

[Boulders at Strafford, LLC v. Town of Strafford](#)

Plan-link posting and reply June 2006

An interesting new Supremes opinion was released today. The Supremes established a new, weaker "rational basis" test for analyzing land use ordinances under substantive due process. Under the new test, substantive due process requires only that a land use ordinance be rationally related to a legitimate government interest.

The Supremes expressly overruled Metzger, which had applied a balancing test as to whether a land use ordinance unduly restricts fundamental property rights. (Metzger invalidated a frontage requirement as against the right to use and enjoy property, where the landowner had adequate frontage to ensure safe access). The Supremes also expressly stated that land use ordinances do not need to pass a "least restrictive means" analysis. In other words, it doesn't matter if the government objective could be achieved through a much less burdensome approach.

In plain English, the Supremes have made it even easier for land use ordinances to pass due process challenges. Under the Supremes's new analysis, a town could, I think, establish a 1000' building setback from any natural features (forests, fields). The "legitimate government interest" would be aesthetics (the Supremes again expressly approve this as an objective). And setbacks are by definition "rationally related" to protecting the visual feature from which the setback is measured. Not narrowly tailored (if 1000'), but rationally related.

The Supremes take a good amount of bandwidth to chastise the lawyers in the case for mixing up the applicable standards. Apparently the landowner also, for some reason, neglected to make an equal protection challenge, which calls for a higher level of constitutional scrutiny. So what is left is a pure substantive due process case.

For what it's worth, as a person who grew up in New Hampshire, it is remarkable that our Supremes do not find it in their hearts or minds to be more sensitive to property rights. For the land use ordinance drafters on this list, this case is good news.

Jim Dannis

For those who are interested (and it is an interesting opinion), it can be found at <http://www.courts.state.nh.us/supreme/opinions/2006/bould062.pdf>. 

Every so often there is an earthquake in New Hampshire. Yesterday the earth shook, legally speaking.

Personally, I have never liked the court's decision in Metzger (I found it inconsistent with many other decisions by the court), so I do like this decision and I'm happy that Metzger has been defenestrated. But Jim's concern is well-taken; the new standard could be abused by overzealous planning boards and towns—so be careful. It's also possible to come up with examples of how the "rational relationship" standard could be stretched, but remember that it is a standard that has been around for a long time, and supports a lot of governmental action at both the federal and state levels. If there's real concern over how this standard would be use, the better solution is at the state legislative level, rather than anywhere else. Towns use the power given to them by the state.

Ben Frost