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Municipal Corporations - Zoning - The Granting of a Variance Based on Unnecessary Hardship

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MUNICIPAL CORPORATIONS—ZONING—THE GRANTING OF A VARIANCE BASED ON UNNECESSARY HARDSHIP—Defendant purchased a tract of vacant land located in the most highly restricted residence zone of his city. The local zoning ordinance prescribed minimum area, width, and depth measurements for building plots in that district. Defendant desired to subdivide the property into two building plots in order to build a one-family residence on each plot. Although the first plot complied with the minimum requirements of the ordinance, the other plot was deficient in area and depth measurements. Defendant was unsuccessful in his attempts both to purchase adjoining land and to sell parts of his property to adjoining owners. He then applied to the local Board of Adjustment for a variance from the zoning ordinance, claiming hardship because of the shape of his property. The board granted the variance holding that the strict application of the zoning ordinance under the circumstances "would work an undue hardship on the owner." Plaintiffs, property owners in the immediate neighborhood, contested the validity of the variance. The lower court affirmed the grant of the variance. On appeal, *held*, reversed. The defendant failed to establish a case of undue hardship as required by the zoning ordinance. *Bierce v. Gross*, (N.J. 1957) 135 A. (2d) 561.

Since a zoning ordinance cannot possibly meet all the contingencies of an existing situation, most state enabling acts provide that each community may establish a local board of adjustment¹ with authority to vary the application of the zoning ordinance in appropriate cases. In substance a

¹The board which grants variances is called a board of appeals or a board of review. The first such board appeared in New York City's pioneer zoning ordinance in 1916 and was called the board of appeals. See BASSETT, ZONING, 2d ed., 133-141 (1940).

typical ordinance provides that a board of adjustment shall have power to vary the application of the provisions of the zoning ordinance provided that (1) there are "practical difficulties or unnecessary hardships"² caused by a strict application of the ordinance; (2) such variance is in harmony with the general purpose and intent of the ordinance; and (3) the public safety and welfare is assured and substantial justice done.³ Since the provision requiring "practical difficulties or unnecessary hardships" constitutes the heart of the variance remedy, most cases relating to variances are primarily involved with that requirement.⁴ Although the courts have not defined the meaning of those terms with certainty, five principles or standards have emerged from the cases which, to a certain extent, limit the discretion of a board. First, the ordinance must cause the hardship; independent factors, such as deed restrictions⁵ or the inherent nature of the property,⁶ are not subjects for which the variance remedy is intended. Second, the cases indicate that the property owner must, in effect, show that he is precluded from making any reasonable use of his property.⁷ This factor—that the property is not suitable for use as zoned—appears to be the most important as well as the most practical consideration in determining the existence of unnecessary hardship.⁸ Contained in this second standard is the almost universal statement by the courts that financial disappointment alone,⁹ including loss of profits¹⁰ or prohibition of

² Some ordinances require "peculiar" or "exceptional" difficulties and "undue," "unusual," or "unreasonable" hardships.

³ 8 McQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §25.166 (1957).

⁴ The standard of unnecessary hardship has been subject to criticism as being too imprecise to define: "The words 'practical difficulty or unnecessary hardship' . . . were not well chosen . . . and their continued use has been very unfortunate. They almost defy critical analysis." Maltbie, "The Legal Background of Zoning," 22 CONN. B. J. 2 at 6, 7 (1948).

⁵ Brackett v. Board of Appeal, 311 Mass. 52, 39 N.E. (2d) 956 (1942).

⁶ Hickox v. Griffin, 298 N.Y. 365, 83 N.E. (2d) 836 (1949).

⁷ E.g., Board of Adjustment v. Stovall, (Tex. Civ. App. 1949) 218 S.W. (2d) 286. See Green, "The Power of the Zoning Board of Adjustment To Grant Variances from the Zoning Ordinance," 29 N.C. L. REV. 245 (1951).

⁸ Otto v. Steinhilber, 282 N.Y. 71, 24 N.E. (2d) 851 (1939) (applicant failed to show that the property could not be used for the uses permitted in the district); Matter of Clark v. Board of Zoning Appeals, 301 N.Y. 86, 92 N.E. (2d) 903 (1950) (denial of application for a funeral home); Talmage v. Board of Zoning Appeals, 141 Conn. 639, 109 A. (2d) 253 (1954); Elkins Park Improvement Assn. Zoning Case, 361 Pa. 322, 64 A. (2d) 783 (1949).

⁹ McMahon v. Board of Zoning Appeals, 140 Conn. 433, 101 A. (2d) 284 (1953); Rochester Transit Corp. v. Crowley, 205 Misc. 933, 131 N.Y.S. (2d) 493 (1954). The very purpose of the ordinance would be undermined if financial loss alone justified granting a variance since all zoning effects some financial hardship in individual cases by depriving the landowner of the most advantageous use of his property. See, e.g., Holy Sepulchre Cemetery v. Board of Appeals, 271 App. Div. 33, 60 N.Y.S. (2d) 750 (1946); Dooling's Windy Hill v. Springfield Township Zoning Board of Adjustment, 371 Pa. 290, 89 A. (2d) 505 (1952).

¹⁰ Benson v. Zoning Board of Appeals, 129 Conn. 280, 27 A. (2d) 389 (1942); Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A. (2d) 828 (1946).

the most profitable use of the property,¹¹ will not justify a variance. However, since the difference between the denial of the right to any reasonable return and the mere deprivation of profits is a question of degree, financial hardship is not entirely irrelevant.¹² A third standard which is significant in determining whether unnecessary hardship exists requires that the hardship caused by the ordinance must be peculiar to the particular property of the applicant,¹³ as distinguished from a hardship common to the whole neighborhood.¹⁴ If the plight of the owner is due to the general conditions in the neighborhood, this may indicate that the basic zoning ordinance is in need of a revision which can be accomplished only by the local legislative authority.¹⁵ A fourth standard states that the applicant must show that the hardship was not self-inflicted. There are two classes of cases in this area. One type involves the applicant's violation of the ordinance, knowing or unknowing, and his subsequent application for a variance based upon his expenditures as the hardship suffered.¹⁶ Unless the applicant is otherwise entitled to a variance, relief will be denied. The second type of case concerns the applicant's purchase of land after the enactment of the zoning ordinance, thus making him chargeable with knowledge of the restriction imposed on the property. Here the courts regard the applicant with disfavor since the hardship could have been avoided by not purchasing the land.¹⁷ This latter theory, however, is subject to fair criticism because it is inconsistent with the idea that the granting of a variance depends on the nature of the property rather than its owner. If the property is otherwise entitled to a variance, it seems only just to grant the variance regardless of the identity of the owner or the time when he purchased the property. A fifth standard which influences the courts is that a variance will not be granted which

¹¹ Board of Adjustment v. Stovall, note 7 supra; Pincus v. Power, 376 Pa. 175, 101 A. (2d) 914 (1954).

¹² The courts do weigh this factor in the setting of whether the land can yield a reasonable return if used only for a purpose allowed by the ordinance. See Otto v. Steinhilber, note 8 supra.

¹³ Levy v. Board of Standards and Appeals, 267 N.Y. 347, 196 N.E. 284 (1935); Talmage v. Board of Zoning Appeals, note 8 supra.

¹⁴ This requirement is further defined by the courts to relate not only to the applicant's property, but also to the particular premises for which the benefit of the variance is sought. Brackett v. Board of Appeal, note 5 supra (applicant, a hotel owner, sought a variance for an adjoining vacant lot to use as a parking lot, but was denied a variance because the parking problem was a hardship affecting the use of the hotel lot, not the lot for which the variance was sought); Searles v. Darling, 7 Terry (46 Del.) 263, 83 A. (2d) 96 (1951).

¹⁵ Arnebergh, "Variances in Zoning," 24 UNIV. KANS. CITY L. REV. 240 (1956); 8 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., §25.165 (1957).

¹⁶ Dolan v. DeCapua, 16 N.J. 599, 109 A. (2d) 615 (1954); DeFelice v. Zoning Board of Appeals, 130 Conn. 156, 32 A. (2d) 635 (1943).

¹⁷ This factor was strongly argued in the principal case, the court responding that it "weighs heavily" against a claim of hardship. Ventresca v. Exley, 358 Pa. 98, 56 A. (2d) 210 (1948).

will change the character of the zone in which the property is located.¹⁸ This standard is intimately related to the common legislative requirement that a variance must be in harmony with the general purpose and intent of the ordinance. Since the determination of the existence of unnecessary hardship is necessarily a question of degree, the courts, in looking closely at the effect of the proposed use on the surrounding area, attempt to balance the equities.¹⁹ The application of the above standards must not be made in a vacuum, but must be interrelated. This procedure was carried out in the principal case, the court giving special emphasis to the fact that the defendant could have used his property for the use permitted in the district and that he purchased with knowledge of the restriction.

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¹⁸ Jennings' Appeal, 330 Pa. 154, 198 A. 621 (1938); *Otto v. Steinhilber*, note 8 supra.

¹⁹ "Even where hardship is shown the board is required to balance such hardship against the equities and to determine to what extent the variance, if granted, would interfere with the zoning plan and the rights of owners of other property." *Rochester Transit Corp. v. Crowley*, note 9 supra, at 937; *Holy Sepulchre Cemetery v. Board of Appeals*, note 9 supra (court balanced the equities in favor of property owners living a mile away from a proposed cemetery).