

Just What is "Unique": The NH Supreme Court's Most Recent Variance Decision

Distributed at the NHMA Law Lecture #1, *Procedural Basics for Planning and Zoning Boards*, Fall 2006

By Christopher L. Boldt, Esq.
Donahue, Tucker, & Ciandella, PLLC
104 Congress Street, Suite 304, Portsmouth, NH 03801
(603) 766-1686
cbold@dtclawyers.com

In the case of [Garrison v. Town of Henniker](#), 154 NH 26 (Docket No. 2005-471, Issued August 2, 2006), the Supreme Court upheld the reversal of variances granted for an explosives plant which was to be located in the middle of 18 lots totaling 1,617 acres - all zoned "rural residential". The applicant had sought use variances to allow the commercial use in the residential zone and to allow the storage and blending of explosive materials where injurious or obnoxious uses are prohibited. After an extensive presentation of the nature of the applicant's business and the site, the ZBA voted 3-2 to grant the variances with two conditions: (1) the 18 lots had to be merged into one; and (2) the variances would terminate if the applicant discontinued the use.

Upon appeal by abutters, the Trial Court reversed finding that the evidence before the ZBA failed to demonstrate unnecessary hardship. In upholding that decision, the Supreme Court agreed with the Trial Court that, while the property was ideal for the applicant's desired use, "the burden must arise from the property and not from the individual plight of the landowner." (Quoting, *Harrington v. Warner*). In discussing the three-prong Simplex standard for unnecessary hardship, the Supreme Court focused on the first prong: that a zoning restriction "interferes with their 'reasonable' use of the property, considering the unique setting of the property in its environment." (emphasis original with citation to *Rancourt v. Manchester*). In doing so, the Court agreed with the Trial Court that the evidence failed to show that the property at issue was different from any other property within the zone.

As a minor "bone" to the applicant, the Supreme Court did agree that *Harrington's* requirement of "dollars and cents" evidence of lack of reasonable return may be met though either lay or expert testimony; but such evidence as presented was not enough to convince the Court that the hardship resulted from the unique setting of the property.

Thus, the Court charged applicants to presenting sufficient evidence to allow the ZBA to determine that the use is reasonable and that the property is unique.