

CASE REVIEW – HARBORSIDE ASSOCIATES, L.P. V. PARADE RESIDENCE HOTEL

by Tim Corwin

On September 22, 2011, the Supreme Court issued its opinion in *Harborside Associates, L.P. v Parade Residence Hotel, LLC*, ___ N.H. ___ (No. 2010-782) wherein the Court, for nearly the first time, examines a variance case applying the new hardship standard codified under SB 147. The Court also provides a useful discussion of the “spirit of the ordinance”, “public interest”, and “substantial justice” criteria.

In *Harborside, Parade Residence Hotel* (“**Parade**”) obtained variances from the Portsmouth Zoning Board of Adjustment to install two parapet and two marquee signs on its hotel and conference center. Neither type of sign is permitted in the zoning district in which Parade’s hotel is located. On appeal, the trial court upheld the ZBA’s grant of a variance for the marquee signs. The trial court, however, reversed the parapet sign variances on the basis that “[t]he only apparent benefit to the public” from having the parapet signs installed “would be an ability to identify [Parade’s] property from far away.” This purpose, the trial court stated, “does not outweigh the clear provision of the ordinance.” Both parties appealed to the Supreme Court seeking a partial reversal of the trial court’s decision.

In analyzing the trial court’s reversal of the parapet sign variances, the Court interpreted the trial court’s ruling that “[t]he only apparent benefit to the public would be an ability to identify [Parade’s] property from far away; however that purpose does not outweigh the clear provision of the ordinance . . .” to mean that the trial court had found that the parapet variances do not meet the “spirit of the ordinance”, “public interest”, and “substantial justice” criteria.

The Court noted that for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance’s “basic zoning objectives,” and that there are two methods for ascertaining whether granting a variance would do this. One way is to examine whether granting the variance would “alter the essential character of the neighborhood,” and the other “is to examine whether granting the variance would threaten the public health, safety or welfare.” The trial court, however, erred by employing the wrong test: eschewing the “essential character of the neighborhood” and “threat to public safety” analysis, the trial court instead examined whether allowing the signs would **serve** the public interest and weighed that against the “clear provision of the zoning ordinance.”

The Court also noted that weighing the “benefit to the public” of granting the variance against the “clear provision of the zoning ordinance” is equally inappropriate when evaluating whether the variance meets the “substantial justice” criteria. Citing *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102 (2007), the Court ruled that the trial court erred in not analyzing the “substantial justice” criteria on the basis of “whether the general public stood to gain from a denial of the variance.”

Turning its attention to the marquee sign variances, the Supreme Court considered Harborside’s argument that both the ZBA and trial court erred by relying upon the size of Parade’s building to determine whether Parade’s property has “special conditions.” Relying upon the concurrence to *Bacon v. Town of Enfield*, 150 N.H. 468 (2004), which stated that a homeowner could meet the “special conditions” part of the unnecessary hardship test only by showing that her property was unique in its setting, not by showing that the shed for which she sought a variance to build would be unique in its setting, Harborside argued that the size of the building is not a relevant factor for unnecessary hardship.

The Court disagreed holding that the ZBA and trial court did not err by focusing upon whether the size of the building upon which the sign is proposed to be installed constitutes “special conditions.” The Court distinguished Parade’s variance request from that at issue in *Bacon* in that Parade was not attempting to meet the “special conditions” test by showing that its signs would be unique in their settings, but that its property – the hotel and conference center – has unique characteristics that make the signs themselves a reasonable use of the property. (Curiously, it does not appear that Harborside argued or that the Court considered whether the building at issue, which was only recently constructed, constituted a self-created hardship.)

The Court also rejected Harborside’s contention that the ZBA erred by finding unnecessary hardship because Parade failed to prove that “the larger marquee signs are necessary in order to operate its hotel.” To establish unnecessary hardship under the first definition set forth in RSA 674:33, I(b)(5), Parade merely had to show that its proposed signs were a “reasonable use” of the property, given its special conditions. See RSA 674:33, I(b)(5)(A). The Court ruled that Parade did not have to demonstrate that its proposed signs were “necessary” to its hotel operation.