

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JOSEPH KRASNEC,)
)
)
 Plaintiff,)
)
 vs.)
)
 KOOTENAI COUNTY, STATE OF IDAHO)
 AND THE BOARD OF COUNTY)
 COMMISSIONERS, KOOTENAI COUNTY,)
 STATE OF IDAHO,)
)
 Defendants.)

Case No. **CV 2001 330**

**ORDER AFFIRMING
KOOTENAI COUNTY
BOARD OF COMMISSIONERS**

I. INTRODUCTION

Petitioner, Joseph Krasnec (“Krasnec”), is appealing the December 20, 2000, decision of the Respondent Kootenai County Board of County Commissioners (“Board”) to grant John Grennay a variance from the required 10-foot side yard setback to a 5-foot setback for Grennay’s cabin. Krasnec is Grennay’s (Grennay is not a party) neighbor and Krasnec has standing to challenge the variance.

On October 1, 1999, Grennay applied to Kootenai County for a Special Notice Permit seeking to make his cabin an Accessory Living Unit under the zoning Ordinance. This was

necessary because Grennay built a new home on the second half of his property. Once the new home was built, the cabin violated the setback ordinance, because it could not qualify as the principle living structure. The cabin is setback 5 feet from Krasnec's property, but should now be 10 feet to not violate the zoning ordinance. The 10-foot setback was enacted after the cabin was built. The 1999 petition for an ordinance was approved by the Board on December 15, 1999. Krasnec filed a Petition for Review and Stay of Decision of the 1999 Order with the Kootenai District Court on January 12, 2000, in Kootenai County District Case No. CV-00-246. Krasnec and the Board entered into a Stipulated Motion for Remand that was filed with the Court on August 17, 2000. Based upon the Stipulation, on August 18, 2000, the Court (Judge Hosack) entered its Order for Remand in Case No. CV-00-246 (1) setting aside the 1999 Order, (2) remanding to the Board for rehearing the Grennay Special Notice Permit Application and (3) ordering Kootenai County to pay Petitioner's costs and fees in the total sum of \$5,135.47. Krasnec is now appealing the Board's latest variance approval.

II. STANDARD OF REVIEW

A variance request, like a rezoning request, focuses upon a specific parcel of property. *City of Burley v. McCaslin Lumber Co*, 107 Idaho 906, 693 P.2d 1108 (Ct.App. 1984). It invokes a quasi-judicial power. *Id.* Moreover, a variance request contemplates no modification of the zoning ordinance. It is governed strictly by existing ordinance requirements. *Id.* In reviewing a variance decision, the court's function is to "determine whether the zoning board's findings are supported by substantial evidence and, if so, whether the board's conclusions properly apply the zoning ordinance to the facts as found." *See id.* at p. 909. The reviewing court must limit its review to the factual record compiled in proceedings before the zoning board. *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). Most specifically, "The Court

shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” I.C. § 67-5279(1). “As administrative bodies having expertise in the zoning problems of their jurisdiction, their actions are presumptively valid.” *Gordon Paving Co. v. Blaine Co. Bd. Of Comm’r.*, 98 Idaho 730, 731, 572 P.2d 164, 165 (1977).

III. ANALYSIS

The main issue on appeal is whether the Board, in approving the Variance Order, acted in violation of I.C. § 67-6516, which requires a showing of (1) undue hardship because of characteristics of the site and (2) that the variance is not in conflict with the public interest. I.C. § 67-6516 Variance-Definition-Application-Notice-Hearing states:

Each governing board shall provide, as part of the zoning ordinance, for the processing of applications for variance permits. A variance is a modification of the bulk and placement requirements of the ordinance as to lot size, lot coverage, width, depth, front yard, side yard, rear yard, setbacks, parking space, height of buildings, or other ordinance provision affecting the size or shape of a structure or the placement of the structure upon lots, or the size of lots. A variance shall not be considered a right or special privilege, but may be granted to an applicant only upon a showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest. Prior to granting a variance, notice and an opportunity to be heard shall be provided to property owners adjoining the parcel under consideration.

I.C. 67-6516. Krasnec claims that the Board failed to base its decision on characteristics of the site that made issuance of the variance necessary to relieve Grennay of an undue hardship.

In order to determine whether the Board based its decision on characteristics of the site, this Court must limit its review of the facts to the factual record compiled in proceedings before the zoning board. In the Board’s Findings of Fact, Conclusions of Law, and Recommended Conditions of Approval, the Board found that the granting of Grennay’s variance is consistent with Section 30.03, Variances, of the Kootenai County Zoning Ordinance and I.C. § 67-6516. In particular, the Board found that:

- 5.1 The undue hardship is in the reason brought forth in the application. In order to meet the requirements of an Accessory Dwelling Unit the structure would be required to be torn down or moved in order to meet a setback that was imposed long after the structure was built. Additionally, the site has physical constraints with slope and erodability of soils, which would make re-location of the structure an unnecessary and undue hardship.
- 5.2 The granting of this permit does not confer any right or special privilege because it is based upon a showing of undue hardship due to site constraints.
- 5.3 The neighborhood response was one in support and one against. It has not been shown to be detrimental to the public or the neighborhood.
- 5.4 The requested variance conforms to Kootenai County zoning Ordinance Section 30.03 and I.C. § 67-6516 because it presents no conflict with public interest, but rather with a private interest, and the requested variance is the minimum necessary to accommodate the proposed use.

Board's Findings of Fact, Conclusions of Law, and Recommended Conditions of Approval, Agency Record Vol. I, p. 84. Kootenai County Zoning Ordinance § 30.03 states:

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.

No nonconforming use of neighboring land, structures, or buildings in the same zone, and no permitted or nonconforming use of lands, structures, or buildings, in other zones shall be considered grounds for the issuance of a Variance.

Kootenai County Zoning Ordinance § 30.03. Thus, the Board found that an undue hardship exists because of the costs associated with moving the cabin into compliance with the 10-foot setback and that the property contains physical restraints such as slope and soil erodability that are unique to the characteristics of the site. Krasnec's attorney at oral argument stated "There is no support for the findings of site problems," by simply arguing that since a 3,000 square foot house was built on the land there must be no site problems. The Court disagrees, and holds the finding of site problems is supported by the record. The Order states the area has a 5-30% slope, the hazard of erosion is "very high" and other reasons are given. Board's Findings of Fact,

Conclusions of law, and Recommended Conditions of Approval, Agency Record, Vol. I., p. 81, §2.06.

Also, the board found no public interest would be harmed by the issuance of the Variance. That finding is completely uncontradicted by Krasnec. These findings were all made in the framework of I.C. § 67-6516 and K.C.Z.O. § 30.03.

Krasnec argues that there are no peculiar circumstances of Grennay's site that warrant a variance. Krasnec argues that this case is similar to *City of Burley v. McCaslin Lumber Co*, 107 Idaho 906, 693 P.2d 1108 (Ct.App. 1984). In *City of Burley*, the zoning commission issued a variance to the owner of a duplex who had expanded the duplex into a triplex. The zoning ordinances forbade a triplex structure on the size of the owner's lot. The zoning commission had based its decision on the owner's testimony that the conversion of the duplex into a triplex was necessary to justify the expense of remodeling. The district judge upheld the decision and the case was appealed to the Idaho Court of Appeals. The Court of Appeals held the variance had been given in error because the ordinance explicitly requires that any "special circumstances ... or conditions" creating the need for a variance must be "peculiar" to the property and not applicable "generally to land or buildings in the neighborhood." *See id.* p. 910. Krasnec would have this Court apply the same reasoning and arrive at the outcome that the Board failed to satisfy the requirement of finding an undue hardship due to the characteristics of the site, and that the variance was erroneously issued.

Krasnec's position fails for three reasons. First, the *City of Burley* case dealt with a more comprehensive ordinance than the one in Kootenai County. The Kootenai County Ordinance repeats the requirements of I.C. § 67-6516, with the one added item that variances issued in for other buildings, zones or neighboring land shall not be considered grounds for the issuance of a

variance. The ordinance in the *City of Burley* has the additional requirement that the condition creating the need for a variance must be peculiar to the property and not applicable generally to land or buildings in the neighborhood. Second, the Board specifically made note of the undue hardship created if the cabin must be moved and found that the particular site or property had unique characteristics that create the undue hardship i.e. slope of the property and erodable nature of the property's soil. The Board also found that the general public would not be harmed by the issuance of the variance. Third, the circumstances surrounding the issuance of the variance do not affect the validity of the variance. Understandably Krasnec is upset that Grennay's new house obstructs his view of the lake. Krasnec is probably upset that Grennay built his new house knowing that once the house was completed and Grennay began to occupy the new house, the cabin would be in violation of zoning ordinances. It is probably difficult for Krasnec to accept that Grennay was issued the variance allowing the cabin to qualify as an accessory living unit. However, these issues do not defeat the fact that the Board found that Grennay's property had special circumstances that qualify it for a variance. The requirements of I.C. § 67-6516 have been met and the Board's issuance of the variance must be upheld.

Additionally, neither party has addressed I.C. § 67-5279(4), which this Court finds applicable and yet another reason the Board must be affirmed under this Court's scope of review. Idaho Code § 67-5279(4) states that the "agency action shall be affirmed unless substantial rights of the appellant (Krasnec) have been prejudiced." This Court finds no prejudice at all to Krasnec. Grennay's old cabin was built before the 10-foot setback was imposed. Krasnec appeals because he is upset that Grennay's new structure impairs Krasnec's view. Petitioner's Brief, p.11. Just because the old cabin now becomes an uninhabitable (per Panhandle Health due

to no kitchen) Accessory Living Unit, no right arises for Krasnec to attack the new structure based on the changed classification of the old structure. There is simply no prejudice to Krasnec.

The last argument Krasnec puts forth is that the order in which Grennay obtained his variance for the accessory living unit precludes Grennay from obtaining the ordinance. This is because the ordinance language contemplates a first structure being in place before the permit for the second structure may be issued. Krasnec fails to cite a single source in support of this proposition. While it makes intuitive sense to apply for a second permit after the first structure is built, the Board has the discretion to issue a variance, even if the variance covers a structure (like Grennay's cabin) that is in violation of the ordinance before a permit is sought. This takes us back to the I.C. § 67-6516 analysis.

Krasnec has requested attorney fees and costs pursuant to I.C. §§ 12-117, 12-120, 12-121 and 12-123. Krasnec has not prevailed and the Board did not act without a reasonable basis in fact or law, nor was the Board frivolous. Attorney fees are denied.

IV. CONCLUSION AND ORDER

IT IS HEREBY ORDERED the requirements of I.C. § 67-6516 have been met, the Board's decision granting a Variance for an Accessory Living Unit is **AFFIRMED**. Costs to the Respondents. Krasnec's request for attorney fees is **DENIED**.

Entered this _____ day of November, 2002.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 13th day of November, 2002, a true copy of the foregoing was faxed to each of the following:

Ronald L. Landeck
John A. Cafferty

Fax 208-883-4593
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Deputy Clerk