Court Establishes New Definition for Variance Hardship

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In a sweeping revision of the unnecessary hardship definition for a zoning variance, the NH Supreme Court has adopted a new hardship standard that is "more considerate of the constitutional right to enjoy property." Simplex Technologies, Inc. v. Town of Newington, (Slip Opinion, January 29, 2001).

Over the years, statutory and case law had established five criteria to be met before a variance from the terms of a zoning ordinance could be granted: 1) denial would result in unnecessary hardship; 2) no diminution in value of surrounding properties would occur; 3) the proposed use would not be contrary to the spirit of the ordinance; 4) granting the variance would benefit the public; and 5) granting the variance would do substantial justice. Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239 (1992); RSA 674:33, I (b).

Unnecessary hardship, the most difficult to meet of the five criteria, was found when "…the deprivation resulting from application of the ordinance [was] so great as to effectively prevent the owner from making any reasonable use of the land." Id.

Now, the unnecessary hardship criterion requires applying a new process of analysis. (The other four criteria remain unchanged). "Henceforth, applicants for a zoning variance may establish unnecessary hardship by proof that: 1) 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; 2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and 3) the variance would not injure the public or private rights of others." Simplex Technologies, Inc. v. Town of Newington, Slip Op., p. 4).

The Court noted that, over the years, few variances had been granted, most likely because of "…our reiterated and restrictive definition of what constitutes an unnecessary hardship[,]" a definition the Court said was inconsistent with its earlier analysis of unnecessary hardship.

The Court based much of its analysis on the balance between constitutionally guaranteed private property rights and the right of municipalities to restrict property use to protect the health, safety and general welfare of their citizens. Until now, as long as there was a rational relationship between the restriction and the legitimate goals the ordinance sought to achieve, the regulation would be upheld. This rational relationship standard is the lowest standard of review for determining the constitutionality of a regulation.

Under the Court's new definition of hardship, more than a rational relationship must exist. Now, a "fair and substantial relationship" is required between the purpose of the regulation and the specific restriction on the property in question. This is known as a "middle tier" standard of review. Not only is this a rather abstract standard for ZBA members (or judges, for that matter) to apply to an application for a variance, this middle tier level of scrutiny means that judicial review of a zoning ordinance no longer begins with a presumption that the ordinance is valid.

It also raises doubt as to whether unnecessary hardship may be found -- and a variance granted -- in instances when application of a regulation would result in no viable economic use of the property, but there has not been a finding of no fair and substantial relationship between the purposes of the ordinance and the specific restriction on the property.

The Simplex decision rests on an earlier ruling in Town of Chesterfield v. Brooks, 126 N.H. 64, (1985). In that case, the town's zoning ordinance required mobile homes to be located on unpaved roads, or set back at least 500 feet from a paved road. The purpose of the ordinance was to preserve the rural character of the town. The mobile home owners claimed they were being discriminated against, and the ordinance was found unconstitutional, not because it sought to protect the town's rural character, but because the way in which it did so violated the mobile home owners' equal protection rights.

The Court said that because zoning ordinances "balance the use and enjoyment of property of some residents against the use and enjoyment of other residents," they are subject to the middle tier equal protection test. Id., p. 603. This standard seemed appropriate in a case where there was an arbitrary distinction made between classes of homeowners -- those owning mobile homes and those owning stick-built homes, regardless of the size or appearance of the homes.

But in the Simplex case, the equal protection test was applied to classes of property owners based on the zoning district in which the property was located -- industrial zone as opposed to commercial zone. Traditionally, these types of cases are challenged under a spot zoning theory, not an equal protection claim. The Simplex decision raises doubts about the validity of the distinction between zoning districts.

For these reasons, sorting out the meaning of this new unnecessary hardship standard may take several years of litigation. However, a few principles should be kept in mind by zoning board members as they consider applications for variances:

1. Consideration should be given to the character of the neighborhood surrounding the parcel for which the variance is sought. Does the zoning ordinance reflect the current character of the neighborhood?
2. Does the regulation interfere with the owner's right to use property as he/she sees fit, as long as that use does not injure the public or private rights of others?

Given that the character of the neighborhood must be taken into account when considering a variance application, it is important for municipalities to continually engage in good planning so that zoning ordinance revisions can occur when appropriate.

Finally, it is interesting to note that the Court did not render a decision on Simplex's request for a variance and, instead, sent the case back to the superior court to determine whether the applicant meets the new definition of unnecessary hardship.

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