

Hey sports fans:

Now that the Pats and St. Belichick are champions again, we can focus on more mundane matters. And I don't mean spring training.

Last Friday, the NH Supreme Court handed down a deliciously complex opinion in *Bacon v. Enfield* (links below) that addresses (though does not necessarily clarify) some of the aspects of hardship delineated three years ago in *Simplex v. Newington*. Here, the court affirmed a superior court decision upholding the denial of a variance by the Enfield ZBA. The facts, briefly, are these: Bacon owned a shorefront home. The structure was legally non-conforming, as it did not comply a 50-foot shoreland setback enacted subsequent to the construction of the building. Bacon hired a contractor to install a propane boiler and an attached shed to contain it--she was converting from wood and electric heat. The shed was on the shore side of the house. Neighbors complained after the construction was complete, and the application for a variance (presumably necessary before she could get a building permit for what she had already had done) was the result. The ZBA denied the variance, finding with a touch of irony that it "(1) did not meet the "current criterion of hardship"; (2) violated the spirit of the zoning ordinance; and (3) was not in the public interest." (ironic emphasis added). The ZBA denied a request for rehearing. Bacon appealed.

The superior court upheld the ZBA's decision, finding that there were reasonable alternatives to the use proposed by Bacon, and that there was a clear relationship between the purposes of the zoning ordinance generally and the specific 50-foot setback. The court said that granting the variance "would have some effect on the public rights of others in that it increases congestion along the shoreline and reduces minimally the filtration of runoff into the lake." (Remember that lack of impact upon the public and private rights of others is one of the prongs of the hardship criterion in *Simplex*.) The court also determined that the variance requested was not within the spirit of the ordinance, and that granting it would not do substantial justice (it's not clear that the ZBA decided that last point--substantial justice--so I don't know why the superior court addressed it).

Now we come to the good part--the supreme court's handling of this case. Writing for the court, Chief Justice Broderick gave great deference to the superior court and focused solely on the court's treatment of the "spirit of the ordinance." To quote: "...the fifty-foot setback restriction addresses not just the potential peril of construction on a single lot, but also the threat posed by overdevelopment in general. While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance. . . . We recognize that the particular characteristics of the shed at issue here could very easily cause reasonable minds to differ with regard to the level of congestion or overdevelopment engendered by it. Given the evidence before the court concerning further congestion and overdevelopment, the absence of contrary evidence on Bacon's part, and the level of deference in our standard of review to both the factual findings of the ZBA and the decision of the trial court, we cannot find that the trial court erred in concluding that the ZBA "acted reasonabl[y] and lawfully" in denying the variance." Having come to this conclusion with regard to the spirit of the ordinance, Broderick chose not to address the other variance criteria.

The trouble with Broderick's opinion is that no other justices agreed with him. Duggan wrote a concurrence, with which Dalianis joined, coming to the same conclusion but for different reasons. Nadeau wrote a dissent, with which Brock (sitting by special appointment) joined. This decision looks like one of the characteristically split opinions of the US supreme court, in miniature.

The Duggan Concurrence.

Although agreeing with Broderick's conclusion, Justice Duggan preferred to focus on the hardship criterion of variances. He did so for reasons that most ZBA members will appreciate: to give you guidance. Duggan noted that hardship is the highest hurdle to surmount in a variance request, and that as a result of Simplex there was confusion. He said, "because Simplex recently changed the unnecessary hardship standard, we believe that analysis of the unnecessary hardship factor in this case will provide guidance to trial courts and zoning boards when reviewing requests for variances." Duggan engaged in a fairly wide-ranging and extensively researched opinion, citing sources from other jurisdictions and academia. Despite the court's recent contrary treatment of a variance in *Rancourt v. Manchester*, Duggan felt that "Even under the Simplex standard, merely demonstrating that a proposed use is a "reasonable use" is insufficient to override a zoning ordinance. Such a broad reading of Simplex would undermine the power of local communities to regulate land use. Variances are, and remain, the exception to otherwise valid land use regulations." He then suggested that variance analyses should reflect the kinds of considerations used when examining whether or not there has been a constitutional taking of private property (under either the NH or US Constitutions). Finally, and perhaps most importantly, he concludes that "use" and "area/dimensional" variances should be treated differently. While the "use" variance goes to the heart of the purpose of zoning--the segregation of land according to use--"area" variances instead deal with matters that are to be regarded as "incidental limitations to a permitted use..." Merging these two lines of thought, he concluded "in considering whether to grant an area variance, courts and zoning boards must balance the financial burden on the landowner, considering the relative expense of available alternatives, against the other factors enumerated here and in Simplex."

Regarding the Simplex hardship prong that addresses the unique setting of the property in its environment, Duggan called for a comparison of the subject property to others similarly situated--which is really a pre-Simplex hardship test. He cites *Rancourt* as standing for this proposition (a variance for horses in a residential zone was OK because of the country setting, the unusual size of the lot, and the existence of a thick wooded buffer).

In conclusion, Duggan found that Bacon had failed to demonstrate unnecessary hardship. He suggested that there were other reasonable alternatives to the proposal (this too, harkens back to a pre-Simplex analysis), finding that the proposal was a request of convenience, not one of necessity. Finally, he felt that there was nothing unique about Bacon's property, in relation to other lakeside homes in the same district--they were similarly burdened by the setback requirement.

But remember, joining with Duggan was only Dalianis. Now for the dissent...

Nadeau's Dissent.

The court's Simplex opinion, which was unanimously decided (Brock, Broderick, Dalianis, and Horton (upon whose *Grey Rocks* dissent the Simplex opinion was largely based)), was written by Justice Nadeau. You may recall that the impact of the decision was to effectively recast how ZBAs were supposed to deal with the hardship question in variances (the other criteria were not addressed in Simplex). The bottom line of Simplex can be found in this quotation from it, appearing in Nadeau's instant dissent: "...there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions." And so, the pendulum swung back toward property rights.

Here, Nadeau made fairly quick work in dismissing Broderick's opinion, suggesting that the "public interests" would only be affected by the proposal in a "de minimis" manner that was not worthy of the court's consideration. He then focused the bulk of his energy on Duggan's concurrence. The Simplex hardship test contains the following prong: [the variance should be granted if] "a zoning restriction as

applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment." In the current case, Nadeau stated that after Simplex, a comparison of "similarly situated properties" was no longer necessary. Rather, only those considerations that pertain to the property itself should be entertained. In support of this, Nadeau cites the Rancourt case, stating that among the factual findings--"country setting, unusually large lot size, the configuration of the lot, and thick wooded buffer"--only the lot size dealt with a comparison with other properties. [Note that Nadeau only explicitly addresses one prong of the hardship test--uniqueness--and purposely leaves the other two. Given the language of his quick dismissal of Broderick's opinion, however, I believe that Nadeau would have found the proposal to be consistent with the other two prongs: no fair and substantial relationship between the ordinance and the specific restriction, and no injury to the private or public rights of others.]

So what are we to make of this case? It's hard to say, and I'm reminded of law school analyses of complex opinions that center upon figuring out who carries the swing vote. Where's the swing vote here? It could be suggested that Broderick is the swing vote, but there's an untold complexity--not so much in this case, but in the court's evolving views on hardship: the court's opinion in Simplex overturned a decision of superior court judge Richard Galway, who has just been nominated to the supreme court by Governor Benson. My guess is that if Galway is appointed, he could provide the vote that swings the court's pendulum back again. Time will tell.

I'm ready for some baseball. How about you?

Ben

[Bacon v. Enfield](#)

[Rancourt v. Manchester](#)

[Simplex v. Newington](#)

~~~~~  
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)

My own take on the decision ...

I was fascinated by the detailed discussion of use vs area variances in the concurring opinion. It seemed to be almost completely peripheral to the bottom line of the concurrence. After all, in states that treat area variances differently, they get a more lenient standard (typically the deliciously vague "practical difficulties"). If Duggan and Dalianis had felt that the variance should have been granted, then an area variance standard would have given them something to hang that opinion on; but their conclusion seems to be, "Even if we had a weaker standard for area variances, this case wouldn't satisfy it." But nobody had even raised the question of area vs use variances, so why bring the issue up at all? Does this possibly foreshadow an intention to try to insert area variances in New Hampshire case law when a more suitable case comes along?

Aside from that interesting digression, the concurrence seems to be a perfectly reasonable analysis (i.e., it agrees with the way that I've interpreted the variance standard since *Simplex* :-). It basically says, "Even in the *Simplex* standard, there has to be \*something\* unique about the property to justify the variance." (I'm a simple-minded sort, and like to have simple formulas to remember these standards. The one I've been using is that the old hardship standard was "The property is uniquely unsuitable for any permitted use"; the *Simplex* hardship standard is "the property is uniquely \*suitable\* for some un-permitted use." That seems to cover the essence of *Rancourt*, anyways.)

As for the dissent, you left out the interesting phrase from the first sentence, "we believe that the special concurrence has misinterpreted the unnecessary hardship test." Then we get the fascinating argument, "Each piece of real property possesses characteristics which contribute to its uniqueness. To hold otherwise would be contrary to our long-standing justification for ordering the specific performance of land contracts. ... The fact that other properties in the zoning district contain some or even all of the same characteristics does not negate a particular property uniqueness." I.e., every property is unique in some way or other, so the phrase "considering the property's unique setting in its environment" is to be reduced to basically meaningless dicta.

And as for the primary opinion -- who in the world decides a variance on "spirit of the ordinance"? Is it possible to read that opinion as anything other than an attempt to avoid coming down on either side in the dispute between the concurrence, which seems to indicate a distinct uneasiness with the potential excesses of the *Simplex* standard, and the dissent, which seems to say, "Yes, the *Simplex* decision is a radical departure, and we meant every word of it"?

I'm looking forward to the future innings of this ball game!

Neil Faiman  
Chairperson, Wilton ZBA  
Member, Wilton Planning Board

Hello, again:

Tom Johnson, Durham's CEO, has asked me to clarify how this case impacts upon ZBA decision making. I don't think I can, because I don't think it does, yet. Rather, I see Bacon as a possible foreshadowing of where the NH Supreme Court may be going in the future--possibly distinguishing between use and area variances, possibly tightening up on hardship again in the wake of Simplex. To an extent, I agree with Neil Faiman's exasperated comment about zoning boards never deciding cases on the "spirit of the ordinance" criterion of variances, but it is part of the law, nonetheless. Perhaps Broderick is staking out some ground there, too.

Neil also pointed out the comment in the dissent likening the uniqueness prong of the hardship criterion to court orders for specific performance of land contracts. When I first read that (and every time since), I was puzzled because I remember earlier cases in which the court expressly dismissed the application of notions of contract law to zoning matters. (See, for example, [AWL Power v. Rochester](#), especially the paragraph discussing "substantial construction". But there may be some notions of contract law that are applicable to zoning actions--at least that's what the dissent says.

I suppose the best advice I can give is not to worry over this case, as its jumble of opinions doesn't help us a great deal. That said, Broderick's opinion does carry weight--not just because he's the Chief, but because it is presented as the "opinion of the court". In a recent US Supreme Court case ("Pap's Kandyland v. Erie (PA)"), the plaintiff argued--among many other things--that because the US Supreme Court's opinions on local regulation of adult businesses was confused by so many opinions, concurrences, and dissents that no real opinion could be found, and should be ignored. As you can imagine, the US Supreme Court, not known for any lack of ego, took a very dim view of this position.

I repeat the conclusion of my first comments on this case: time will tell. That's a hopeful statement.

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 | www.nh.gov/oep