

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-393

SEPTEMBER TERM, 2006

In re Appeal of T & M Construction and
Development Corporation

} APPEALED FROM:

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Environmental Court

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DOCKET NO. 172-10-03 Vtec

Trial Judge: Merideth Wright

In the above-entitled cause, the Clerk will enter:

Applicant appeals the decision of the Environmental Court denying without prejudice applicant=s request for a variance. We affirm.

Applicant seeks to construct a single-family home on a narrow lot in Swanton, Vermont. The Swanton Land Use and Development Regulations require a 15-foot side setback in the zoning district within which applicant proposes to build. Applicant sought a variance of five feet on each side setback from the Swanton

Zoning Board of Adjustment. The Board denied the variance, and applicant appealed to the Environmental Court.

At the hearing before the Environmental Court, applicant presented evidence of the footprint of the proposed structure, that it would be two and one-half stories tall and would be wheelchair accessible. Applicant did not include in the application or present evidence at the hearing regarding the exterior elevations, design or appearance of the house, and particularly its height and appearance within the five feet of side setback on each side for which the variance is sought. The Environmental Court denied the variance.

In reaching its conclusion, the Environmental Court applied Section 9.4 of the Swanton Land Use and Development Regulations, which sets forth the standards for granting a variance. That provision states that a variance may be granted only if all of the following facts are found: (1) Unique physical circumstances or conditions that will create a hardship if the variance is not granted; (2) no possibility the property can be developed in strict conformity with zoning regulations, such that the variance is necessary for the reasonable use of the property; (3) the applicant has not created an unnecessary hardship; (4) the variance will not alter the essential character of the neighborhood; and (5) the variance represents the minimum deviation that will afford relief. Swanton Land Use & Dev. Regs. ' 9.4(A). Thus, under the Regulations, the burden is on the applicant to demonstrate that all five criteria have been met. In re Mutschler, Canning & Wilkins, 2006 VT 43, & 9.

The Environmental Court concluded that applicant had not met criteria (4) and (5). Regarding criterion (4), the court concluded that it could not make affirmative findings as to the impact of the requested variance on neighboring properties in the absence of any evidence of the design of the proposed structure. The Environmental Court reasoned that a house with the proposed footprint could be designed in any number of different ways, and that

without presenting evidence as to the roof orientation, type, and drainage, applicant has not met its burden of proof to show that the volume or shape of the proposed house within the setback variance areas would not conduct drainage of

water onto the adjacent properties and thereby impair their appropriate use, or to show that its bulk would not loom over the adjacent properties and thereby impair their appropriate use and reduce their access to solar energy.

Thus, the court concluded that A[w]ithout a design to consider in relation to the variance criteria, the court cannot make positive findings that it will meet the variance criterion regarding the effect of the proposal on the neighboring properties@ as required by ' 9.4(A)(4). The court further concluded that applicant had not shown Athat the requested variance is the minimum necessary to obtain relief,@ as required by subsection ' 9.4(A)(5). The court emphasized that it denied the variance without prejudice and that A[i]t is probable that some side setback variance is necessary to make reasonable residential use of the property.@

On appeal, applicant argues that it was error for the Environmental Court to require evidence of the design of the proposed structure because the design was not relevant to assessing the impact of the variance on neighboring property, and that design specifics also had no bearing on whether the requested variance represented the minimum deviation from zoning regulations necessary to permit reasonable use of the property. We will affirm the Environmental Court=s construction of Swanton=s Regulations unless we determine the decision is clearly erroneous, arbitrary or capricious. In re Dunnett, 172 Vt. 196, 200 (2001).

Variations are exceptions to general rules of zoning, and for that reason they are reluctantly and carefully granted. See In re Mutschler, Canning & Wilkins, 2006 VT 43, & 7. The discretion to grant variations is circumscribed by statute, which sets forth the same five criteria listed in Swanton=s regulations. See id. & 8 (citing 24 V.S.A. ' 4468(a)).

Regarding the impact of the requested variance on neighboring properties (criterion (4) under the regulations), applicant in essence argues that it was error as a matter of law for the Environmental Court to consider the design of the proposed structure as opposed to its use. Applicant points out that the Swanton regulations do not provide for a Adesign review@ of buildings. Applicant cites no authority for the proposition that design information is categorically irrelevant to the assessment of the impact of a requested variance.

Rather, as the Environmental Court emphasized, various design features, in combination with a side-setback variance, could affect the use of adjoining properties in any number of ways. For example, different designs could have different impacts in terms of water runoff and drainage, blocking sunlight, and creating a crowded appearance in the neighborhood. We cannot conclude that the Environmental Court was arbitrary and capricious in deciding that applicant had presented insufficient evidence to meet this criterion.

It is not clear, however, how the height and design of the proposed structure relates to the mandate in ' 9.4(A)(5), that the variance achieve the least practical deviation from the side setback regulation. The trial court faults the applicant for failing to demonstrate that a two story building is necessary to justify the setback variance, when one appears to have little or nothing to do with the other. Absent further explanation, we find this to be an erroneous application of the regulation. Nonetheless, our affirmance of the Environmental Court's holding that applicant failed to meet criterion (4) in the absence of evidence of design and/or height is a sufficient basis for upholding the denial of the permit without prejudice.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice