property owner from using the property for a permitted purpose, or will render conformity with those regulations unnecessarily burdensome.**
 - a. The Zoning Board of Appeals finds that strict compliance with the Setback requirements will not unreasonably prevent the property owner from using the property for a permitted purpose. The setbacks stated in are necessary for various health, welfare and safety reasons.
4. **That the requested variance is the maximum variance necessary to do substantial justice to the applicant as well as to other property owners in the district.**

Since no variance is being granted, this standard was not implicated.

5. **That the requested variance will not cause an adverse impact on surrounding property, property values, or the use and enjoyment of the neighborhood or zoning district.**
 - a. The Zoning Board of Appeals finds that the requested variance would be detrimental to E. Swainston Creek and the Boardman River because development may increase the water temperature and cause more nutrients to enter the creek.
 - b. The Zoning Board of Appeals finds that the requested variance will cause an adverse impact on surrounding property in the neighborhood or zoning district. Lack of larger setbacks would endanger children walking to school since a car leaving the

property would not have a clear view of the sidewalk and road.

- c. The Zoning Board of Appeals finds that the requested variance will cause an adverse impact on surrounding property in the neighborhood or zoning district.
- d. The Zoning Board of Appeals finds that the requested variance will not cause an adverse impact on property values of property in the neighborhood or zoning district.
- e. The Zoning Board of Appeals finds that the requested variance will not cause an adverse impact on the use and enjoyment of property in the neighborhood or zoning district.

This Court has reviewed the whole record. The Zoning Board's finding that the property is a unique piece of property, although there are other lots with a stream running through them, is supported by the evidence. The record is silent, however, on whether there is a practical difficulty associated with building a residence on the lot. The Appellant stated in his application for the variances that the lot is "unusable" due to the setback requirements. In his brief on appeal, however, he only claims that he cannot "build the proposed house" without the variances. The Zoning Board, on the other hand, found that compliance with setback requirements will not unreasonably prevent the property owner from using the property for a permitted purpose, but there is no evidence in the record to support this finding. If a residence can be built on this property, the Zoning Board has not indicated where it would be placed or its dimensions.

The Zoning Board's finding that the need for the requested variance is not the result of actions of the property owner is also not supported by the evidence. In fact, the scant evidence in the record suggests just the opposite. The Appellant purchased the subject property in 1997, after the enactment of the Village Zoning Ordinance which imposes the setback requirements from which Appellant now seeks variances. In *Johnson v Robinson Twp*, 420 Mich 115; 359 NW2d 526 (1984), a preexisting zoning ordinance was challenged by a landowner who purchased property with knowledge of the restrictions and the Court denied relief. See also, *Kropf v Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). However, even when

problems result from the owner's own actions, a variance may still be proper if the requirements for a variance are otherwise met. *Indian Village Manor Co v Detroit*, 5 Mich App 679, 685; 147 NW2d 731 (1967).

The Zoning Board's failure to consider whether the requested variance is the maximum variance necessary to do substantial justice to the applicant as well as to other property owners in the district was an error. This standard requires the Zoning Board to consider whether there are reasonable, less extreme alternatives to the setback variances requested by the applicant. In other words, the Zoning Board is required to consider whether the requested variance is the least deviation from the setback requirements that will allow the property owner to build on the lot while still protecting the health, safety and welfare of the community. The Zoning Board failed to do this.³

The Zoning Board's finding that the requested variance would be detrimental to E. Swainston Creek and the Boardman River is supported by the report from Brian Sousa of Wade Trim. In addition, the County Drain Commissioner denied the Appellant's application for a soil erosion permit because, among other reasons, the site plan showed the proposed house located approximately 13' from the stream (not the minimum of 50'; required by the zoning ordinance) and only 3' from the regulated wetland edge.

The Court finds that the Zoning Board of Appeals' entire decision to deny the Appellant's request for setback variances is not supported by competent, material, and substantial evidence on the whole record. This failure is largely the fault of the Appellant. Nevertheless, this matter should be and hereby is remanded to the Village Zoning Board of Appeals. The Appellant must be more forthcoming and assist the Zoning Board in developing the record so that it may make specific findings regarding the following:

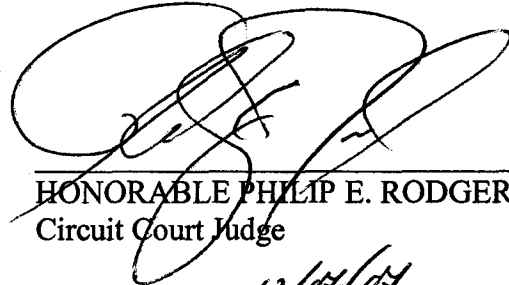
1. Whether the need for the requested variance is the result of actions of the property owner;
2. Whether the setback requirements will prevent the Appellant from using the property for a residential purpose; and

³ In fairness, it is not clear that it was asked to do so. Further, the Appellant was unclear as to what type or how extensive a residential structure it was proposing.

3. Whether the requested variances are the maximum variances necessary to do substantial justice to the applicant as well as other property owners in the district.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

12/07/07