

[Leonard Vigeant v. Town of Hudson](#)

Argued: September 23, 2004

Opinion Issued: February 23, 2005

File this opinion under "How could they have known?"

By that comment, I refer to the embattled members of the Hudson ZBA. In 2003, what seems like eons ago in the realm of variances, they denied the variance request that is the subject of this case. Much has changed since then, and I think that it is possible that the Hudson ZBA would have treated its decision differently if its members had had the benefit of the court's Bacon and Boccia wisdom at hand. But they didn't have that benefit.

In this case, the owner desired to construct a 5-unit multi-family housing complex on a 1.6-acre parcel in the Business zone, where multi-family uses are permitted. The lot is long and relatively narrow (770 feet long x 129 feet at its widest) and is generally rectangular in shape. There is a 50-foot road setback on two sides, and a 15-foot road setback on a third side--which gets increased to 50 feet because of a wetland setback. Thus, the building envelope is quite constrained (by my reckoning, it would be about 705 feet x 29 feet at its widest). The ZBA found that the requested variance failed to meet any of the five necessary criteria.

At trial, the judge took a view of the site and ultimately reversed the ZBA's decision, applying the Simplex variance standards. The town appealed, and the Supreme Court affirmed the trial court's reversal of the ZBA decision.

In its opinion here, the Supreme Court reviewed the standards for granting a variance, as well as the recent history of cases ranging from Simplex through Boccia, with special focus on the latter, as that was the case in which the Court established for the first time as law in New Hampshire the concept of a dimensional variance as different from a use variance. Relying on an earlier concurrence (Bacon), the Court said that this differentiation was necessary "[b]ecause the fundamental premise of zoning laws is the segregation of land according to uses" and therefore "use variances pose a greater threat to the integrity of a zoning scheme." On the other hand, "the area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by an ordinance." Because of this perceived need to distinguish between use and area variances, the court established a new standard for area variances. Some have characterized this as a relaxation of the variance standard beyond what even Simplex had done. Until the present case, I was not so sure of that viewpoint. I now believe, based on Vigeant v. Hudson, that the area variance standard is quite a bit lower than that for use variances under Simplex.

When I initially reviewed Boccia, I made the following comments:

"...the question that remains open is how to assess the use proposed by the applicant in light of the second prong of the area variance hardship test. In the Boccia case, the proposal was for a 100-unit hotel. The second prong identifies "the benefit sought by the applicant" as the measure of reasonableness--does this mean that the ZBA should be looking at all hotel alternatives, or just

100-unit hotel alternatives? Reading between the lines, my feeling is that the Court would prefer to start with 100-unit alternatives, but then look at others and review the financial impact. The test would be something like this: can you get the applicant an approximation of the specific use that's proposed (rather than the general use allowed) without imposing an "undue" financial burden."

In *Vigeant*, the Court has answered my question, sort of. Citing *Boccia*, the Court said in *Vigeant* that "the question whether the property can be used differently from what the applicant has proposed is not material. See [*Boccia*] (sixty-room hotel not viable alternative to presented in opposition to applicant's proposed 100-room hotel)." The problem with this citation is that in *Boccia*, the Court NEVER SAID that the 60-room alternative wasn't viable. They only said that it wasn't clear if there were reasonably feasible alternatives. So the Court is making a reference to a passage in *Boccia* that simply doesn't exist in that case. But they can do that. They're the Supreme Court. The fact that the statement was never made upon which they're relying now to substantiate a view doesn't matter. What matters is that it is their view, regardless of the source.

Based upon that new-found view, in this case the Court rejected the notion that less intensive alternatives should be examined. So it would be inappropriate here for the ZBA to have demanded some lesser alternative, such as a 3- or 4-unit housing complex. Assumedly, it also would have been inappropriate for the Portsmouth ZBA to have demanded a 60-unit hotel in place of the applicant's proposed 100-unit hotel.

The trouble I have with this reasoning is that the Court is failing to distinguish between "types" of uses (e.g., multi-family housing, service station, dry cleaner) and "intensity" of uses (e.g., 3-, 4-, or 5-unit multi-family housing complexes; 4, 12, 24 pump service stations; etc.). Using the logic of the Court's opinion here, as long as it's a permitted use, it doesn't really matter what the intensity of it is.

As long as you accept the notion that there should be a difference between use and area variances, I do think that the Court was correct to observe that when considering an area variance, it is assumed that the proposed use is a permitted one (else, there would be a need for a use variance, too), and that such a use must be assumed to be reasonable. To conclude otherwise would defy logic, as the town would not allow unreasonable uses to be listed as permitted in its zoning ordinance. Of course, this gets back to the problem of distinguishing between type and intensity of uses. A 60-unit hotel might be a reasonable alternative in a situation where a 100-unit hotel is not--but how will you know the difference if the zoning ordinance simply allows "hotels"? Therein lies the benefit of dimensional standards as barriers to excessively intensive use of properties.

The hidden message in this opinion, to which the Court gives a number of clues, is that there are other criteria for granting a variance. The real problem with the original decision of the ZBA, apparently, is not that they weren't following the Court's *Boccia* decision (it hadn't been made yet), but that the ZBA did not provide a record of the evidence upon which it relied to find that the other four criteria had not been met. In its glowing recitation of the lower court's proceedings, the Supreme Court quoted the trial court's decision demolishing the ZBA's decision as being "not supported by any evidence." The key, of course, is not to rely only on one of the

criteria when making a decision, but to rely on any that have been met or not met, and to substantiate that decision with findings of fact. Although it is the applicant's burden to prove that the criteria have been met, it is the ZBA's obligation to establish a record upon which a subsequent appeal can be made. Failure to do this adequately leaves you open to challenge and loss at trial.

Finally, although I appreciate Neil Faiman's logic in narrowly interpreting Vigeant so as not to apply to lot sizes, I must disagree as I don't think that such an interpretation is within the spirit of Court's opinion in Vigeant. In both Boccia and Vigeant, the Court interchangeably uses the terms "non-use' variance" and "area variance". I don't think that the mere omission of the word "area" from the quotation from a Missouri case stands as a sufficient basis for excluding lot size ("area") from the definition of "area." This would lead to an even more tortured interpretation than the Court itself arrived at several years ago when it concluded that "frontage" was not a dimensional standard. Therefore, I would urge local ZBA's to apply the Boccia standards to variances for lot sizes, at least until the law changes again.

Speaking of which, the House Municipal and County Government Committee will hold hearings on Friday, March 11 on two bills that would seek to modify the statutory criteria for granting variances. The public is welcome to testify.

HB 359 (Kurk) 9:30 AM Legislative Office Building, Room 301

HB 412 (Sorg) 11:00 AM Legislative Office Building, Room 301

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Benjamin D. Frost, AICP, Senior Planner  
NH Office of Energy & Planning  
57 Regional Drive, Concord, NH 03301  
Voice: 603-271-2155 | Fax: 603-271-2615  
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