Coates' Canons Blog: Hardship, Reasonable Use of Land, and Zoning Variances

By Richard Ducker

Article: https://canons.sog.unc.edu/hardship-reasonable-use-of-land-and-zoning-variances/

This entry was posted on November 03, 2010 and is filed under Land Use & Code Enforcement

UPDATE September 2013: The 2013 legislation revising the board of adjustment statutes affects the standards for granting variances. S.L. 2013 – 126 repeals the reference to "practical difficulties" and provides that to grant a variance unnecessary hardship must result from the strict application of the ordinance. Moreover, G.s. 160A-388(d1) is added to provide that "(i)t shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.

Lola would love to expand the day-care center she runs in her residential neighborhood. The neighbors don't seem to mind. Inconveniently enough, her expansion plans do not meet the side-yard setbacks of the zoning ordinance. She will need a zoning setback variance. The people down at city hall tell her the ordinance says that to get one she must prove that she can make no reasonable use of her property without a variance. That sounds like a pretty stiff standard to meet. Is a standard like this permissible and necessary? The answer is yes. But those who think they fully understand the law of zoning variances are either confused or probably haven't read all of the cases.

It seems fitting that the law of zoning variances varies from state to state. The Standard Zoning Enabling Act, promulgated as a model for state enabling legislation in the mid-1920s by the U.S. Department of Commerce, authorizes variances in cases of "unnecessary hardship." However, many states, including North Carolina, followed New York City's lead and authorize variances for "practical difficulties or unnecessary hardships." In some of these states, "practical difficulties or unnecessary hardships" is read disjunctively to refer to two different types of variances. In those states proof by the applicant of an unnecessary hardship is necessary to qualify for a use variance (allowing a use where it is otherwise prohibited). Alternatively, proof by the applicant of "practical difficulties" (a lesser test that is easier to meet) allows a dimensional variance (like a setback variance) to be granted. From a practical standpoint, the real significance of these statutory provisions is in the ordinance decision-making standards that stem from the language. Perhaps the most important such standard is associated with "unnecessary hardships." It provides that a variance may be granted only if the applicant "can secure no reasonable return from, or make no reasonable use of, the property" without the variance. This standard allows a local government to grant a variance so that the application of the ordinance does not amount an unconstitutional "taking" of property. Whether this standard applies or not, determining the degree of detriment to a property that triggers a variance is a central question in most cases.

Variance law in North Carolina is distinctive. In 1946 the North Carolina Supreme Court decided the only zoning variance case that the court has ever taken up. In Lee v. Board of Adjustment of the City of Rocky Mount, 226 N.C. 107, 37 S.E. 2d 128 (1946), the court invalidated a variance granted by the board of adjustment which would have allowed a grocery store-service station on a lot in a zoning district restricted to residential use. The case was widely interpreted to mean that use variances were categorically illegal in North Carolina. In *Lee* the court never specifically acknowledged the North Carolina statutory language authorizing variances in cases of "practical difficulties or unnecessary hardships." But the court made clear that the "financial situation or pecuniary hardship of a single owner" was not a sufficient ground for granting a variance. It declined to recognize "practical difficulties" as a separate, more relaxed test for granting a dimensional variance.

In 1952 Professor Phil Green of the Institute of Government published *Zoning in North Carolina*. Based on the *Lee* case and cases from other states, Green concluded that in North Carolina the statutory language "practical difficulties or unnecessary hardships" should be interpreted as a single unitary phrase. A single set of ordinance standards consistent with those terms should apply to all variance applications. In other words there was no legal distinction between "practical difficulties" and "unnecessary hardships"; these terms referred to the same thing. Even more important, it was not only appropriate for a zoning ordinance to require that the no-reasonable-return/reasonable-use standard be met before issuing any variance; it was also necessary.

Some five decades later in 2001 the North Carolina Court of Appeals decided the case of Williams v. North Carolina Dept. of Environment and Natural Resources, 144 N.C. App. 479, 548 S.E.2d 793 (2001). *Williams* concerned an application for a variance under the Coastal Area Management Act (CAMA) to fill in a lot and build a bulkhead. The CAMA statute concerning variances (G.S. 113A-120.1) had been modeled after the North Carolina zoning statutes and included the "practical difficulties or unnecessary hardships" language. The Court of Appeals ruled that the Coastal Resources Commission had misapplied the statute by failing to determine whether Williams "had been denied reasonable and significant use of his property." Where did that phrase comes from? The Court of Appeals apparently concluded that North Carolina case law had never directly provided a workable standard for interpreting "practical difficulties or unnecessary hardship" and chose to adopt a standard enunciated by the highest court in the state of Maryland. According to the *Williams* court, the denial-of-reasonable-and-significant-use standard was not equivalent to a standard that simply sought to avoid an unconstitutional taking; it was a less demanding standard. Variances could be granted in cases where the application of a zoning ordinance does not deprive the owner of all reasonable uses of the property whatsoever.

In 2002 the Court of Appeals heard the case of Showcase Realty v. City of Fayetteville Board of Adjustment, 155 N.C. App. 548, 573 S.E.2d 737 (2002). Like many North Carolina zoning ordinances, the Fayetteville ordinance required the more demanding reasonable-return/reasonable-use standard. The court overruled the grant of a variance because the court made no findings of fact concerning this standard, implicitly acknowledging the validity of the standard in so doing. According to the court in *Showcase Realty*, the *Williams* case simply held that in considering a variance, a board must make findings of fact regarding the "impact of the (ordinance) on (the owner's) ability to make reasonable use of his property."

So what does North Carolina zoning variance law require when it comes to the impact of the ordinance on the owner's use of the property? A charitable (but realistic) interpretation is that two slightly different standards may be available, at least until the North Carolina Supreme Court addresses the matter. The *Williams* standard focuses on the use that the property owner actually wishes to make of the property. In contrast the no-reasonable-use-or- reasonable-return implies that the property owner must also show that other alternatives uses of property are also "unreasonable."

For a North Carolina local government to grant a zoning variance, the unit must at a minimum find that the property owner has been "denied reasonable and significant use of his property," and that this language should be included in the ordinance standards. Alternatively, the ordinance may include a requirement that a property owner show that he or she can make "no reasonable return from nor make no reasonable use of the property" without the variance. There is a difference between the two legal standards, but only a slight one. Given the kind of variance applications received by most local governments, it is unlikely that the standard enunciated in *Williams*, if properly applied, would make a difference in the outcome of most cases. The thing to remember is that both standards demand that a property owner must claim more than financial loss or mere inconvenience to qualify for a variance.

The only remaining question is this: will the board of adjustment pay any attention to either of these variance standards when it gets around to hearing Lola's day-care center setback case? For anyone who cares about the rule of law, let's hope so.

Links

- www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H276v6.pdf
- appellate.nccourts.org/opinions/?c=2&pdf=18337
- appellate.nccourts.org/opinions/?c=2&pdf=20825