

Boccia v. Portsmouth

(opinion by Galway, joined by Broderick, Dalianis, and Duggan)

Good morning, I think:

Call me prescient. When the Supreme Court issued its complex Bacon v. Enfield decision in January, I suggested that it could be foreshadowing the Court's future direction in distinguishing between use and area variances. I also suggested that the imminent appointment of Judge Galway to the Court could influence the Court's treatment of variances. Guess what?

In this long but relatively clear opinion, the Court establishes separate tests for determining hardship for use vs. area variances.

The facts: A property owner in Portsmouth sought to develop a 100-unit hotel on his property. After a complex procedural history that involved a petitioned zoning change (denied by the City, but then granted by the court), the property owner applied for six variances from dimensional standards of the zoning ordinance--all dealing with setback requirements. The ZBA found that hardship had been demonstrated and that the other criteria for a variance had also been shown, and thus granted the variances. Abutters appealed. The superior court demanded a more complete analysis and remanded; the ZBA complied, applied the Simplex standard for hardship, and reaffirmed its earlier decision; abutters appealed again. The superior court upheld the six variances. Abutters appealed.

The Supreme Court said:

"Here, the [superior] court upheld the ZBA's finding that the use of the property as a 100-room hotel was reasonable, given the unique setting of the property in its environment. In so doing, the court applied the Simplex test for unnecessary hardship to an area variance. The question remains, however, whether this Simplex test governs the unnecessary hardship prong when seeking an area variance. We do not believe it does."

Having already reviewed how it has looked upon area variances in the past, and especially focusing on Duggan's special concurrence in Bacon, the Court concluded:

"...we believe that distinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met."

Drawing on other jurisdictions, the Court developed the following two-prong test for finding hardship in area variances:

- (1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and
- (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

In applying the first prong, the Court said that the owner does not need to establish that without the variance the property would be valueless--rather, that practical considerations make it difficult or impossible to implement a permitted use, given the special conditions of the property. In the instant case, the Court found that this prong had been met by the developer, owing to the configuration of the property and the presence of wetlands.

The second prong, the Court explained, calls for an examination of other reasonably feasible alternatives. The Court clearly stated that the developer's financial considerations do indeed become part of the calculus of what is reasonable. Undue financial burdens should not be imposed upon a landowner, so the relative expense of alternatives must be examined. The Court found that the record in the instant case was insufficient to determine if this prong had been met, and remanded for further proceedings.

Some thoughts:

This is a watershed case, and we will be discussing it for years to come. Take the time to read through the opinion and come to your own conclusions about its practical implications. My feeling is that although the first prong of the new area variance hardship test is legally thorny (exactly what constitutes "special conditions of the property"?), the second prong will be most problematic for zoning boards to apply. Each request for an area variance will have the potential to result in a fishing expedition, as angry abutters hire experts to develop "reasonable" alternatives to counter the "reasonable" proposal of the applicant. In the end, it seems that the side with the greater resources (meaning the capacity to hire the best experts) will win out. Perhaps that's no different than how things already happen.

A question that remains open is how to assess the use proposed by the applicant in light of the second prong of the area variance hardship test. In the Boccia case, the proposal was for a 100-unit hotel. The second prong identifies "the benefit sought by the applicant" as the measure of reasonableness—does this mean that the ZBA should be looking at all hotel alternatives, or just 100-unit hotel alternatives? Reading between the lines, my feeling is that the Court would prefer to start with 100-unit alternatives, but then look at others and review the financial impact. The test would be something like this: can you get the applicant an approximation of the specific use that's proposed (rather than the general use allowed) without imposing an "undue" financial burden.

Also, in this case, the Court took pains to remind the reader that hardship is only one of five parts of the variance consideration. In this case, however, the lower court had already found that the other four parts of the variance test (which are not different for use or area variances) had been met. In Simplex, the ZBA had found against the applicant on several of the hardship criteria, but weirdly enough, only the hardship criterion had been appealed.

Finally, remember the planning board. Even with the grant of six area variances for this use it's conceivable that the planning board, in conducting site plan review, could find that the site will not safely support a 100-unit hotel. Who knows, we may be reading another court opinion on this proposal again in a few years.

Ben

~~~~~  
Benjamin D. Frost, AICP, Senior Planner  
NH Office of Energy & Planning  
57 Regional Drive, Concord, NH 03301  
Voice: 603-271-2155 | Fax: 603-271-2615  
[ben.frost@nh.gov](mailto:ben.frost@nh.gov) | [www.nh.gov/oep](http://www.nh.gov/oep)