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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-192

NOVEMBER TERM, 2006

In re Appeal of Richard Bailey	}	APPEALED FROM:
	}	
	}	Environmental Court
	}	
	}	DOCKET NO. 230-10-02 Vtec

Trial Judge: Merideth Wright

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

Petitioner Richard Bailey appeals pro se from the environmental court=s order granting a variance to applicant Black Locust Development, LLC, from the Town of Arlington=s minimum lot size requirements. Petitioner raises numerous claims of error. We affirm.

This case is before us for a second time. Many of the underlying facts are set forth in our first decision, which was issued in July 2005. See In re Bailey, 2005 VT 38A, 178 Vt. 614 (mem.). We briefly restate them here. Applicant owns a small parcel of land located on Route 7A. Petitioner owns property southerly of the subject parcel, as well as a vacant parcel of property adjacent to the subject parcel. Applicant sought a zoning

permit to build a 640 square foot real estate office with four parking spaces on its lot. The proposed building did not meet the town=s front or rear yard setback requirements. The town zoning board concluded that applicant=s lot was a preexisting undersized lot under its bylaws, and it granted applicant=s request for a variance from the front and rear setback requirements. Petitioner appealed this decision to the environmental court, which agreed that the lot was a preexisting undersized lot and that applicant met all of the criteria necessary for the issuance of a variance for the front and rear setback requirements. Petitioner appealed to this Court, and we reversed. We concluded that applicant=s lot did not qualify as a preexisting small lot because a portion of the lot was under the highway right-of-way, and this land could not be included in the lot size calculation. Id. & 7. Given our conclusion, we did not reach the issue of whether the court erred in determining that applicant met the variance criteria. Id.

Shortly after our decision, applicant filed a motion to reopen with the environmental court, asking the court to make additional findings based on the original record or, alternatively, to conduct additional proceedings to address whether it was entitled to a variance from the minimum lot size requirement. Applicant noted that it had raised this issue in the first proceeding. Petitioner opposed applicant=s request. In September 2005, the court granted applicant=s request to reopen and directed the parties to file memoranda addressing the issue raised by applicant.

In March 2006, the court issued a Adecision and order after remand,@ concluding that applicant was entitled to a variance from the town=s minimum lot size requirement, and reiterating its earlier conclusion that applicant was also entitled to a variance from the front and rear yard setback requirements. The court explained that applicant=s lot was slightly less than one-tenth of an acre in size (approximately 4140 square feet), excluding the land lying under the highway right-of-way. Because the town had not expressly prohibited development on lots that were less than one-eighth acre in area, the court concluded that it could consider if applicant was entitled to a variance from the otherwise-applicable minimum lot size. The court evaluated each of the town=s variance criteria, and concluded that applicant was entitled to a variance. This appeal followed.

Petitioner raises numerous claims of error, many of which are inadequately briefed and some of which are

irrelevant to the issue before us. See Quazzo v. Quazzo, 136 Vt. 107, 111 (1978) (Court will not search the record for errors not adequately briefed or referenced). The main thrust of petitioner=s argument appears to be that the court committed procedural and substantive errors in granting applicant=s request for a variance from the minimum lot size requirement.

While we agree that the posture of this case is somewhat unusual, we find no basis to reverse on procedural grounds. Petitioner correctly asserts that we did not expressly remand this case to the environmental court. Instead, the court acted upon applicant=s motion to reopen. It decided an issue that was raised by applicant in connection with petitioner=s first appeal, and both parties were provided the opportunity to submit arguments on this issue. It does not appear from the record that petitioner requested a hearing. We do not see that petitioner suffered any harm from the method in which the proceedings were conducted below. We reject petitioner=s suggestion that the court acted contrary to our first decision, as well as his assertion that the court needed to await a change in the town=s zoning bylaws before it could act on applicant=s request. As set forth above, the court recognized that the town=s bylaws set a minimum lot size of one-half acre. It found, however, that because the town had not expressly prohibited development of lots less than one-eighth acre in size, see 24 V.S.A. ' 4412(2)(A)(i), it would therefore consider whether applicant was entitled to a variance from the minimum lot size requirement. By doing so, it did not supersede the town=s zoning bylaws.

We thus turn to the merits of the court=s decision. We recognize that A[v]ariances have historically been employed as an escape hatch from the literal terms of an ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus amount to confiscation.@ In re Mutschler, 2006 VT 43, & 7 (quotations omitted). To be entitled to a variance, an applicant must provide sufficient evidence to support a finding with respect to each of the following five criteria:

> (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 unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the

provisions of the zoning regulation 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 regulation and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

(3) That the 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, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, nor be detrimental to the public welfare; and(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the zoning regulation and from the plan.

Town of Arlington Zoning Bylaws, ' 7.2.

The environmental court made specific findings as to each factor. It found that applicant=s lot was unusually small and unusually shallow, and that applicant=s inability to develop the lot in compliance with zoning regulations was due to the highway right-of-way. The court also found that there was no possibility that the lot could be developed with a structure in strict conformance with zoning regulations. Because the property was too small and too close to the road, an agricultural use without a structure was not reasonable. The court found that applicant had not created the unnecessary hardship. Additionally, it found that applicant=s proposed building was consistent with the general character of the neighborhood. Finally, the court concluded that the proposed variance represented the minimum deviation possible from zoning regulations. It explained that the proposed uses suggested by petitioner, such as a freestanding ATM machine or a farm stand, would generate more traffic than the proposed use, and they would not be approved due to a lack of access from Route 7A. The court stated that petitioner presented no evidence that the proposed building could have been designed differently so as to deviate less from the town=s zoning regulations. The court thus granted applicant a variance from the minimum lot size, and reiterated its prior approval of the setback variances, which rested on an

evaluation of the same criteria.

While petitioner disagrees with the court=s findings, he has not demonstrated that any of the findings are clearly erroneous. He reiterates his assertions that the court should have considered the possibility of a freestanding ATM, or another type of development that did not require a structure, but the variance criteria are not so restrictive. Applicant in this case sought a variance to allow the construction of a structure, and the evidence before the court supported its finding that the variance granted Arepresent[s] the minimum variance that will afford relief and represent the least deviation from the zoning regulations.@ Town of Arlington Zoning Bylaws, ' 7.2 (emphasis added). As the court stated, petitioner did not provide any evidence challenging the particular design submitted by applicant. This is not a case where applicant justified its proposal Ain terms of personal convenience or maximizing the profitable use of the property.@ Cf. In re Mutschler, 2006 VT 43, & 11 (noting that Court has consistently held that these justifications do not represent the Aminimum necessary for relief@). Rather, applicant proposed to build a small building on an unusual-sized lot. As the environmental court found, the front and rear setbacks overlapped on the property, thereby making it unusable for development of any structure without a variance. We note that it was certainly reasonable for the environmental court to conclude that the uses proposed by petitioner would generate more traffic than those proposed by applicant. We find no basis to disturb the court=s findings on appeal. See Simendinger v. City of Barre, 171 Vt. 648, 649 (2001) (mem.) (On review, the Court Awill set aside factual findings of the trial court only if they are clearly erroneous, viewing the evidence in the light most favorable to the prevailing party, and disregard modifying evidence@).

We have considered all of petitioner=s arguments relevant to this appeal, and find them all without merit. There is no support for petitioner=s assertion that the court misallocated the burden of proof in this case. As discussed above, the court properly considered whether applicant had presented sufficient evidence to support its request for a variance. The town zoning board=s Areluctant@ approval of applicant=s request has no relevance to the decision on appeal. We note, moreover, that the environmental court=s review of the town=s decision was de novo. See V.R.E.C.P. 5(g). Contrary to petitioner=s assertion, the court did not consider the past use of the property in reaching its decision. The court=s statement regarding the development history of

applicant=s parcel had no bearing on its conclusion. Its finding that the property was adjacent to a stream on applicant=s property was not clearly erroneous. The court could properly consider this fact in deciding that applicant=s proposal would not substantially or permanently impair the appropriate use or development of petitioner=s property. The doctrine of unclean hands and the sunshine laws referenced by petitioner have no application in this case. Finally, we reject petitioner=s argument that applicant created the hardship with which it is faced. The fact that applicant purchased an undersized lot did not prevent it from seeking a variance. Because the environmental court=s findings support its conclusion, we affirm its decision to grant applicant=s request for variances from the town=s zoning bylaws.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice