Bar News - June 21, 2013

Municipal & Governmental Law: Beware the Variance: Five Useful Decisions

By: Joshua M. Pantesco

You get a call from Kelly Culvert, who was recently appointed to the local zoning board of adjustment. She asks you how she should prepare for the legal aspects of her new position.

"Congratulations," you say, "but beware the variance application!" You explain just how difficult it can be to apply the abstract language of the variance standard to real-life development proposals. And the standard is complex: It consists of five distinct, yet interrelated, legal tests.

Kelly is undaunted, so you lighten up. "The State Legislature made your job easier in 2009," you tell her. As amended, RSA 674:33, I(b) establishes a single "unnecessary hardship" test that applies to both "use" and "area" variances. You advise her to read the statutory text first, and to ignore the old "area" variance standard from *Boccia v. Town of Portsmouth*.

"A book containing every variance decision ever issued by the New Hampshire Supreme Court would be more thrilling than *The Da Vinci Code*," you say. "I would buy a copy for everyone on my Christmas list. But since you have time for only five..."

The Five-Part Variance Test

1. The variance will not be contrary to the public interest.

2. Owing to special conditions, a literal enforcement of the ordinance will result in unnecessary hardship.

3. The spirit of the ordinance will be observed.

4. Substantial justice will be done.

5. The variance would not diminish the value of surrounding properties.

*Note that the statute requires all of the criteria to be satisfied; thus, if the applicant fails to satisfy any one of them, the variance cannot be granted.

1. *Simplex v. Newington* *is a good place to start*. The "unnecessary hardship" prong of the variance standard is met if the applicant meets either the test set forth in *Simplex*, or the far more exacting test that was in place before *Simplex*. *Simplex* will control the "unnecessary hardship" analysis in the vast majority of variance applications. The pre-*Simplex* standard, as articulated in the *Governor's Island* decision, is exceedingly difficult to meet, and will apply only where there is a fair and substantial relationship between the purpose of the zoning restriction and its

application to the property, but its impact on the property is so severe that it constitutes an unconstitutional "taking."

The *Simplex* "unnecessary hardship" standard is a two-pronged test in which both prongs hinge on the "special conditions of the property." The second prong, known as the "fair and substantial relationship" test, is met if the property's special conditions create a situation in which the regulation as applied to the property does not achieve the result the regulation was designed to achieve.

2. ***Harrington v. Warner*** features a lucid discussion of the "reasonable use" and "special conditions" aspects of the Simplex test. According to the Harrington court, "special conditions" exist if the property is "burdened by the zoning restriction in a manner that is distinct from other similarly situated property... the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district."

In other words, the "reasonable use" question is whether the development proposal – which is presumed to be unreasonable, because it violates a specific zoning regulation – is reasonable due to the property's special conditions.

ZBA members often miss this key concept. Every variance application involves a development proposal that violates the strict letter of the zoning ordinance: That is why the developer is applying for a variance in the first place. A variance should never be denied simply because the proposal conflicts with the ordinance.

3. ***Malachy Glen Associates v. Chichester*** best illustrates the "substantial justice" prong. There, the Supreme Court said there are two questions to ask in determining this criterion. First, if the variance is denied, would the gain to the general public outweigh the loss to the individual? Second, is the proposed development consistent with the area's present use?

4. ***Chester Rod & Gun Club v. Chester*** highlights the significant overlap between the "public interest" and the "spirit of the ordinance" prongs of the analysis.

"[T]o be contrary to the public interest, the variance must unduly, and in a marked degree, conflict with the ordinance such that it violates the ordinance's basic zoning objectives." Those "basic objectives" are to maintain the essential character of the locality, and to promote public health, safety, and welfare. These tests are thus fused in the sense that one requires proof of the other – if a variance is against the "spirit of the ordinance," because it alters the neighborhood's essential character or detracts from public health, safety, or welfare, then it will be against the public interest.

5. ***Bacon v. Enfield*** teaches the important lesson that a variance application should not be considered in isolation. Even though a single non-conforming use might not have a meaningful impact on the neighborhood, "the cumulative impact of many such projects might well be significant." In other words, zoning boards should think about every variance decision in terms of setting a precedent: How will the neighborhood be impacted if every similarly-situated applicant were to receive the same variance?

“Thanks – any last words of advice?” Kelly asks.

“Bring a comfy chair from home,” you reply. “There are many long nights in your future.”

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