

Rancourt v. City of Manchester

A simple little variance case to start the new year: [Rancourt v. City of Manchester](#).

Careful, there's more here than meets the eye ...

In 2000, the Gately's bought a three (+/-) acre lot in Manchester, after correctly determining that stabling horses was a permitted use in the relevant district. In 2001, they contracted to build a single family house, then sought a permit to build a barn to stable two horses. To their surprise, they were informed that the city had recently amended its zoning ordinance to prohibit livestock (including horses) in the district. They filed for a variance, which the ZBA granted; Rancourt, an abutter, appealed to the superior court, and the court upheld the grant of variance. Rancourt appealed to the supreme court.

The supreme court recounted the standards that must be used by the superior court and by itself. The superior court should uphold the ZBA's decision unless it finds that the ZBA made errors of law or that the ZBA's decision was unreasonable based upon a balance of probabilities. Likewise, the supreme court will not reverse a superior court decision unless it finds that the court's decision is unsupported by evidence on the record or is legally erroneous. None of that happened here, and the supreme court upheld the superior court's decision, and recounted some of the evidence that supported the ZBA's decision.

When going over the standard for a variance, the supreme court recounted its January 2001 decision in *Simplex v. Newington*, in which it altered 25 years of jurisprudence by changing the standard by which zoning boards are to judge variance requests. In *Simplex*, the court recited the variance criteria thus:

According to RSA 674:33, I(b), a zoning board of adjustment may authorize a variance if the following conditions are met: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; and (4) substantial justice is done. See RSA 674:33 (1996 & Supp. 2000). In addition, the board may not grant a variance if it diminishes the value of surrounding properties. See *Ryan v. City of Manchester Zoning Board*, 123 NH 170, 173, 459 A.2d 244, 245 (1983).

In *Rancourt*, however, this is how the court looked at the criteria:

RSA 674:33, I(b) (1996) authorizes a zoning board of adjustment to grant a variance if the following conditions are met: (1) the variance will not be "contrary to the public interest"; (2) "special conditions" exist such that "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship"; (3) "the spirit of the ordinance shall be observed"; and (4) "substantial justice" will be done.

I know this is like one of those Sunday newspaper comics puzzles, but can you spot the difference? In *Rancourt*, the supreme court has omitted the variance criterion dealing with diminution of surrounding property values. Either the court made a mistake, or it has turned its back on its own 50-year-old standard (the "diminution of values" criterion originally appeared in *Gelinas v. Portsmouth*, 97 NH 248 (1952)). An alternative explanation, and I think a reasonable one, is that the court is simply lumping the diminution criterion into the third prong of the *Simplex* test for hardship, which is as follows (lifted from OSP's Board of Adjustment Handbook):

1)The zoning restriction as applied to the applicant's property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment.

Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district.

(2) No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property.

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or "unnecessary" hardship.

(3) The variance would not injure the public or private rights of others.

This is perhaps similar to a "no harm - no foul" standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance*?

Certainly, if a person uses his/her property to the detriment of a neighbor's property value, then it can be argued that the neighbor's "private rights" have been injured.

Another point of interest in this case is the manner in which the court addressed the first prong of the Simplex hardship test--the reasonableness of the proposal in light of the unique setting of the property in its environment. Exactly what is meant by this test was fodder for a lot of discussion/debate when Simplex was decided. The court didn't help much by way of explanation, except to note in Simplex that the surrounding neighborhood had changed to such a degree that the limitations of the zoning ordinance were overly strict -- i.e., that the requested variance should be granted in that case. It had little to do with the subject property itself. In Rancourt, the supreme court looked at how the property differed from others in the neighborhood (larger, hence could accommodate livestock more readily), and also recounted approvingly the nature of the property where the horses were proposed to be stabled ("thickly wooded buffer"). So it seems that an analysis of "setting of the property in its environment" should entertain considerations both of what the property itself is like, and what's going on in the surrounding neighborhood.

It looks like another interesting year!

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