

COURT DEFINES "PUBLIC INTEREST"

[Chester Rod and Gun Club, Inc. v. Town of Chester](#), 152 N.H. 577 (2005)

One of the four tests other than "unnecessary hardship" that is applicable to both use and area variances is the requirement that granting the variance "will not be contrary to the public interest." In this decision, the supreme court gave us some guidance about how "public interest" is defined.

As a special meeting in September, 2001 the Chester Town Meeting approved a warrant article to authorize the selectmen to enter into a lease to allow a telecommunications tower to be located on the town's transfer station property. In January, 2003 AT&T Wireless and a tower builder applied for a use variance to construct a 150-foot tower on the Rod and Gun Club's property, which is located in a residential district where telecommunications towers are not a permitted use. Before the ZBA held a hearing on the variance application, AT&T Wireless negotiated a contract with the town to construct a tower at the transfer station. On July 1, 2003 the ZBA heard the variance application submitted by the Rod and Gun Club, and denied the variance. The ZBA's reasons for the denial were as follows:

1. Public Interest: The Board of Selectmen appeared before the ZBA and presented convincing evidence that the public interest of the Town was expressed by the citizens at the Town Meeting when they previously voted to locate a telecommunications facility on the Town Transfer Station property. The Town Warrant and the existence of a lease agreement with the Town for a telecommunications facility are both relevant to the question of public interest. The legislative body of a town is the ultimate law and policy making body and when the citizens vote as a legislative body, they express the public interest of the Town. In light of the co-location requirements of the Ordinance the granting of a variance would frustrate the ability of the Town to fulfill its pending lease agreement for a telecommunications facility on the Town Transfer Station property, and would frustrate the public interest established by the Town Warrant Article.

2. Hardship: The applicant has not shown that the granting of the variance would not injure the public or private rights of others. The Town Warrant and the subsequent lease agreement establish public rights of the Town which will be injured by granting this variance.

The town and AT&T Wireless subsequently sought a variance to build a telecommunications tower on the town's transfer station property which, like the property of the Chester Rod and Gun Club, is located in a residential district. The ZBA granted this variance!

The Chester Rod and Gun Club appealed the denial of its variance to the superior court, which ruled that the ZBA improperly relied upon the warrant article to conclude that granting the variance would be contrary to the public interest and would injure the public rights of others. The superior court reasoned that the town's "contract for the construction of a similar tower on its property is not a basis for the Board finding that it was not in the public interest to grant the variance" to the Rod and Gun Club.

The town appealed to the NH Supreme Court, which began its analysis by noting that the requirement that the variance not be "contrary to the public interest" (an independent constituent of the 5-part variance test) is "coextensive" with the requirement that granting the variance "will not injure the public rights of others" (which is part of the third piece of the Simplex test for "unnecessary hardship" for a use variance (that granting the variance "will not injure the public or private rights of others")). Moreover, both those requirements "are related to the requirement that the variance be consistent with the spirit of the ordinance." The supreme court offered some explanation of these principles by quoting the following text from a well known treatise, Anderson's American Law of Zoning:

The standards which limit the power of administrative boards to vary the application of the zoning regulations in specific cases are intended to provide administrative relief in

individual cases of unnecessary hardship, without injury to the rights of landowners other than the applicant, and without substantial interference with the community's plan for the efficient development of its land. Accordingly, an applicant for a variance must prove not only that a literal application of the ordinance will result in unnecessary hardship . . . , but also that the variance he seeks will not harm landowners in the vicinity of his proposed site, or prevent the accomplishment of the purposes of the zoning scheme. The public interests are protected by standards which prohibit the granting of a variance inconsistent with the purpose and intent of the ordinance, which require that variances be consistent with the spirit of the ordinance, or which permit only variances that are in the public interest.

The court went on to explain that the first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the zoning ordinance itself. As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary to that public interest. Thus, to be contrary to the public interest or injurious to the public rights of others so as to justify the denial of the variance, the variance must unduly, and in a marked degree conflict with the ordinance such that the variance violates the ordinance's basic zoning objectives.

The court then explained that one way to judge whether granting the variance would violate basic zoning objectives is to examine whether the variance would alter the essential character of the neighborhood. This is because the fundamental premise of traditional zoning restrictions is to segregate the land according to uses. Thus, the variance must be denied if the proposed use will alter the essential character of the neighborhood. Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare, because the dominant design of any zoning act is to promote the general welfare.

The court concluded that the ZBA erred by looking to the vote upon the September 2001 warrant article as a declaration of the public interest. The relevant public interest is set forth in the applicable zoning ordinance. The record shows that the purpose of the ordinance creating the residential zone in which the plaintiff's property is located is to "recognize the unique scenic, historic, rural and natural characteristics" of this part of the Town, "while encouraging development . . . in a manner which will protect these important characteristics." Rather than examining whether the variance would unduly conflict with basic zoning objectives by altering the essential character of the neighborhood, or by threatening the public health, safety and welfare, the ZBA relied upon the effect that the variance would have upon the Town's incipient plan to build a telecommunications tower elsewhere. This was also a mistake. Thus, the supreme court agreed with the trial court that the ZBA incorrectly defined the relevant public interest when it denied the variance. However, rather than order the ZBA to issue the variance as the trial court had done, the supreme court remanded the case back to the trial court with instructions that the variance case be sent back to the ZBA for further proceedings so that, presumably, the ZBA could rehear the case using the correct analysis of what constitutes "public interest" and the "public rights of others."

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