IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-00301

WILLIAM ALIAS, JR. — APPELLANT

VS.

THE CITY OF OXFORD, MISSISSIPPI, — APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

William Alias, Jr., Appellant

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Attorneys for William Alias, Jr.

Mayor George Patterson, Appellee
Alderman Ernest Oliver, Appellee
Alderman Bradley Mayo, Appellee
Alderman Janice Antonow, Appellee
Alderman Ulysses Howell, Appellee
Alderman Preston Taylor, Appellee
Alderman John Morgan, Appellee
Alderman Ney Williams, Appellee
Planning Commissioner Jay Carmean, Appellee
Planning Commissioner Rob Neely, Appellee
Planning Commissioner Lew Yoder, Appellee
Planning Commissioner Micheal Harmon, Appellee
Planning Commissioner Gloria Kellum, Appellee
Planning Commissioner Watt Bishop, Appellee
Planning Commissioner Carter Myers, Appellee

Former Mayor Richard Howorth
Former Alderman Jon Fisher
Former Alderman William Baker
Former Planning Commissioner Sandy Grisham
Former Planning Commissioner Debby Chessin
Former Planning Commissioner Leon McCullough
Former Planning Commissioner Tim Cantrell
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J. Cal Mayo, Jr.
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Richard and Karen Elam, non-parties with an interest in the zoning decision at issue

SO CERTIFIED, this the 15th day of October, 2009.

PAUL B. WATKINS, JR.
One of the Attorneys for the
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CASE NO. 2009-CA-00301

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VS.

THE CITY OF OXFORD, MISSISSIPPI, — APPELLEE

BRIEF OF THE APPELLEE

STATEMENT OF ISSUES

1. Whether Alias' Notice of Appeal to the Circuit Court was timely filed.
2. Whether this Court should change the standard of review for municipal zoning decisions.
3. Whether the City's zoning decision was arbitrary and capricious.

STATEMENT REGARDING ORAL ARGUMENT

Alias has not requested oral argument in this matter. Appellees submit that the facts and legal arguments are adequately presented in the briefs and record in this case. Oral argument would not significantly aid the Court in its decisional process. In deference to the taxpayers of the City of Oxford, Appellee respectfully request that the Court not schedule oral argument in this case. *See* MISS. R. APP. P. 34(a).

STATEMENT OF THE CASE

A. Nature of the case.

Alias has appealed a zoning decision of the governing authorities of the City of Oxford, Mississippi ("the City").

B. Course of the proceedings and statement of facts.

This case arose as a dispute between two neighbors, Alias and Rick Elam ("Elam") about a fence in an upscale Oxford neighborhood. Although his neighbor repeatedly consulted with him about his plans for the fence, Alias waited until construction was underway and launched a lengthy and expensive campaign to force its removal. In addition to this appeal, Alias has directly sued his neighbor over said fence. Because the City supports the official actions of its zoning authorities in this case and all others, it has been forced to defend this appeal at the taxpayers' expense. This Court should not abrogate the City's discretion in zoning matters for the sake of Alias' feud with his neighbor.

Alias owns the property immediately to the south of the driveway leading to Elam's home. The record reflects that Elam presented Alias with plans for an eight foot tall privacy fence along the driveway leading to Elam's home in early February 2007 and that Alias did not object to the plans. R. 25. After Alias provided Elam with an attorney letter expressing concerns about the project, Elam redesigned the fence and discussed the revised plans with Alias on March 6, 2007. Alias raised no objections to the revised design. *Id.*

Because the City's Director of Planning and Development ("the Director") originally interpreted the City's Land Development Code ("LDC" or the "Code") to allow an eight-foot privacy fence along Elam's driveway, the City's Building Official issued Elam a building permit for the project. R. 6. After construction of the fence had begun, Elam again asked Alias whether he had any problems with the project. Alias replied that he did not. R. 26.

Alias' attorney subsequently protested the Director's interpretation of the Code and the construction of the fence. R. 6-7, 26-27. The Director revised his interpretation of the Code and advised Elam that a variance would be necessary to complete the project as planned. In the meantime, the City's Building Official issued a stop work order for the project. R. 6, 26. Elam applied for a variance from the City's Board of Adjustment on April 25, 2007. R. 6. The Board considered Elam's application for a variance at its regular meeting on May 14, 2007. R. 22.

In addition to the above information, the record before the Board included the following evidence:

- Elam's lot was an irregular "flag lot" that was inadequately addressed by applicable Code provisions (R. 6-7; 9);
- Elam's driveway parallels Alias' garage and utility area (R. 48-49, 51, 59);
- Both the Grand Oaks Homeowners' Association and the Grand Oaks Architectural Control Committee approved the design of Elam's fence (R. 11-12);
- The Code would allow Alias to build a fence of identical dimensions and design on his side of the same property line along which Elam's fence was proposed (R. 6-7; 27; 39);
- Numerous photographs of the construction site from various perspectives and showing the position of the fence and its impact on Alias' lot. (R. 47-64).

Counsel for Alias presented Alias' objections to the application for a variance before the Board. Alias' attorney presented testimony that Alias was not given an opportunity to appear before the Architectural Control Committee or the Homeowners' Association, that there was "no fence like this in Grand Oaks", and that the Homeowners' Association and the Architectural Control Committee have no zoning authority. R. 40-41. Alias presented testimony that the fence would be

very obtrusive from his side of the property line, that the proposed fence could not be seen from Elam's house, that Alias' house was built before Elam's house, and that Alias would have no objection to "[s]trategic plantings of five to seven shrubs or trees." R. 42-43.

The Board voted to grant Elam's variance application. R. at 22. The variance was expressly conditioned upon Elam's agreement that the fence would not extend beyond the front elevation of Alias' home. R. 22.

Alias filed his Bill of Exceptions and Notice of Appeal on June 14, 2007.[1] After considering the parties' briefs and oral argument, the Circuit Court affirmed the Board's decision and entered judgment in favor of the City on March 11, 2008. R. 116-124.

The Land Development Code grants the Board the authority:

> To authorize upon appeal in specific cases such variance from the terms of this Ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this Ordinance would result in unnecessary hardship. A variance from the terms of this Ordinance shall not be granted by the Board of Adjustment unless and until written application for a variance is submitted demonstrating:
>
> a. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same District;
>
> b. That literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same District under the terms of this Ordinance;
>
> c. That the special conditions and circumstances do not result from the actions of the applicant; and

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[1]The City points out that the Second Amended Bill of Exceptions, at R. 69-71, reflects the record approved by the City's Mayor and by the Circuit Court below. There, any exhibits that are not discussed in the Second Amended Bill of Exceptions were not part of the record before the Board of Adjustment.

d. That granting the variance requested will not confer on the applicant any special privilege that is denied by this Ordinance to other lands, structures, or buildings in the same District.

LDC § 216.07(1).

The Board must also find that "the variance is a minimum that will make possible the reasonable use of the land, building, or structure" (LDC § 216.07(5)) and that "the granting of the variance will be in harmony with the general purpose and intent of this Ordinance, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare." (LDC § 216.07(6)).

The Code defines a "hardship" as:

> An unusual situation on the part of an individual property owner that will not permit the full utilization of their property as is allowed others within the community. A hardship exists only when it is not self-created or when it is not economic in nature. In other words, a true hardship exists only when the literal interpretation of the requirements of the Code would place an individual in an unusual circumstance and would deny the right to use property for any purpose, ***or*** create an unnecessary burden, unless relief is granted.

LDC § 117.89 (emphasis added).

The Code provides that "no fence, wall or hedge which is also a screen located in front of any front building line shall exceed thirty (30) inches in height and shall not exceed eight (8) feet in height on side or rear yards." LDC § 157.01(2). The "front line" of a building is defined as a "line intersecting the foremost portion of a building and parallel and/or concentric to the right of way line." LDC § 117.23.

It should be noted that the "line labeled 'Fence 150'" as shown on page four of Alias' brief does not accurately represent the length of the fence approved by the Board. As noted above, the Board restricted Elam's height variance to the length of the driveway *only up to the front of Alias'*

house. Alias did not submit a drawing of his house relative to Elam's house, but it is incorrect for Alias to imply that Elam's height variance extended beyond the front elevation of Alias' home.

SUMMARY OF ARGUMENT

Alias failed to notice his appeal of the City's zoning decision within ten days as required by MISS. CODE ANN. § 11-51-75. Because Alias' Notice of Appeal was not filed until a month after the City's decision, it was untimely.

The decision of the Board of Adjustment may not be overturned if it was fairly debatable. Alias should not be allowed to undercut the "arbitrary and capricious" standard of review applicable to municipal zoning decisions.

The decision of the Board of Adjustment was not arbitrary and capricious. There is evidence in the record to support the City's findings as to every element required by the Land Development Code.

ARGUMENT

A. Alias' appeal to the Circuit Court was untimely filed

As Alias' Brief points out, the Board of Adjustment granted Elam's request for a variance on May 14, 2007. Alias did not file his Notice of Appeal until June 14, 2007. Alias' Brief, at 1. Because Alias did not file his Notice of Appeal within ten days after the City's decision to grant the variance, this appeal must be dismissed.

Alias appealed the City's zoning decision pursuant to MISS. CODE ANN. § 11-51-75, which provides that "[a]ny person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal ***within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such***

judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities." (emphasis added). The statutory ten-day deadline is both mandatory and jurisdictional, and neither the circuit court nor any appellate court obtains jurisdiction over an untimely appeal. *Newell v. Jones County*, 731 So. 2d 580, 582 (Miss. 1999).

The Court of Appeals has recently held that the ten-day time period for appealing a municipal decision under Section 11-51-75 begins when the municipality adjourns the meeting at which the decision was made and *not* when the minutes from that meeting are approved. *Rankin Group, Inc. v. City of Richland*, 8 So. 3d 259, 261 (Miss. Ct. App. 2009).[2] In so holding, the Court of Appeals looked to MISS. CODE ANN. § 21-15-33, which provides in part:

> The minutes of every municipality must be adopted and approved by a majority of all the members of the governing body of the municipality at the next regular meeting or within thirty (30) days of ***the meeting*** thereof, whichever occurs first. Upon such approval, said minutes shall have the legal effect of being valid from and after the date of ***the meeting***.
>
> (emphasis added).

This Court has recently held that "where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout." *Barbour v. State* ex rel. *Hood*, 974 So.2d 232, 241 (Miss. 2008) (internal citations omitted). Section 21-15-33 uses the phrase "the meeting" twice. The first time the phrase is used, the statute instructs municipalities to approve the minutes of their official actions either (1) at the governing authorities' next regular meeting or (2) at some point within thirty days of "the meeting" at which such official actions were

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[2]The City did not raise the timeliness issue below. However, because the ten-day time limit is a jurisdictional issue, it may not be waived and it can be raised at any time. *See Esco v. Scott*, 735 So. 2d 1002, 1006 (Miss. 1999); *Duvall v. Duvall*, 80 So. 2d 752, 754 (Miss. 1955).

taken. Nothing in the plain language of the statute indicates that the Legislature intended for its second use of the phrase "the meeting" to carry any different meaning.

The Court of Appeals correctly found that the Legislature's second use of the phrase "the meeting" referred to the original meeting at which the municipality's action was taken, not the meeting at which the minutes of the original meeting were approved. *Id.* at 261; *see also Claiborne County v. Parker*, No. 2008-CA-00126-COA, 2009 WL 1758905, at *1 (Miss. Ct. App. June 23, 2009) ("If an appeal is not filed within ten days of the adjournment of the board meeting at which the decision was made, neither the circuit court, nor this Court, has jurisdiction to consider the appeal.") (internal citations omitted). Once approved, the minutes of the Board of Adjustment's May 14, 2007 meeting were effective on May 14, 2007. Because Alias failed to file his Notice of Appeal within ten days of May 14, 2007, this Court lacks jurisdiction to consider this appeal.

B. The City's decision must be affirmed if it was fairly debatable.

Alias spends nearly six pages of his brief attempting to convince the Court to change its long-settled standard of review for municipal zoning decisions. This standard is deferential to the City and its planning officials' weighing of the facts of each case:

> The standard of review in zoning cases is whether the action of the board or commission was ***arbitrary or capricious and whether it was supported by substantial evidence.*** Thus, zoning decisions will not be set aside unless ***clearly shown*** to be arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis. There is a ***presumption of validity*** of a governing body's enactment or amendment of a zoning ordinance and the ***burden of proof is on the party asserting its invalidity.*** Where the point at issue is ***fairly debatable***, we will not disturb the zoning authority's action.

Drews v. City of Hattiesburg, 904 So. 2d 138, 140 (Miss. 2005) (internal citations omitted) (emphasis added). This Court "cannot substitute its own judgment as to the wisdom or soundness

of the municipality's action." *Perez v. Garden Isle Cmty. Ass'n*, 882 So. 2d 217, 219 (Miss. 2004) (quoting *Barnes v. DeSoto County Bd. of Supervisors*, 553 So. 2d 508, 510-11 (Miss. 1989)). Because "the judicial department of the government of this state has no authority to interdict either zoning or rezoning decisions which may be said 'fairly debatable,'" *Luter v. Hammon*, 529 So. 2d 625, 628 (Miss. 1988), "[t]he Courts should not constitute themselves as a Zoning Board for a municipality." *Westminster Presbyterian Church v. Jackson*, 176 So. 2d 267, 272 (Miss. 1965).

Alias proposes a much different standard of review for zoning cases:

> Thus, on a question such as 'what are the conditions at the property,' there is a deferential standard of review. On the other hand, as with any legal issues, such as where the question is 'what does this ordinance mean,' the standard of review is *de novo*. Having adopted a zoning ordinance, a municipality is bound by its terms. *The questions of what those terms mean – such as 'what constitutes a hardship under the ordinance' are legal questions, and are not entitled to deferential review.*

Alias' Brief, at 9 (emphasis added).

Alias rightly points out that, as a general matter, this Court reviews pure issues of law under a *de novo* standard. Alias is also correct that a municipality may not ignore the terms of its own zoning ordinances. However, Alias has not alleged that the City failed to follow the procedures set forth in its Land Development Code, *see Noble v. Scheffler*, 529 So.2d 902 (Miss. 1988) (remanding because County failed to consider exceptions to use and area regulations), and none of the cases cited in Alias' Brief support his argument that the Court should abrogate the "arbitrary and capricious" standard, *see Caver v. Jackson County Bd. of Supervisors*, 947 So.2d 351 (Miss. Ct. App. 2007) (applying "arbitrary and capricious" standard of review).

In fact, this Court has held that "***the best interpretation of what the wording in the ordinance means is the manner in which it is interpreted and applied by the enacting and***

enforcement authorities." *Fondren N. Renaissance v. Mayor of Jackson*, 749 So. 2d 974, 983 (Miss. 1999) (quoting *Faircloth v. Lyles*, 592 So. 2d 941, 945 (Miss. 1991)) (emphasis added). To be clear, the City does not argue that it may act with limitless discretion. However, the Board of Adjustment is the body ultimately responsible for the interpretation and application of the Land Development Code. To the extent that Alias argues that the Code does not mean what the Board of Adjustment says it means, the City respectfully submits that the Board's interpretation should be afforded great deference.

To be sure, the City is bound to its own validly-enacted zoning ordinance. However, the City is afforded great deference in implementing its ordinance and in interpreting it to make zoning decisions. Alias' attempt to make an end-run around this deferential standard of review is unfounded.

C. The City's zoning decision was fairly debatable, and not arbitrary and capricious

Alias argues that the Board's decision should be reversed because (1) Elam failed to demonstrate a hardship or burden sufficient to support a variance; (2) the hardship upon which the Board based its approval of Elam's variance was "self-created" as a matter of law; (3) the Board failed to consider other, "less obtrusive" variances, and (4) there was no evidence that Elam was denied rights commonly extended to others. Alias, ignoring the evidence before the Board and the deference due to municipal zoning decisions, now asks this Court to re-weigh that proof and reach a different conclusion than did the Board.

1. <u>The City's finding of a burden upon Elam was fairly debatable</u>

Alias argues that, regardless of the plain language of the City's zoning ordinances, an applicant for any variance in any political subdivision of this State "must show that the restrictions

make any use of the property impossible or impractical." Alias' Brief, at 18. Citing a "standard land-use treatise" and a Florida case from the mid-1980s, Alias asserts that this statement "is the law generally." *Id.* The problem with Alias' argument is that the appellate courts of this State have consistently looked to *local zoning ordinances* to determine the criteria for a variance. *See Drews v. City of Hattiesburg*, 904 So. 2d 138, 140-41 (Miss. 2005) (citing City of Hattiesburg's definition of a "variance"); *Taquino v. City of Ocean Springs*, 253 So.2d 854, 855 (Miss. 1971) (relying upon definition of "variance" found in City of Ocean Springs' subdivision regulations); *Caver v. Jackson County Board of Supervisors*, 947 So. 2d 351, 353 (Miss. Ct. App. 2007) (citing Jackson County's definition of "variance"). Furthermore, this Court has refused to impose additional restrictions upon a local zoning ordinance based on treatise citations. *See Fondren North Renaissance v. Mayor and City Council of City of Jackson*, 749 So.2d 974, 982-83 (Miss. 1999) ("However, FNR's argument is founded on a general treatise, and no such language requiring use by the general public appears in the City of Jackson ordinance.").

The City's zoning ordinance *does not* require that a piece of property be rendered useless before a variance may issue. The Code requires that the record support a finding of "unnecessary hardship" in order to grant a variance. LDC § 216.07(1). The Code states that a hardship can be found when a literal interpretation of the Code "would place an individual in an unusual circumstance and would deny the right to use property for any purpose, ***or*** create an unnecessary burden, unless relief is granted." LDC § 117.89. (emphasis added). Because this last phrase is disjunctive, the Board of Adjustment's discretion is not so limited as Alias suggests.

In an attempt to get around the plain language of the ordinance, Alias argues that a finding of "unnecessary burden" must be of "equivalent weight" to a finding that a property has been deprived of any use at all. Alias' Brief, at 20-21. This statement, which is of Alias' own creation,

is nothing more than an invitation for the Court to substitute its judgment for that of the Board of Adjustment. Neither the ordinance nor any Mississippi law of which the City is aware requires that an "unnecessary burden" be tantamount to a complete deprivation of the use of an applicant's property.

The burden in this case is illustrated by the fact that shape of Elam's lot is plainly not contemplated by the relevant Code provisions. Under a literal interpretation of the Code, much of the segment of property in question (the "pole" of the flag lot) is a driveway-width "front yard" sandwiched between the "side yards" of the properties to the immediate north and south. R. 39. By way of further example, if the front line of the building as defined by the Code (a line drawn from the foremost portion of the house parallel to the right-of-way line) is drawn on the Elam lot, that line of the house would cut directly through a portion of the house. LDC § 117.23; R. 6-9 In that case, part of the western face of the house itself could be a non-conforming "wall ... which is also a screen located in front of any front building line." LDC § 157.01(2). [*See* Appendix 1].[3] Also, if the literal terms of the ordinance were applied to the Elam property, the southern "side yard" would only begin at a point *behind* the back of Elam's house. [*Id.*].

This case is distinguishable from the Court of Appeals' decision in *Caver*. In that case, the applicant's home was located sixteen and a half feet from one neighbor's property line and seven and a half feet from the property line of the neighbor on the opposite side of the house. *Caver*, 947 So. 2d at 352-53. A subsequent zoning ordinance required that all houses be built at least twenty feet from each adjacent property line, but the applicant's house fell under a grandfather clause. *Id.* at

[3]Appendix 1 is a copy of R. 9 with the "front building line" drawn as described in LDC § 117.23. The City offers this Appendix for demonstrative purposes only, and does not seek to add to the certified record.

353. The applicant's nonconforming house burned down, and, during the process of rebuilding, he sought to "center" his home on his lot, leaving twelve and a half feet between his house and each adjacent property line. *Id.* Because this new plan sought to build outside the footprint of the new house, the applicant sought a variance. *Id.* at 353.

The applicant's neighbors opposed the variance, which would have allowed the reconstructed home to be built four feet closer to their property line than the old home had been. *Id.* at 252-53. The Court of Appeals found that there was no evidence of "undue hardship" because the applicant had admitted that the only burden to him in the absence of a variance was payment of an additional $530 to have his house plans redrawn. *Id.* at 354. Nothing in the Court of Appeals' opinion indicates that the applicant was denied any rights that were commonly conferred upon others in his area.

Unlike *Caver*, the variance was not granted merely for Elam's convenience, and his burden is not merely financial. Because of the unusual shape and orientation of his lot, a literal interpretation of the Land Development Code will absolutely prohibit Elam from using his property in the same manner his neighbors can. Alias' belief that this use is "frivolous" (even while conceding that he would not have opposed a screen of vegetation built to serve the same purpose, R. 43) does not render the Board's decision arbitrary and capricious. Alias' Brief, at 21.

In order to grant a variance under the City's zoning ordinance, the Board need not have found that Elam would have been deprived of any use of his property for any purpose. The Board could reasonably have determined that a literal application of the ordinance created an "unusual circumstance" or an "unnecessary burden" from which Elam should have been granted relief. The

Board found that special circumstances exist that are peculiar to Elam's property, and that finding was not arbitrary and capricious.

2. Elam's hardship is not self-created "as a matter of law"

Alias does not argue that Elam created the hardship on his property. Instead, he asserts that the hardship was "self-created" as *a matter of law* because a prior subdivider initially created the shape of the lot. As the City discussed above, the City's decision must be upheld if it is not arbitrary and capricious. Alias' claim that he should be given a more favorable *de novo* standard of review on this issue is unfounded.

Because the City has considerable discretion in passing and administering its zoning ordinances, the question is not "What should the ordinance say?", but rather "What does the ordinance actually say?" Neither the City's zoning ordinances nor any Mississippi law says that actions of a predecessor in title disqualify a variance applicant from his requested relief. There is no prohibition on variances tied to the actions of a subdivider. Alias' argument only succeeds if this Court either (1) implies new language into the text of the Code or (2) creates new Mississippi law that imposes a new restriction on every zoning authority in the State, regardless of the language of any of their zoning ordinances.

MISS. CODE ANN. § 17-1-3 empowers the City to, "in [its] ***discretion*** ... regulate the height, number of stories and size of building and other structures, the percentage of lot that may be occupied, the size of the yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes." (emphasis added). The Code provides only that a hardship may "not result from the actions of the applicant." LDC § 216.07(1)(c). This Court may not add the more restrictive phrase "or the actions

of a predecessor in interest" at the end of the operative section. Mississippi law establishes a clear presumption against inadvertent legislative omissions or oversights, as well as "legislation by implication." *City of Houston v. Tri-Lakes Ltd.*, 681 So.2d 104, 106 (Miss. 1996). This Court may not "omit or add to the plain meaning of the statute," "presume that the legislature failed to state something other than what was plainly stated," or conclude that "the legislature intended, but forgot, to include" rights or restrictions not contained in the legislation. *Id.* If the City's governing authorities had intended to include the actions of prior subdividers in the ordinance, they could have done so. *See generally* 30-A ME. REV. STAT. § 4353 (requiring a showing that "[t]he hardship is not the result of action taken by the applicant ***or a prior owner***") (emphasis added). They did not so choose. The Court should not override the City's legislative and administrative authority in zoning matters.

Mississippi common law on the nature of "undue hardships" required to justify a variance is admittedly sparse, but the common thread in the few variance cases on the books is that this Court always looks to the language of the statute first. *See Drews*, 904 So. 2d at 140-41; *Taquino*, 253 So.2d at 855; *Caver*, 947 So. 2d at 353. Alias cites several out-of-state cases discussing actions taken by a variance applicant's predecessor(s) in interest, but none of this authority suggests that the plain language of the City's ordinance somehow violates any heretofore-unannounced principle of general Mississippi zoning law. *See Beasley v. Neelly*, 911 So. 2d 603, 609 (Miss. Ct. App. 2005) ("The Mississippi Supreme Court has long held that when 'construing a zoning ordinance, unless manifestly unreasonable, great weight should be given to the construction placed upon the words by the local authorities.'") (citing *Columbus & Greenville Ry. Co. v. Scales*, 578 So. 2d 275, 279 (Miss. 1991)).

Furthermore, it is not at all clear that every other American jurisdiction (or even the ones cited by Alias) would apply Alias' more restrictive "predecessor-in-interest" analysis. In *Neilson v. Zoning Hearing Bd. of Mt. Lebanon*, 786 A.2d 1049 (Pa. Commonw. Ct. 2001), a landowner received a variance from a zoning regulation that required residential lots to have frontage on a public street. *Id.* at 1051. Among other arguments, the parties opposed to the variance asserted that the applicant had created the hardship because he had acquired the lot from neighbors with full knowledge of the zoning restriction. *Id.* at 1053. The Court found that the applicant "did not create the hardship" because of his knowledge of the operative regulation. *Id.*; *see also Twigg v. Town of Kennebunk*, 662 A. 2d 914, 918 (Me. 1995) (holding that "actual or constructive knowledge of the zoning ordinances prior to purchase of the property may be considered by the Board as a factor in evaluating self-created hardship, but it is not determinative or such hardship").

This Board did not act arbitrarily or in conflict with the City's Land Development Code when it found that Elam's hardship was not self-created. This issue lacks merit.

3. The City was not required to grant Alias' "less obtrusive alternative"

Another element required for a variance is a finding that "the variance is a minimum that will make possible the reasonable use of the land, building, or structure". LDC § 216.07(5). Alias claims that the City "entirely failed to consider" this issue because it did not grant a "less-obtrusive alternative variance" that he would have preferred. Alias' Brief, at 22-23. This argument is unavailing.

The fact that the Director "did not mention this factor in recommending a granting of the variance" is of no import. Alias' Brief, at 23. The law in Mississippi is clear that "the failure to make explicit findings of fact, in and of itself, is an insufficient basis for reversal and the decision

rendered in such regard is tantamount to a finding of fact." *Beasley v. Neelly*, 911 So. 2d 603, 608-09 (Miss. Ct. App. 2005) ((citing *Barnes v. Bd. of Supervisors of DeSoto County*, 553 So. 2d 508, 511 (Miss. 1989)). The record need only contain some factual basis for the City's decision. *Id.* at 609.

As evidence that the City failed to consider this element, Alias points to his "testimony" that "[s]trategic plantings of five to seven shrubs or trees would accomplish Mr. Elam's goal in full compliance with the zoning ordinance. I would have no objection to a screen that involved planting trees or shrubs as opposed to an obtrusive fence." R. 43. This statement does not justify Alias' insistence that the City should have altered its action in order to suit his whims.

First, this statement is incorrect. The Code provides that any "fence, wall or hedge which is also a screen" is subject to the fence height ordinance. LDC § 157.01(2). Any type of side yard screen, whether brick or shrub, would require a variance on Elam's property. Alias' statement offers no support for his argument that a height variance should not issue.

Second, there is no proof in the record that a solid screen of vegetation would be "less obtrusive" than a solid fence. Alias' testimony only establishes that he would *prefer* a wall made of vegetation to a fence made of brick. Alias' glib statement that "a screen of shrubbery would obviously be less obtrusive than a fence of the height involved here" conflates the *height* of a side yard screen with the *material* used to construct that screen. It is not "uncontradicted" on this record or as a matter of logic that trees are "less" than bricks. They are merely different.

Finally, the record contained numerous photographs of the construction site from which the Board could have drawn conclusions about whether the variance was the "minimum" required to achieve Elam's goals. The photographs were taken after concrete footings had been poured and pipe and metal framing had been installed. The Board had ample opportunity to survey the extent of the

project, the proposed height of the fence, and the degree to which the fence would provide a visual screen. The issue of a "minimum variance" was unquestionably fairly debatable on the record before the Board.

4. The City's finding that Elam was deprived of commonly-enjoyed rights was fairly debatable

Finally, Alias argues that Board of Adjustment acted arbitrarily and with caprice when it found that a literal interpretation of the Land Development Code would deprive Elam of rights commonly enjoyed by other property owners in his district. The Land Development Code asks whether variance applicants would be denied "the full utilization of their property as is allowed others within the community" in deciding whether to grant the variance (§ 117.86) and whether a literal interpretation of the ordinances would "deprive the applicant of rights commonly enjoyed by other properties in the same District" (§ 216.07(1)(b)).

The record is clear that Alias could have constructed a fence identical in height and design on his side of the property line without a variance. In fact, if the "pole" portion of Elam's lot did not run between Alias' lot (214) and the next lot to the north (212), the fence could have been constructed without a variance on *either* lot 212 or lot 214. R. 39.

Alias takes issue with these facts, claiming that the operative ordinances do not allow the Board of Adjustment to consider whether Elam was deprived of rights enjoyed by other *specific* property owners. Nothing in Mississippi law or the Land Development Code supports Alias' argument that the Board may consider conditions on hypothetical pieces of property within the City, but not conditions on the exact piece of property at issue.

Alias' only authority on this question is a 1991 decision of the Commonwealth Court of Pennsylvania, *Chacona v. City of Philadelphia*, 599 A.2d 255 (Pa. Commw. Ct. 1991). In that case, which applied a less deferential standard of review to a more restrictive definition of a variance, the court held that a landowner was not entitled to a variance from a regulation that required new stories added to non-conforming buildings to comply with new area and setback regulations even when the underlying structure did not. The landowner had argued that he should be allowed to extend his building up to the height of his neighbors' *existing non-conforming* buildings; there was no argument that the regulations affected him any differently than his neighbors. In this case, by contrast, Elam's neighbors could even *now* construct an identical fence on essentially the same piece of property.

Alias derisively accuses the City of granting the variance based on "some abstract notion of 'fairness' in what Mr. Elam can do in comparison to what his neighbors could do." Alias' Brief, at 26. This statement overlooks the fact that the zoning ordinance *specifically directs* the Board of Adjustment to consider whether a literal interpretation of its terms is fair to a variance applicant. (§ 216.07(1)(a)-(b)) In fact, the ordinance also *requires* the Board to determine whether each variance would be fair to other property owners in the district (§ 216.07(1)(d)), to the neighborhood, and to the public as a whole (§ 216.07(6)). A variance is an equitable form of relief by its very nature, which is why the Board is vested with considerable discretion in reviewing the record and reaching a decision.

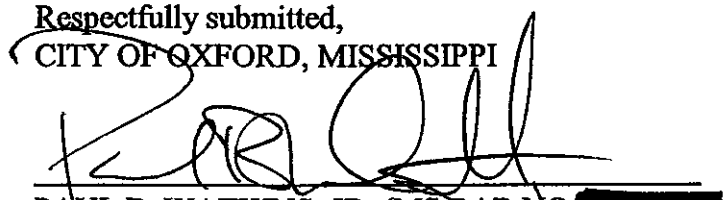
Based on the record before it, the Board could reasonably have concluded that Elam had been denied a utilization of his lot that was afforded to others within his neighborhood. The Court may not re-weigh the evidence before the Board. The City's decision was fairly debatable and must be affirmed.

CONCLUSION

The City need not prove that its decision to grant the variance was a correct decision, or even a good one. Alias has failed to carry his burden proving that the Board acted arbitrarily in granting the variance. The record supports the conclusion that each of the necessary findings made by the Board was at least fairly debatable. Because the Board's findings were fairly debatable, there is no basis for Alias' argument that the grant of the variance was arbitrary and capricious. This Court should affirm the decision of the Board of Adjustment and dismiss Alias' appeal.

THIS, the 15th day of October, 2009.

Respectfully submitted,
CITY OF OXFORD, MISSISSIPPI



PAUL B. WATKINS, JR. (MS BAR NO [redacted]
POPE S. MALLETTE (MS BAR NO [redacted]
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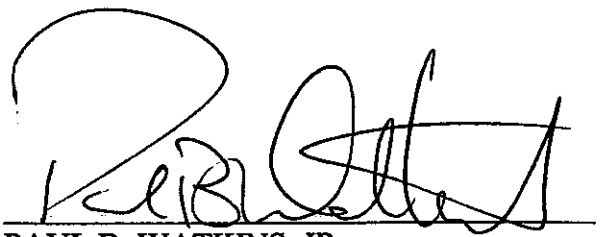
CERTIFICATE OF SERVICE

I, Paul B. Watkins, Jr., one of the attorneys for Appellees do certify that I have this date delivered by United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief to:

Honorable Robert Elliott
Lafayette County Circuit Court
102 North Main Street
Suite F
Ripley, Mississippi 38663
CIRCUIT COURT JUDGE

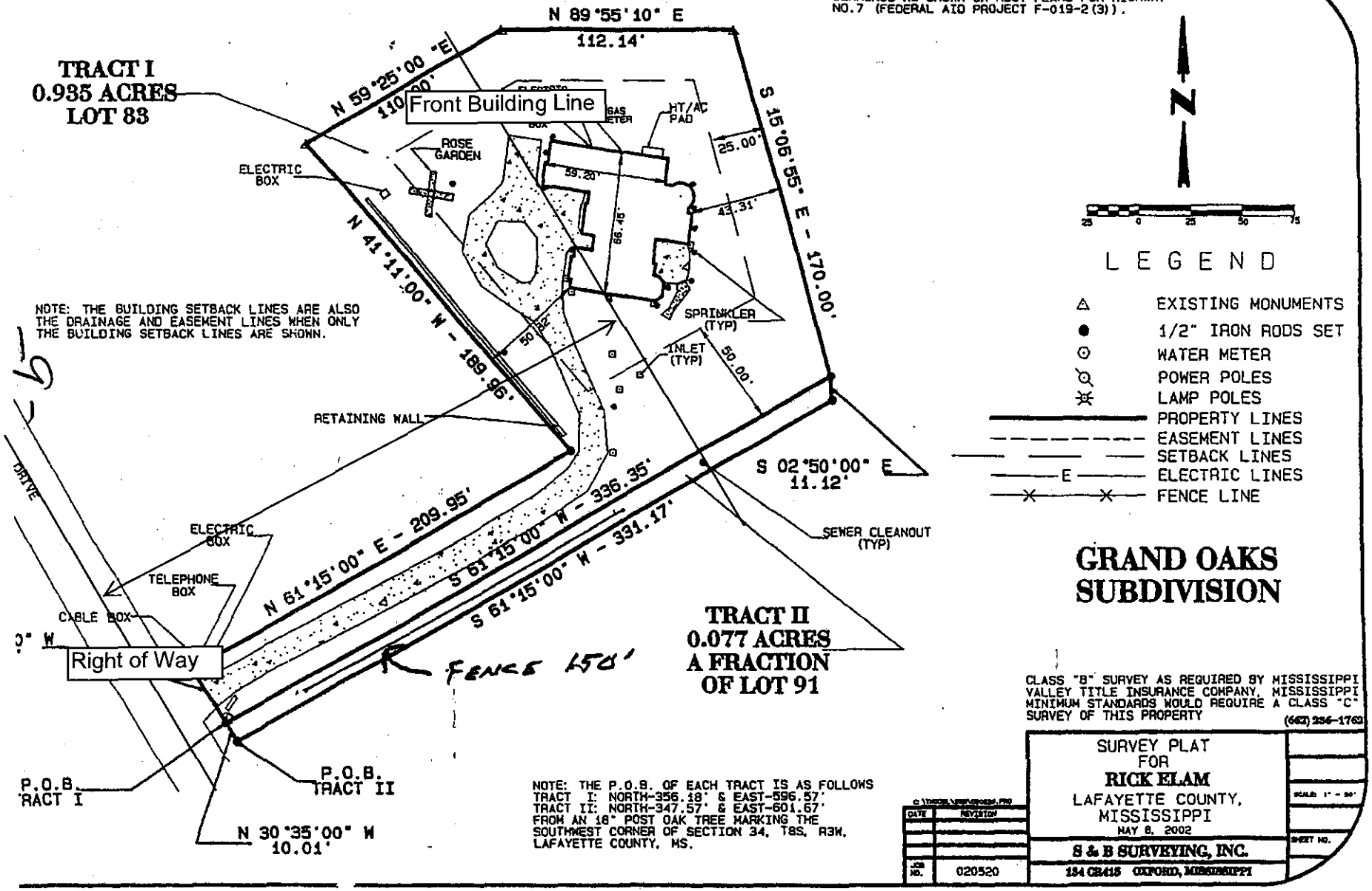
T.H. Freeland, IV, Esq.
Joyce Freeland, Esq.
Freeland & Freeland, Lawyers
1013 Jackson Avenue
P.O. Box 269
Oxford, MS 38655
ATTORNEY FOR APPELLANT WILLIAM ALIAS

THIS, the 15th day of October, 2009.



PAUL B. WATKINS, JR.

APPENDIX 1


NOTE: ALL BEARINGS ARE REFERENCED TO THE BEARINGS AS SHOWN ON MDOT PLANS FOR HIGHWAY NO.7 (FEDERAL AID PROJECT F-019-2(3)).
TRACT I
0.935 ACRES
LOT 83
N 89°55'10" E
112.14'
N 59°25'00" E
110.00'
Front Building Line
S 15°06'55" E - 170.00'
ROSE GARDEN
ELECTRIC BOX
GAS METER
HT/AC PAD
25.00'
39.20'
43.31'
66.45'
N 41°11'00" W - 189.96'
SPRINKLER (TYP)
INLET (TYP)
50.00'
50.42'
NOTE: THE BUILDING SETBACK LINES ARE ALSO THE DRAINAGE AND EASEMENT LINES WHEN ONLY THE BUILDING SETBACK LINES ARE SHOWN.
RETAINING WALL
S 02°50'00" E
11.12'
SEWER CLEANOUT (TYP)
DRIVE
ELECTRIC BOX
TELEPHONE BOX
CABLE BOX
N 61°15'00" E - 209.95'
S 61°15'00" W - 336.35'
S 61°15'00" W - 331.17'
Right of Way
FENCE 1.50'
TRACT II
0.077 ACRES
A FRACTION
OF LOT 91
P.O.B. TRACT I
P.O.B. TRACT II
N 30°35'00" W
10.01'
N
25 0 25 50 75
LEGEND
EXISTING MONUMENTS
1/2" IRON RODS SET
WATER METER
POWER POLES
LAMP POLES
PROPERTY LINES
EASEMENT LINES
SETBACK LINES
ELECTRIC LINES
FENCE LINE
GRAND OAKS SUBDIVISION
CLASS "B" SURVEY AS REQUIRED BY MISSISSIPPI VALLEY TITLE INSURANCE COMPANY, MISSISSIPPI MINIMUM STANDARDS WOULD REQUIRE A CLASS "C" SURVEY OF THIS PROPERTY
(662) 236-1762
NOTE: THE P.O.B. OF EACH TRACT IS AS FOLLOWS
TRACT I: NORTH-356.18' & EAST-596.57'
TRACT II: NORTH-347.57' & EAST-601.67'
FROM AN 18" POST OAK TREE MARKING THE SOUTHWEST CORNER OF SECTION 34, T8S, R3W, LAFAYETTE COUNTY, MS.
DATE
REVISION
JOB NO. 020520
SURVEY PLAT
FOR
RICK ELAM
LAFAYETTE COUNTY, MISSISSIPPI
MAY 8, 2002
SCALE: 1" = 50'
SHEET NO.
S & B SURVEYING, INC.
134 CR415 OXFORD, MISSISSIPPI

APPENDIX 2

LAND DEVELOPMENT CODE

City of

OXFORD, MISSISSIPPI

November 10, 2004

(updated as of 3/15/07)

117.15 Block: A parcel of land intended to be used for urban purposes which is entirely surrounded by public streets, highways, railroad rights-of-way, public walks, parks or green strips, rural land or drainage channels, or a combination thereof.

117.16 Boarding House: Any dwelling unit other than a hotel where for compensation and by prearrangement for definite periods, meals or lodging and meals are provided for three (3) or more persons.

117.17 Board of Adjustment: The Oxford Board of Adjustment.

117.17 Buffer Area/Strip: An area with sufficient planting and/or screening which acts as a separation area between two or more incompatible uses and/or districts.

117.18 Building area: That portion of a lot remaining after required yards have been provided.

117.19 Buildable Width: Width of the building site left after the required yards have been provided.

117.20 Building: Any enclosed structure having a roof and intended for shelter, housing or enclosure of persons, animals or chattel. The main building is that building which contains the principal use of a lot.

117.21 Building, Alteration Of: Any change or rearrangement in the supporting members (such as bearing walls, beams, columns, or girders) of a building, any addition to a building or movement of a building from one location to another.

117.22 Building Code: The current Building Code, International Building Code, as adopted by the Governing Authority.

117.23 Building, Front Line Of: A line intersecting the foremost portion of a building and parallel and/or concentric to the right of way line.

117.24 Building Height: The vertical distance measured from the average plane to the highest point of the roof surface

117.25 Building Official: The official appointed by the administration and charged with the responsibility of enforcing the City Building Codes and issuance of building permits.

117.26 Building, Main: A building in which is conducted the principal use of the lot on which it is situated.

117.27 Building Permit: A permit, which a person shall obtain from the Building Official granting permission to said person to construct or build any structure.

117.28 Building Setback Line: The distance required by this Code to be maintained between a given lot line, easement or right-of-way line and any structure foundation: front, rear, or side, as specified.

117.29 Building Site: A single parcel of land occupied or intended to be occupied by a building or structure, and appropriate accessory building or uses.

117.30 Reserved

117.31 Care Center:

1. **Home Care Center**: A private establishment enrolling up to four (4) persons where tuition, fees, or other forms of compensation for the care of persons is charged. A Home Care Center is a home occupation.

117.75 Frontage: All the property on one side of a street between two intersecting streets (crossing or terminating), measured along the line of the street. If the street is dead-ended, then all of the property abutting on one side between an intersecting street and the dead-end of the street.

117.76 Future Land Use Plan: That part of the Comprehensive Plan now and hereafter adopted which includes the adopted Future Land Use Plan, and which sets forth identification, location, area and classifications of proposed land uses.

117.77 Garage Apartment: A dwelling unit above a private garage.

117.78 Garage, Private: An accessory building or part of a main building used for storage purposes for one (1) or more automobiles. Also includes carports.

117.79 Garage, Public: Any building, other than a private garage, available to the public where vehicles are parked or stored for remuneration, hire, or sale.

117.80 Gas Code: The current Standard Gas Code, International Building Code, as adopted by the Governing Authorities.

117.81 Gasoline, Service or Filling Station: Any area of land, including structures thereon, that is used for the retail sale of gasoline or oil fuels, and installation of other minor automobile accessories, and which may or may not include facilities for lubricating, washing or cleaning, but not including storage and rental of vehicular equipment.

117.82 Governing Authorities: Mayor and Board of Aldermen of the City of Oxford, Mississippi.

117.83 Grade or Grade Level: The finished elevation of land either horizontal or sloping, after completion of site preparation for the construction of structures.

117.84 Grading Code: See Erosion Control Code, Appendix D, of this document.

117.85 Gross floor area: The sum of the gross horizontal areas of the several floors of a structure, including interior balconies and means; all horizontal measurements to be made between the exterior faces or walls, including the walls of roofed porches having more than two (2) walls.

117.86 Ground Elevation: The height of the ground above sea level expressed in terms of Mean Sea Level or the City of Oxford Datum.

117.87 Group Care Facility: A facility or dwelling unit housing persons unrelated by blood or marriage and operating as a group family household. A group care facility may include halfway houses, recovery homes, and homes for orphans, foster children, the elderly, battered children and women. It would include a specific treatment providing less than primary health care.

117.88 Habitable Floor: A space in a building for living, sleeping, eating or cooking. Bathrooms, toilet compartments, closets, halls, storage or utility space, and similar areas are not considered habitable space.

117.89 Hardship: An unusual situation on the part of an individual property owner that will not permit the full utilization of their property as is allowed others within the community. A hardship exists only when it is not self-created or when it is not economic in nature. In other words, a true hardship exists only when the literal interpretation of the requirements of the Code would place an individual in an unusual circumstance and would deny the right to use property for any purpose, or create an unnecessary burden, unless relief is granted.

117.90 Historic Preservation Code: An overall program of protection, enhancement and perpetuation of landmarks, landmark sites and historic districts which represent distinctive elements of the city's cultural, social, economic, political and architectural history; to safeguard, stabilize, promote the city's historic aesthetic and cultural heritage through the Oxford Historic Preservation Commission. Standards and requirements established by the

Section 157 Open Space / Setback Requirements

157.01 No open space or lot area required for a building or structure shall during its life be occupied by, or counted as open space for any other building or structure.

1. In any residential district, except the A District, the front yard minimum setback of any lot unoccupied as of the effective date of this Code shall be equal in depth to the average depth of the front yards of the nearest adjacent occupied lots.

2. Fences, walls, and hedges in residential districts may be permitted in any required yard or along the edge of any yard provided that no fence, wall or hedge which is also a screen located in front of any front building line shall exceed thirty (30) inches in height and shall not exceed eight (8) feet in height on side or rear yards. However, fences, which allow for visibility, such as wrought iron fences, may be four (4) feet high in the front of the front building line. In a reverse frontage lot situation the fence, wall or hedge which is also a screen located in the side yard abutting the rear lot shall not exceed thirty-six (36) inches in height, excepting fences which allow for visibility, such as open iron fences, may be four (4) feet high.

3. Where the dedicated street right-of-way is less than fifty (50) feet or is unknown, the depth of the front yard shall be measured starting at a point twenty-five (25) feet from the back of ditch; or, if there is no ditch, twenty-five (25) feet back of the area commonly used by utilities or maintained by the City.

4. No dwelling unit shall be erected on a lot, which does not abut or have access to at least one (1) public street.

5. A sight triangle shall be formed by measuring back thirty (30) feet from the point of intersection of the right-of- way lines and connecting the points so as to establish a sight triangle on the area of the lot adjacent to the street intersection. On any corner lot on which a front and side yard are required, no wall, fence, sign, structure or any plant growth, shall obstruct sight lines at elevations over two and one-half (2 1/2) feet above any portion of the crown of the adjacent roadways.

Section 158 Reserved

2. Special Exceptions, Conditions Governing Applications, Procedures:

a. To hear and decide only such special exceptions as the Board of Adjustment is specifically authorized to pass on by the terms of this Ordinance; to decide such questions as are involved in determining whether special exceptions with such conditions and safeguards as are appropriate under this Ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this Ordinance. A special exception shall not be granted by the Board of Adjustment unless and until:

1) A written application for a special exception is submitted indicating the section of this Ordinance under which the special exception is sought and stating the grounds on which it is requested;

2) Notice shall be given at least fifteen days in advance of the public hearing. The owner of the property for which exception is sought or his agent shall be notified by mail. Notice of such hearing shall be posted on the property for which special exception is sought in the same manner as required in Section 225, at the City Hall, and in one (1) other public place at least fifteen (15) days prior to the public hearing;

3) The public hearing shall be held. Any party may appear in person or by agent or attorney;

4) The Board of Adjustment shall make a finding that it is empowered under the section of this Ordinance described in the application to grant the special exception and that granting the special exception will not adversely affect the public interest; and

5) The Board of Adjustment has received a recommendation on the request from the Oxford City Planning Commission.

b. Special Exceptions Approved.

1) Every exception authorized hereunder shall not be personal to the applicant therefore but shall be transferable and shall run with the land so long as the conditions under which the exception was granted continue.

2) In granting any special exception the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when made a part of the terms under which the special exception is granted, shall be deemed a violation of this Ordinance and punishable under Section 219 of this Ordinance.

3) The Board of Adjustment shall prescribe a time limit within which the action for which the special exception is required shall be begun or completed or both. Failure to begin or complete, or both, such action within the time limit set shall void the special exception.

216.07 Variances, Conditions Governing Applications, Procedures.

1. To authorize upon appeal in specific cases such variance form the terms of this Ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this Ordinance would result in unnecessary hardship. A variance from the terms of this Ordinance shall not be granted by the Board of Adjustment unless and until written application for a variance is submitted demonstrating:

a. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same District;

b. That literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same District under the terms of this Ordinance;

c. That the special conditions and circumstances do not result from the actions of the applicant; and

d. That granting the variance requested will not confer on the applicant any special privilege that is denied by this Ordinance to other lands, structures, or buildings in the same District.

2. Notice of public hearings shall be given as in Section 225 herein.

3. The public hearings shall be held. Any party may appear in person, or by agent or by attorney.

4. The Board of Adjustment shall make findings, that the conditions required by Section 216.07, Subsection 1. of this Ordinance and described in the application do exist.

5. The Board of Adjustment shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building, or structure.

6. The Board of Adjustment shall further make a finding that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

7. In granting any variance, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this Ordinance and punishable under Section 219.

8. No nonconforming use of neighboring lands, structures, or buildings in the same District, and no permitted use of lands, structures, or buildings in other Districts shall be considered grounds for the issuance of a variance.

9. Under no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this Ordinance in the District involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said District.

216.08 Decisions of the Board of Adjustment.

1. In exercising the above mentioned powers, the Board of Adjustment may, so long as such action is in conformity with the terms of this Ordinance, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have powers of the administrative official from whom the appeal is taken.

2. The concurring vote of a majority of members of the Board present and voting shall be necessary to reverse any order, requirement, decision, or determination of the administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under this Ordinance, or to effect any variance or special exception in the administration of this Ordinance. (Ord. No. 1989-14, § 2, 8-15-89)

Maine Revised Statutes Annotated Currentness
Title 30-A. Municipalities and Counties (Refs & Annos)
Part 2. Municipalities
Subpart 6-A. Planning and Land Use Regulation (Refs & Annos)
Chapter 187. Planning and Land Use Regulation (Refs & Annos)
Subchapter 3. Land Use Regulation (Refs & Annos)
§ 4353. Zoning adjustment

Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section.

1. Jurisdiction; procedure. The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance. The board of appeals is governed by section 2691, except that section 2691, subsection 2, does not apply to boards existing on September 23, 1971.

2. Powers. In deciding any appeal, the board may:

A. Interpret the provisions of an ordinance called into question;

B. Approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance except that, if the municipality has authorized the planning board, agency or office to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and

C. Grant a variance in strict compliance with subsection 4.

3. Parties. The board shall reasonably notify the petitioner, the planning board, agency or office and the municipal officers of any hearing. These persons shall be made parties to the action. All interested persons shall be given a reasonable opportunity to have their views expressed at any hearing.

4. Variance. Except as provided in subsections 4-A, 4-B and 4-C, the board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The land in question can not yield a reasonable return unless a variance is granted;

B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

C. The granting of a variance will not alter the essential character of the locality; and

D. The hardship is not the result of action taken by the applicant or a prior owner.

Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.

4-A. Disability variance. The board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this subsection, a disability has the same meaning as a physical or mental handicap under Title 5, section 4553 and the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

4-B. Set-back variance for single-family dwellings. A municipality may adopt an ordinance that permits the board to grant a set-back variance for a single-family dwelling. An ordinance adopted under this subsection may permit a variance from a set-back requirement only when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

B. The granting of a variance will not alter the essential character of the locality;

C. The hardship is not the result of action taken by the applicant or a prior owner;

D. The granting of the variance will not substantially reduce or impair the use of abutting property; and

E. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

An ordinance adopted under this subsection is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, [FN1] if the petitioner has obtained the written consent of an affected abutting landowner.

4-C. Variance from dimensional standards. A municipality may adopt an ordinance that permits the board to grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;

B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;

C. The practical difficulty is not the result of action taken by the petitioner or a prior owner;

D. No other feasible alternative to a variance is available to the petitioner;

E. The granting of a variance will not unreasonably adversely affect the natural environment; and

F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals that do not meet the dimensional standards otherwise required, in order to promote cluster de-

velopment, to accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by municipal zoning. As long as the development falls within the parameters of such an ordinance, the approval is not considered the granting of a variance. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter I, article 2-B.

5. Variance recorded. If the board grants a variance under this section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be recorded in the local registry of deeds within 90 days of the date of the final written approval of the variance or the variance is void. The variance is not valid until recorded as provided in this subsection. For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.

CREDIT(S)

1989, c. 104, § A, 45; 1989, c. 642; 1991, c. 47, §§ 1, 2; 1991, c. 659, §§ 1 to 3; 1993, c. 627, § 1; 1995, c. 212, § 1; 1997, c. 148, §§ 1, 2; 2005, c. 244, § 2.

[FN1] 38 M.R.S.A. § 435 et seq.

Current with emergency legislation for the 2009 First Regular Session of the 124th Legislature

END OF DOCUMENT

H

Commonwealth Court of Pennsylvania.
Robert NEILSON & Joan Neilson, Patricia LaBanc & Thomas LaBanc, Ken Zebrouvis & Jane Zebrouvis, Dan Mueller & Carolyn Kelly Mueller, Robert A. Dollinger & Annette R. Dollinger, Ruth C. King, David F. Garson & M. Rene Garson, Douglas D. Mitchell & Mary K. Mitchell, Rev. Dragau Filipovic & Mirjana Filipovic, Lundy S. Valentine, Stephen R. Sulentic & Alison M. Sulentic, Janet M. Sodini & Orlando R. Sodini, Cynthia Shay & William Shay, Carlo Petronio & Patricia Petronio, Edward F. Johnston & Marjorie K. Johnston, Daniel J. Shaffer, III, Jeanne L. Shaffer, Gladys S. Klaber, Barbara S. Thompson, M. Anthony Wilhelm & Amy Wilhelm, David McNelis & Darice McNelis, George Strasbaugh & Jacquilin A. Strasbaugh, Dia Nguyen & Tinai Tran, Ann Castor, Robert X. Medonis & Mary Kathleen Medonis, Enigul SonmezAlpan, Norman J. Faett, III & Becky L. Faett, Theresa Carlisle, D. Vogel, Frank Taucher & Adrienne Taucher; James E. Traut & Catherine J. Traut, Richard D. Klaber & Judith B. Klaber, Appellants,
v.
ZONING HEARING BOARD OF THE MUNICIPALITY OF MT. LEBANON, and Reed B. Coyle.
Submitted on Briefs June 22, 2001.
Decided Nov. 15, 2001.

Homeowners sought review of zoning board decision to grant property owner variance to build a residential dwelling. The Court of Common Pleas, Allegheny County, No. SA 2000-124, James, J., affirmed the zoning board's decision. Homeowners appealed. The Commonwealth Court, No. 393 C.D. 2001,Flaherty, Senior Judge, held that property owner was properly granted variance even though the property did not front on a public road.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ⚿745.1

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k745 Scope and Extent of Review
414k745.1 k. In General. Most Cited Cases

Zoning and Planning 414 ⚿746

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k745 Scope and Extent of Review
414k746 k. Matters of Discretion. Most Cited Cases
The court's review of a zoning board's decision, where the trial court did not take additional evidence, is limited to determining whether the board abused its discretion or committed an error of law.

[2] Zoning and Planning 414 ⚿503

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k503 k. Architectural or Structural Designs in General. Most Cited Cases
Property owner was properly granted variance to permit him to construct a residential dwelling on his property even though the property did not front on a public road, which was a requirement of the zoning ordinance; property owner would suffer hardship without the variance because the property could not be developed for any use permitted in the zoning district, a variance was necessary for the reasonable use of the land, the purchase of the property did not give rise to the hardship, the variance would not alter the essential character of the neighborhood, and the variance sought was the minimum variance necessary to afford property owner relief.

[3] Zoning and Planning 414 ⚿497

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k492 Hardship, Loss, or Injury
414k497 k. Self-Created Hardship; Prior Knowledge. Most Cited Cases
A purchaser's knowledge of zoning restrictions is insufficient to preclude the grant of a variance unless the purchase itself gives rise to the hardship.

[4] Zoning and Planning 414 ⚿251

414 Zoning and Planning
414V Construction, Operation and Effect
414V(B) Architectural and Structural Designs
414k251 k. In General. Most Cited Cases
The purpose of a zoning ordinance requiring lots to front on a street is to protect the public by ensuring access by fire, police and emergency vehicles to the property and to provide reliable access to and from the property.

[5] Zoning and Planning 414 ⚿363

414 Zoning and Planning
414VII Administration in General
414k358 Procedure
414k363 k. Conclusiveness of Determination and Collateral Attack. Most Cited Cases
Administrative decisions by a zoning board have no precedential value before a reviewing court.
***1050** John H. Rushford, Pittsburgh, for appellants.

Templeton Smith, Jr., Pittsburgh, for appellees.

***1051** Before DOYLE, President Judge, SMITH, Judge, and FLAHERTY, Senior Judge.

FLAHERTY, Senior Judge.

Robert Neilson and Joan Neilson, et al. (Appellants) appeal from an order of the Court of Common Pleas of Allegheny County (trial court) which affirmed the decision of the Zoning Hearing Board of Mt. Lebanon (Board) granting variances to Reed Coyle (Coyle) from Sections 102 and 701.1.13 of the Mt. Lebanon Zoning Ordinance (Ordinance). The effect of the variances is to permit Coyle to construct a residential dwelling on his property even though the property does not front on a public road. We affirm.

The facts in this case as found by the Board are as follows. Coyle is the owner of property in an area of Mt. Lebanon zoned R-2, single family dwellings. The property is an unimproved parcel identified as Lot No. 765 in the Sunset Hills Plan of Lots No. 3 in the Allegheny County Recorder of Deeds Office. The lot is bounded on the west by Gypsy Lane, on the east by three lots and on each other side by other lots in the same plan. Gypsy Lane, dedicated for public use in the original plan, was never accepted by Mt. Lebanon and is a private street. Although Gypsy Lane is an improved road it is not improved to municipal standards. Because the Ordinance does not permit development of residential lots which do not front a public street, dedicated for public use and improved to municipal standards, Coyle applied to the Board for variances from sections 102 and 701.1.13 of the Ordinance. Section 102 of the Ordinance defines "lot" as follows:

Lot: any tract or parcel of land held in single or separate ownership which is or may be, occupied by a Main Building, and its Accessory Uses or Building, if any, together, with open space required by this Chapter. .... A Lot shall front on a Public Street dedicated for Public Use and improved to Municipal Standards.

Section 701.1.13 of the Ordinance provides:
Frontage on Public Street. Each One Family Dwelling and Two Family Dwelling shall have a Lot Line, Front on a Public Street dedicated for Public use and improved to municipal standards. This regulation shall apply to One Family Dwellings and Two Family Dwellings located in a development consisting of Multi Family Dwellings and Townhouse Units in addition to aforesaid dwell-

ings.

The Board conducted a hearing at which Coyle and Appellants testified and presented evidence. In its findings, the Board stated that the property was wholly adequate to allow for the construction of a dwelling but for the Ordinance requirement that the property front a public street, dedicated for public use and improved to municipal standards. Gypsy Lane, a privately maintained residential street, serves twenty-nine existing homes.[FN1] The Board considered the requirements that must be met in order to obtain a variance, which are as follows:

> FN1. The homes on Gypsy Lane were developed before the current Ordinance which prohibits development of residential lots which do not front on a public street.

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not by the circumstances or conditions generally created by the provisions of the zoning ordinance***1052** in the neighborhood or district in which the property is located.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

Section 910.2 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended, added by* the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2.

[1] The Board determined that Coyle met all of the above requirements for the grant of a variance. On appeal, the trial court affirmed. On appeal to this court, Appellants maintain that Coyle did not meet the requirements for a variance. Our review, where, as here, the trial court did not take additional evidence, is limited to determining whether the Board abused its discretion or committed an error of law or abuse of discretion. *Isaacs v. Wilkes-Barre Zoning Hearing Board,* 148 Pa.Cmwlth. 578, 612 A.2d 559 (1992).

Initially, we observe that Appellants do not take issue with the Board's finding that Coyle's property is landlocked because it does not front on a public street. Both *Filanowski v. Zoning Board of Adjustment,* 439 Pa. 360, 266 A.2d 670 (1970), and *Malakoff v. Board of Adjustment of the City of Pittsburgh,* 72 Pa.Cmwlth. 109, 456 A.2d 1110 (1983), stand for the proposition that property which is landlocked, with no public street frontage exhibits a physical feature which can establish unnecessary hardship. Nonetheless, Appellants claim that such a physical feature, i.e., the fact that the property is landlocked does not distinguish Coyle's property from other lots in Mt. Lebanon, which similarly do not front a public street. We disagree. Coyle's property is unique in that Gypsy Lane, on which the property is located, already serves twenty-nine existing homes and the property itself is identified as a lot in the Sunset Hills Plan. Moreover, as found by the Board, the location, size and topography of the land are wholly adequate to allow the construction of a dwelling on the property, but for the Ordinance requirement that the property front on a public street.

[2] In arguing that Coyle has failed to meet the hardship requirement, Appellants rely on *Sotereanos, Inc. v. Zoning Board of Adjustment of Pittsburgh,* 711 A.2d 549 (Pa.Cmwlth.1998), *petition for allowance of appeal denied,* 556 Pa. 699, 727 A.2d 1125 (1998). In that case, a restaurant owner needed fifteen parking spaces to expand his restaurant pursuant to a conditional use granted fifteen years earlier. Owner obtained additional non-adjacent property and requested dimensional variances in order to construct a parking garage. This court concluded that the owner was not entitled to the variances because owner failed to demonstrate any hardship with respect to the newly obtained property. There was no evidence that the property could not be used as a parking garage within the zoning code's dimensional requirements nor was there any evidence that the property could not be used for ***1053** any other use permitted in the district. Although owner may suffer a hardship because of his inability to expand his restaurant, this court held that the hardship must be shown to be unique to the property subject to the variance request. In the present case, Coyle requested a variance because he cannot use his property for any use permitted in the district. Unlike *Sotereanos,* there is evidence in the record supporting Coyle's hardship claim, i.e., that property cannot be developed for any use permitted in the district.

As to the second requirement, i.e., whether because of such physical circumstances the property cannot be developed in strict conformity with the Ordinance and that a variance is necessary for the reasonable use of the land, we observe that the only use permitted in the district is single-family dwellings. Without a variance Coyle cannot develop his property. Moreover, although Coyle meets all other requirements of the Ordinance, Coyle cannot develop his land in strict conformity of the Ordinance because Coyle's land does not front a public road.

[3] Concerning the third requirement, we also agree with the Board that Coyle did not create the hardship. Namely, although Coyle acquired the property from his parents and neighbors, a purchaser's knowledge of zoning restrictions is insufficient to preclude the grant of a variance unless the purchase itself gives rise to the hardship. *N. Pugliese, Inc. v. Palmer Township Zoning Hearing Board,* 140 Pa.Cmwlth. 160, 592 A.2d 118 (1991).

[4] We similarly agree with the Board that the variance will not alter the essential character of the neighborhood. Twenty-nine houses are already situated on Gypsy Lane. As such, the construction of another house would not alter the essential character of the already established residential neighborhood. In addition, construction of another home will not be detrimental to the public welfare. The purpose of a zoning ordinance requiring lots to front on a street is to protect the public by ensuring access by fire, police and emergency vehicles to the property and to provide reliable access to and from the property. *Glennon v. Zoning Hearing Board of Lower Milford Township,* 108 Pa.Cmwlth. 371, 529 A.2d 1171 (1987). As is evidenced by the record, fire, police and snow removal is already provided to the residents of Gypsy Lane. (R.R. 80a.) Hence, there are no concerns in this case that the condition of Gypsy Lane renders it inaccessible to emergency vehicles because such services are already provided.

As to the last requirement, we agree with the Board that the variance sought by Coyle is the minimum variance necessary which would afford him relief. As stated by the Board, the lot at issue is wholly adequate to construct a dwelling. Coyle is impeded from developing the land because Gypsy Lane is not a public street. Hence, a variance from the restriction that all lots front a public road, is the least variance necessary to afford Coyle relief.

[5] Finally, Appellants reference a 1989 Board decision, *Helm,* which denied a variance to landowners who proposed to construct a house on a lot which fronted an unimproved road. We initially observe that administrative decisions have no precedential value before this court. *State Farm Mutual Automobile Insurance Company v. Department of*

Insurance, 720 A.2d 1071 (Pa.Cmwlth.1998), *aff'd per curiam,* 560 Pa. 595, 747 A.2d 355 (2000). Nonetheless, we note that in that case, the landowners proposed to construct a home at the end of a 150 foot long, dedicated but unimproved extension of a public road. The Board concluded that landowners could improve the 150 foot public right-of-***1054** way to meet the requirements of the Ordinance and made no finding as it did in this case that the property at issue was landlocked. As previously stated, the road at issue in this case is a private road, not a public road. As testified to by one of the appellants, it would be impossible to bring the road up to municipal standards because homes on the street would lose a significant portion of their yardage making it impossible for homeowners to enter or exit their driveways. (R.R. at 81a.) Additionally, the road at issue already services twenty-nine existing homes; such was not the case in *Helm.*

In accordance with the above, because Coyle met the requirements for the variances, the order of the trial court is affirmed.

ORDER

Now, November 15, 2001, the order of the Court of Common Pleas of Allegheny County at No. S.A.2000-124, dated January 25, 2001, is affirmed.

Pa.Cmwlth.,2001.
Neilson v. Zoning Hearing Bd. of Municipality of Mt. Lebanon
786 A.2d 1049

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Commonwealth Court of Pennsylvania.
Chris J. CHACONA, Appellant,
v.
ZONING BOARD OF ADJUSTMENT and City of Philadelphia and Reed M. Axelrod, Appellees.
Submitted May 17, 1991.
Decided Nov. 13, 1991.

The Court of Common Pleas, Philadelphia County, No. 3385 July Term, 1990, Samuel M. Lehrer, J., affirmed zoning board of adjustment's grant of variance to homeowner to construct addition to home that had nonconforming footprint. Objector appealed. The Commonwealth Court, No. 57 C.D. 1991,Narick, Senior Judge, held that: (1) grant of variance to homeowner to construct addition above already existing portion of his home, which intruded upon rear and side yard requirements, could not be justified as grant of logical, reasonable, and natural structural change in building where proposed addition would have violated local ordinance requiring that new stories erected upon nonconforming structures meet rear-yard and open-area requirements, and (2) grant of variance could not be justified under de minimis doctrine, where addition would require variance of 33% for rear-yard requirements and over 60% for open-court requirements.

Reversed.

West Headnotes

[1] Zoning and Planning 414 ⚿490

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k490 k. Public Interest and Welfare, and Harmony With, or Impairment Of, Regulation. Most Cited Cases

Zoning and Planning 414 ⚿496

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k492 Hardship, Loss, or Injury
414k496 k. Unique or Peculiar Hardship. Most Cited Cases
Party seeking variance bears burden of proving that unnecessary hardship will result if variance is denied, that hardship is unique or peculiar to property as distinguished from hardship arising from impact of zoning regulations on entire district, and that proposed use will not be contrary to public interest.

[2] Zoning and Planning 414 ⚿503

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k503 k. Architectural or Structural Designs in General. Most Cited Cases
Homeowner did not show unnecessary hardship sufficient to justify variance from rear-yard and area requirements for proposed addition on basis of fact that other homes in his district were three-story houses and that his addition would not be excess of his neighbors' homes, inasmuch as property could continue to be used as residence without planned addition.

[3] Zoning and Planning 414 ⚿518

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k518 k. Particular Prior Uses. Most Cited Cases
Grant of variance to homeowner to construct addition above already existing portion of his home that intruded upon area and rear-yard requirements could not be justified as grant of logical, reasonable and natural structural change in building which did

not increase any nonconformity of its use where addition would have violated zoning ordinance that required new stories erected upon nonconforming structures to meet yard, court, occupied-area, open-area, and rear-yard area regulations on level upon which such new stories were being erected, so as to require variance; addition would have violated rear-yard and open-area requirements of local ordinance.

[4] Zoning and Planning 414 ⇐489

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k489 k. Grounds for Grant or Denial in General. Most Cited Cases
"De minimis doctrine," which exists as narrow exception to heavy burden of proof generally placed on party seeking variance, applies where only minor deviation from zoning ordinance is sought and rigid compliance is not necessary to protect ordinance's public policy concerns.

[5] Zoning and Planning 414 ⇐518

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k518 k. Particular Prior Uses. Most Cited Cases
Granting of variance which would violate zoning ordinance requiring new stories erected upon nonconforming structures to meet rear-yard and open-area requirements could not be justified under de minimis doctrine where addition would require variance of 33% for rear-yard requirements and over 60% for open-court requirements.
****256 *409** Chris J. Chacona, for herself, appellant.

***410** Patricia M. Hamill, Chief Asst. City Sol., for Zoning Bd. of Adjustment and City of Philadelphia, appellees.

Reed M. Axelrod, for himself, appellee.

Before DOYLE and PELLEGRINI, JJ., and NARICK, Senior Judge.

NARICK, Senior Judge.

Chris J. Chacona, Objector, appeals from a decision of the Court of Common Pleas of Philadelphia County that affirmed the Philadelphia Zoning Board of Adjustment's grant of a variance to Reed M. Axelrod, Applicant. We reverse.

Axelrod owns a two-and-one-half story house at 267 South 21st Street in Philadelphia. Chacona owns a three-story house at 265 South 21st Street. Both houses are located in an R-10 residential district.

On May 3, 1990, Axelrod applied to the Philadelphia Department of Licenses and Inspections for a zoning permit to erect an addition above the rear of his home. The house is three stories high in front, the street side, and two-and-one-half stories high in the rear. The Applicant proposed to erect a 320 square foot addition above the second story in the rear. The planned addition would add a story to the rear portion of Axelrod's home so that the entire home would be a full three stories.

Section 14-104(10) of the Philadelphia Zoning Code provides that in R-10 residential districts:

where a structure is non-conforming because it does not fulfill the yard, court, occupied area, open area or rear yard area regulations of a district in which it is located, any new stories erected on such structures shall be constructed so as to fulfill the yard, court, occupied area, open area and rear yard area regulations, which in such a case shall be ****257** applied on the level upon which such new stories are being erected.

The ordinance applies the yard, court, occupied area, open area and rear yard area regulations to new stories erected ***411** above ground level. If new stories are placed above structures which contain a non-conforming deviation from area regula-

tions, the new stories may not repeat the nonconformity. Instead, the new stories must be built to comply with the regulations even though the underlying structure does not.

At present, the Applicant's home is dimensionally non-conforming to rear yard and open court requirements. To make his home a full three stories, the Applicant intends to build part of his addition above the dimensionally non-conforming portion of his home. There is a nine-foot rear yard requirement in the Applicant's district. The Applicant's addition would, like its underlying structure, allow for only six feet in the rear yard. There is a five-foot open court area requirement in the district. The Applicant's addition would, like its underlying structure, allow for only one foot nine inches of open court area. (Hearing Transcript, June 13, 1990, pp. 19-20). The Department of Licenses and Inspections refused Axelrod's application for a permit on the grounds that the addition would violate the rear-yard and open-court area requirements.

Axelrod appealed the refusal. The Zoning Board of Adjustment held a public hearing on June 13, 1990. The Board found that the proposed addition would not exceed any adjacent neighbors' dwellings because every property on that street is three stories high. The Board also found that the addition would not exceed the existing footprint of the Applicant's home.[FN1] (Zoning Board's Findings of Fact Nos. 4-5.) The Zoning Board of Adjustment granted Axelrod a variance.

> FN1. While the planned expansion is an extension of lower stories, it does include a bay effect which goes beyond the building footprint. This part of the addition, however, is very minor and does not affect the outcome of this appeal.

Objector Chacona appealed the decision to the Court of Common Pleas of Philadelphia County. The trial court affirmed the Board's decision and dismissed Chacona's appeal. This appeal followed.

***412** Where a trial court takes no additional evidence, the Commonwealth Court's scope of review is limited to determining whether the Board abused its discretion or committed an error of law. *Valley View Civic Association v. Zoning Board of Adjustment,* 501 Pa. 550, 462 A.2d 637 (1983).

We must address three issues in this appeal: 1) did the Board err in concluding that Axelrod would endure unnecessary hardship if not granted a variance; 2) may the Board's grant of a variance be affirmed on the basis of the Supreme Court's decision in the *Yocum Zoning Case,* 393 Pa. 148, 141 A.2d 601 (1958); and 3) is Axelrod entitled to a de minimis variance.

[1] A party seeking a variance bears the burden of proving that (1) unnecessary hardship will result if the variance is denied, (2) the hardship is shown to be unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on the entire district, and (3) the proposed use will not be contrary to the public interest. *Valley View.*

[2] Previously, we had determined that one can establish unnecessary hardship by one of three ways. First, one shows that the physical characteristics of the property are such that the property cannot be used for any permitted purpose. Second, one shows that the physical characteristics of the property are such that the property could be arranged for permitted purposes at only a prohibitive expense. Third, one shows that the characteristics of the property are such that the property has no value or only distress value for any purpose permitted by the ordinance. *Griffith v. Zoning Hearing Board of Exeter Township,* 109 Pa.Commonwealth Ct. 382, 531 A.2d 121 (1987), *petition for allowance of appeal granted,* 519 Pa. 656, 546 A.2d 60 (1988).

During the Zoning Board's hearing the Applicant stated four reasons to gain approval for his proposed addition. The Applicant****258** argued that he bought his home at 267 South ***413** 21st Street in order to improve it. He stated that he planned to

own the property for the "long term." He contended that a variance would permit him to use his property to its highest and fullest use. He claimed that all the homes in his neighborhood are three story houses and that his addition would not be in excess of what all of his neighbors have. (Hearing Transcript pp. 17-19). Clearly these reasons do not constitute unnecessary hardship since the property can continue to be used as a residence without the planned addition.

[3] Applicant and the Board argue that the Supreme Court's reasoning in *Yocum* should be applied to the instant case to affirm the Board's grant of a variance. *Yocum* involved a permit request of home owners who wanted to extend their second floor forward to coincide with the front edge of their first floor. A municipal ordinance required a twenty-foot setback. The edge of the first floor was only seventeen feet from the street, but was a permitted intrusion because it pre-existed the setback ordinance. The *Yocum* Court faced the issue of whether the second story addition violated the setback and side-yard requirements.

In *Yocum*, the Court upheld the trial court's grant of a permit to the home owners. The Court determined that the addition would not extend or increase the home's non-conformity and that the setback and the side-yard requirements would suffer no further encroachment. The Court also held that a permit was the "grant of a logical, reasonable and natural structural change in the building," which neither increased any non-conformity of its use or violated any provision of the zoning ordinance. *Id.* 393 Pa. at 153-54, 141 A.2d at 605. The Court also held that the addition did not in any way affect the general welfare of the neighborhood. With regards to possible encroachments on light and air, the Court found those alleged intrusions to be "more fanciful than real." *Id.*

One year following the *Yocum* decision, the Supreme Court decided the *Kline Zoning Case*, 395 Pa. 122, 148 A.2d 915 (1959). *Kline* involved a variance to enclose a roofed front porch. The porch encroached three-and-one-half feet ***414** into a thirty-foot setback line. The porch lawfully extended into the front yard area because the porch pre-existed the setback ordinance. No other enclosed or unenclosed parts of the dwelling intruded upon the setback line.

To gain the variance, the home owner in *Kline* argued that he needed to enclose the porch because his wife and son suffered from respiratory ailments. The Supreme Court determined that the personal needs of the homeowner's wife and son did not amount to unnecessary hardship. *Kline.* The Supreme Court held that the trial court had erred in granting a variance to the homeowner.

More recently, this Court has addressed the applicability of *Yocum* and *Kline* to a porch which permissibly intruded on a twenty-foot setback line and which the owner sought to enclose. In *Angle v. Zoning Hearing Board of the Borough of Dormont*, 83 Pa.Commonwealth Ct. 52, 475 A.2d 1371 (1984), we held that *Kline* and not *Yocum* applied to the owner's variance request. We did so because the front yard area in *Angle* had never previously been occupied by an enclosed structure. Like *Kline*, only the front porch in *Angle* intruded upon setback lines. We explained that in *Yocum* both an unenclosed front porch and an enclosed part of the home's living room intruded upon the setback line. We declared our concern that pre-existing unobtrusive structural elements should not make inoperative zoning setback requirements aimed at preserving yard areas. *Angle.* We further distinguished *Kline* and *Angle* from *Yocum* on the grounds that *Yocum* applied to requests for permits and not for variances as did *Angle* and *Kline.*

Factually, this case is much like *Yocum.* The Applicant originally sought a permit from the Department of Licenses and Inspections. The Applicant desires a permit for the purposes of placing an addition above an already existing portion of his home which permissibly intrudes upon rear and side yard requirements. The deprivation of light and air caused by the canyon effects of the Applicant's ad-

dition would be minimal. The Objector's contention that **259 the addition would deprive him of light and air is "more fanciful *415 than real." The Applicant appealed the refusal of his permit application.

Unlike *Yocum,* however, the Applicant's proposed addition violates the zoning ordinance. Section 14-104(10) of the Philadelphia Zoning Code requires new stories erected upon non-conforming structures to meet the yard, court, occupied-area, open-area and rear-yard area regulations "on the level upon which such new stories are being erected." Consequently, a variance is required.

The Applicant's addition would extend back to the rear edge of his home. At the Board hearing, the Applicant admitted that a portion of the rear of his home intrudes upon the rear-yard and open-court requirements. The Applicant acknowledged that his proposed addition would similarly fail to comply with rear-yard and open-court requirements. The addition, like its underlying structure, would fall three feet short of rear-yard and open-court requirements. (Hearing Transcript p. 20). The Applicant's addition would violate rear-yard and open-court requirements of the ordinance. For this reason, we reject the Board's argument that the grant of a variance to Axelrod can be affirmed on the basis of *Yocum* and apply the rule from *Kline* and *Angle.*

[4] The Board in the present case also argued that the grant of Axelrod's variance can be substantiated on de minimis grounds. The de minimis doctrine is a narrow exception to the heavy burden of proof generally placed on a party seeking a variance. De minimis applies where only a minor deviation from the zoning ordinance is sought and rigid compliance is not necessary to protect the ordinance's public policy concerns. *Leonard v. Zoning Hearing Board of the City of Bethlehem,* 136 Pa.Commonwealth Ct. 182, 583 A.2d 11 (1990).

[5] We have previously held that a five-foot variance from an eight-foot side yard requirement in a Philadelphia R-10 residential district was not de minimis. *Heilman v. Zoning Board of Adjustment of Philadelphia County,* 69 Pa.Commonwealth Ct. 157, 450 A.2d 318 (1982). More *416 recently, we held that a variance of thirteen percent of the open-area requirement in a very congested area in Philadelphia was not de minimis. *D'Amato v. Zoning Board of Adjustment of the City of Philadelphia,* 137 Pa.Commonwealth Ct. 157, 585 A.2d 580 (1991). During the hearing before the Zoning Board of Adjustment, Axelrod admitted that his addition would require a variance of thirty-three percent for rear-yard requirements and over sixty percent for open-court requirements. The grant of a variance in this case requires a significant deviation from the zoning ordinance. For this reason, we refuse the Board's assertion that the variance is de minimis.

Accordingly, we reverse the order of the trial court affirming the grant of a variance by the Board.

ORDER

AND NOW, this 13th day of November, 1991, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter which affirmed the Zoning Board of Adjustment's grant of a variance is hereby reversed.

Pa.Cmwlth.,1991.
Chacona v. Zoning Bd. of Adjustment
143 Pa.Cmwlth. 408, 599 A.2d 255

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