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Brandt Development v. Somersworth and the "New" Variance Standard

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New Hampshire Land Surveyors Association Case Summary Presentation:

Brandt Development v. Somersworth and the "New" Variance Standard

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Brandt Development Company of NH, LLC v. City of Somersworth, 162 N.H. 553 (Issued October 12, 2011) – Interpretation of Fisher v. Dover

- The Supreme Court reversed and remanded the Trial Court's affirmance of ZBA's decision not to consider the Company's variance application.
- Brandt sought area variances in December 2009 to allow an old Victorian house and attached barn in the multi-family zone to be converted from 2 dwelling units (with 3 and 7 bedrooms respectively) to 4 dwelling units (1 with 4 bedrooms, 1 with 2 bedrooms and 2 with 3 bedrooms).
- Brandt had made a similar application in 1994 before one of the units had been expanded via building permits to 7 bedrooms. Brandt argued that it complied with the second prong of Fisher v Dover – that material changes in circumstances had occurred in the 15 years between the original application and the one in 2009, via changes in (i) the case law interpreting the variance criteria, (ii) the City's zoning ordinance and policy documents, and (iii) the physical layout of the property.
- The Trial Court agreed with the City that the changes to the unnecessary hardship prong via Simplex and Boccia were not sufficient since the original application had been denied on all 5 criteria, that the changes to the Zoning Ordinance and policy documents were not material and that the changes to the property were self-created and thus irrelevant.
- The Supreme Court disagreed and held that "[i]mportant recent changes in the law governing the standard to be applied to variance applications convince us that the ZBA unreasonably declined to hear Brandt's 2009 application."
- The Court then analyzed the law as it stood in 1994 under the Governor's Island case, which required the applicant to show a deprivation "so great as to effectively prevent the owner from making any reasonable use of the land" and compared that to the

changes effected by Simplex ("a standard that is markedly more favorable to property owners") and Boccia ("which created a higher likelihood that an applicant will prevail under the new test").

- "Simplex and Boccia loosened the reins of the unnecessary hardship test and instructed zoning boards to apply an approach more respectful of the constitutional rights of property owners to use and enjoy their property."
- The Court also noted that due to the filing date of Brandt's application, the old Boccia test would still apply to the "area" variance portions of the application.
- The Court further held that the remaining variance criteria had also been "refined and clarified" since 1994, including the "spirit of the ordinance" and "public interest" prongs being "co-extensive" via the "unduly and in a marked degree" test of Chester Rod & Gun Club and the "substantial justice" prong (albeit with a slightly different twist: "two critical inquiries: (1) whether the gain to the public by denying the variance will outweigh any loss to the individual; and (2) whether the proposed development is consistent with the area's present use.")
- The Court chided the Trial Court for not recognizing that the change to the unnecessary hardship test alone was a sufficient material change since "unnecessary hardship is central to the very concept of a variance."
- "Our post-Simplex line of cases demonstrates that the five criteria of RSA 674:33, at least before they were modified by the legislature in response to Boccia, are not discrete and unrelated criteria, but interrelated concepts that aim to ensure a proper balance between the legitimate aims of municipal planning and the hardship that may sometimes result from a literal enforcement of zoning ordinances."

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (Issued September 22, 2011) – Sign Variances under the "New" Standard

- The Supreme Court affirmed in part, reversed in part and remanded the Trial Court's partial affirmance and partial reversal of ZBA's grant of sign variances for Parade's new Marriot hotel (down the street from Harborside's Sheraton hotel).
- Parade sought variances for 2 parapet signs (which were not allowed in the district) and 2 marquee signs of 35 sq. ft. when only 20 sq. ft. are allowed in the district.
- ZBA voted to grant the requests with express statements of reasons including: placement of parapet signs did not "feel like visual clutter"; signs will not be contrary to public interest, result in no change to the neighborhood nor harm health, safety or welfare; sheer mass of the building and occupancy by a hotel create a special condition; proposal is reasonable and not overly aggressive; marquee signs will not disrupt visual landscape and will enhance streetscape; no benefit to public via denial; "no evidence that this well thought out design would negatively impact surrounding property values."
- The Trial Court reversed the grant of the parapet sign variance but affirmed the grant of the marquee sign variance. Accordingly, both sides appealed.

- The Supreme Court noted that this case was decided under the revised variance standard effective January 1, 2010; and in stating the text of the unnecessary hardship criteria, the Court noted that the two definitions of RSA 674:33, I (b)(5)(A) and (B) are "similar, but not identical, to" the definitions the Court provided in Simplex and Governor's Island.
- The Court next addressed the Trial Court's reversal of the parapet sign variance by stating that, since the ruling is "somewhat unclear, we interpret it either to be" a ruling that the ZBA erred in finding the variance would not be contrary to the public interest and consistent with the spirit of the ordinance, or that the ZBA erred in finding the variance would work a substantial justice.
- In analyzing the public interest/spirit of the ordinance criteria, the Court cited to Farrar and Chester Rod & Gun Club for the continued premise that these two criteria are considered together and require a determination of whether the variance would "unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives."
- "Mere conflict with the terms of the ordinance is insufficient."
- The Court noted that it has "recognized two methods for ascertaining" whether such a violation occurs: (1) whether the variance would "alter the essential character of the neighborhood" or (2) whether the variance would "threaten public health, safety or welfare."
- The Court chastised the Trial Court for instead focusing on whether allowing the signs would "serve the public interest" and considered the record to support the ZBA's factual findings so that the Trial Court's rulings were reversed on these two criteria.
- The Court similarly examined the substantial justice criterion and restated its position from Malachy Glen, Harrington and Daniels that "the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice."
- The Court again chastised the Trial Court for its focus on "the only apparent benefit to the public would be an ability to identify [Parade's] property from far away" while the ZBA correctly focused on whether the public stood to gain from a denial of the variance.
- The Court again considered the record to support the ZBA's factual findings so that the Trial Court's ruling on this criterion was reversed; but the Court remanded the parapet sign variances back to the Trial Court to "consider the unnecessary hardship criteria in the first instance."
- Turning to the marquee sign variance, the Supreme Court noted that the ZBA used only the first of the new statutory definitions and agreed with the ZBA's determination that the "special condition" of the property was its sheer mass and its occupancy by a hotel.
- The Court rejected Harborside's argument that size is not relevant based on the concurrence in Bacon v. Enfield. The Court noted that the concurrence was not adopted by the majority so that it does not have precedential value and that Parade is not claiming that the signs are unique but that the hotel/conference center property is.

- "Because a sign variance is at issue, we find no error in examining whether the building upon which the sign is proposed to be installed has 'special conditions'."
- The Court also rejected Harborside's argument that there could be no unnecessary hardship since Parade could operate with the smaller sized sign: "Parade merely had to show that its proposed signs were a 'reasonable use'….Parade did not have to demonstrate that its proposed signs were 'necessary' to its hotel operations."
- The Court similarly rejected Harborside's argument that Parade could not meet the public interest, spirit of the ordinance or substantial justice criteria because it could have achieved "the same results" by installing smaller signs: "Harborside's argument is misplaced because it is based upon our now defunct unnecessary hardship test for obtaining an area variance" under Boccia.
- Finally, the Court' rejected Harborside's argument that there was no evidence on no diminution of surrounding property values other than the statement of Parade's attorney since "it is for the ZBA…to resolve conflicts in evidence and assess the credibility of the offers of proof" and that the ZBA was "also entitled to rely on its own knowledge, experience and observations."
- Accordingly, the grant of the marquee sign variance was upheld.

REQUIREMENTS FOR VARIANCE APPLICATIONS
Filed on or after January 1, 2010

by

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1. THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST.

As before, the case of Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005) and its progeny continues to control this issue after January 1, 2010 – namely that the criteria of whether the variance is "contrary to the public interest" should be construed together with whether the variance "is consistent with the spirit of the ordinance". Id., at 580; see also, Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). More importantly, the Supreme Court then held that to be contrary to the public interest or injurious of public rights, the variance "must unduly, and in a marked degree" conflict with the basic zoning objectives of the ordinance. Chester Rod & Gun Club, at 581; and Harborside at 514. "Mere conflict with the terms of the ordinance is insufficient." Harborside at 514. In making such a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare. Id. See also, Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-106 (2007); and Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment, 157 N.H. 322 (2008).

2. THE SPIRIT OF THE ORDINANCE IS OBSERVED.

See, Criteria 1, above.

3. SUBSTANTIAL JUSTICE IS DONE.

As before, the Supreme Court reference in Malachy Glen, 155 N.H. at 109 to the Peter J. Loughlin, Esq., treatise will continue to apply. See, Loughlin, Land Use, Planning and Zoning, New Hampshire Practice, Vol. 15, 3d ed., and its reference to the Office of State Planning Handbook, which indicates as follows:

> "It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance." Id. at § 24.11.

See also, Farrar v. City of Keene, 158 N.H. 684, 692 (2009); and, Harborside at 515.

4. THE VALUES OF SURROUNDING PROPERTIES ARE NOT DIMINISHED.

This variance criterion has not been the focus of any extensive Supreme Court analysis to date. That said, in considering whether an application will diminish surrounding property values, it is appropriate for ZBAs to consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood. Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria; but be cautious in relying solely on that experience/knowledge if it contravenes the evidence of professional experts. See, Malachy Glen, 155 N.H. at 107.

5. LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE WOULD RESULT IN AN UNNECESSARY HARDSHIP.

(A) FOR PURPOSES OF THIS SUBPARAGRAPH, "UNNECESSARY HARDSHIP" MEANS THAT, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA:

(i) NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY; AND
(ii) THE PROPOSED USE IS A REASONABLE ONE.

(B) IF THE CRITERIA IN SUBPARAGRAPH (A) ARE NOT ESTABLISHED, AN UNNECESSARY HARDSHIP WILL BE DEEMED TO EXIST IF, AND ONLY IF, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, THE PROPERTY CANNOT BE REASONABLY USED IN STRICT CONFORMANCE WITH THE ORDINANCE AND A VARIANCE IS THEREFORE NECESSARY TO ENABLE A REASONABLE USE OF IT.

THE DEFINITION OF "UNNECESSARY HARDSHIP" SET FORTH IN SUBPARAGRAPH (5) SHALL APPLY WHETHER THE PROVISION OF THE ORDINANCE FROM WHICH A VARIANCE IS SOUGHT IS A RESTRICTION ON USE, A DIMENSIONAL OR OTHER LIMITATION ON A PERMITTED USE, OR ANY OTHER REQUIREMENT OF THE ORDINANCE.

This is the crux of the legislative change wrought by SB 147. This removes the "use" vs. "area" distinction created by the Boccia decision but ostensibly leaves in place the post-Simplex court interpretations of the various criteria. Also, as listed in the statement of intent attached to the statute, Criteria 5(B) is meant to clarify that the pre-Simplex standard for unnecessary hardship remains as an alternative; however, the Supreme Court has noted that the language used

"is similar, but not identical, to" the definitions the Court provided in Simplex and Governor's Island cases. See, Harborside at 513.

The dual references of the property being "distinguished from other properties in the area" solidifies the repeated Court statements that the "special conditions" are to be found in the property itself and not in the individual plight of the applicant. See, e.g., Harrington v. Town of Warner, 152 N.H 74, 81 (2005); and Garrison v. Town of Henniker, 154 N.H. 26, 30 (2006). Depending upon the variance being sought, those "special conditions" can include the "as built" environment. See, Harborside at 518 (special conditions include the mass of the building and its use as a hotel in case for sign variances).

This statutory revision does contain a fair amount of uncertainty – most particularly with the issue of who is the fact finder (ZBA or applicant) of what is reasonable under either (A) or (B), above. The Court's prior opinions containing the phrases that a use is "presumed reasonable" if it is allowed in the district and that the ZBA's desires for an alternate use are "not material" were all in the context of "area" variances and made with respect to the "public interest" and "spirit of the ordinance" criteria, above. See, Vigeant v. Town of Hudson, 151 N.H. 747, 752 - 753 (2005); and Malachy Glen, 155 N.H. at 107; but see, Harborside at 518-519 (applicant did not need to show signs were "necessary" rather only had to show signs were a "reasonable use"). Thus the determination of "reasonableness" is likely within the ZBA's purview so that the ZBA must have both the evidentiary basis and the clear findings to support its decision on this issue. Boards should expect to see a variety of arguments and evidentiary presentations, including economic arguments, by both applicants and abutters as to what is or is not reasonable concerning a given site. Be on the lookout for more Supreme Court opinions interpreting this criterion.