Coates' Canons Blog: Zoning Variances: Is It Better to Ask for Forgiveness than Permission?

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UPDATE September 2013: The 2013 legislation revising the board of adjustment statutes codifies the "self-created-hardship" standard for granting variances that is common in many ordinances. S.L. 2013 – 126 provides that the hardship may not result from actions taken by the applicant or the property owner. In addition, it expressly provides that "the act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship."

Bill claims that he had no idea that the new zoning ordinance might affect the privacy fence he had just finished building along his property line. It turns out that the fence is in clear violation of the regulations. Tonight he will present his case for a zoning variance to the board of adjustment. Will the board be sympathetic, or will it be, in Bill's words, "rigid" in applying the rules, causing him to dismantle the fence? Perhaps more important for our purposes, would a decision to grant a variance in this situation be legally defensible? Read on, friends, for an answer.

Central to the lore of zoning variances is the idea of helping property owners to avoid "unnecessary hardship" because of the strict application of the ordinance. Hardship arising from the development of property is "unnecessary" if the hardship is attributable solely to the actions of the owner. Hence it is common for ordinances to prohibit the granting of a variance for hardships that are or "self-created" or "self-imposed." However, determining when these self-inflicted predicaments should serve as the basis for a variance has proved to be more difficult than one might expect.

One group of situations involves the development or use of property that clearly violates the ordinance. There is an understandable tendency to rush to the judgment that surely a board should not "bail out" someone who is responsible for a clear violation. But when exactly is the owner/user of the property responsible for a zoning violation that has resulted? The North Carolina zoning variance statutes give no hint. However, the second sentence of G.S. 160A-425, a code enforcement statute, states that the "owner or occupant shall each immediately remedy the defects, hazardous conditions, or violations of law in the property he owns." Doesn't this provision suggest that the owner is ultimately responsible for curing any mistakes or problems that affect the property? After all, may we not assume that the owner has the opportunity to recover damages for negligent or substandard work done by contractors, design professionals, or even ordinary workmen whose work caused the zoning violation?

What little North Carolina zoning variance case law we have does not necessarily support the notion that the owner is always responsible for the condition of the property, at least when a variance is sought. In Turik v. Town of Surf City, 182 N.C. App. 427, 642 S.E. 2d 251 (2007), the Hunters submitted a survey with their zoning/building permit application that showed the duplex they were building was in compliance with the zoning setback. After construction was underway, their neighbors produced two different surveys, both of which tended to show that the property line was in a different location and that the building violated the setback. The zoning administrator then determined that the Hunters' building violated the ordinance and issued a stop-work order.

Rather than appeal the interpretation behind the stop-work order, the Hunters then decided to apply for a variance. The Court of Appeals, in upholding the variance granted by the town, sloughed off the fact that the zoning administrator had found the Hunters' survey to be inaccurate. It declared that "the hardship that the Hunters faced was not of their own making."

One might ask, then, of whose making might the hardship be? Apparently, for variance purposes, the Hunters were not responsible for any possible mistakes made by their surveyor, whether or not they were in a position to recover damages from the surveyor for negligent work. The court was quite possibly influenced by the fact that the Hunters relied on the zoning administrator's initial decision to grant the permit before they began construction. In any event, Turik is consistent with the prevailing national view that evidence of good faith by the owner, including relying on the mistakes or

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misrepresentations of third parties, can be enough to sidestep a claim that the hardship is self-created. It is also worth noting that a violation of the ordinance alone should not block a variance from being granted if all other hardship requirements are met. The law simply prohibits a variance from being granted if the self-created hardship is the sole basis for the application.

Let's return to Bill for a moment. Suppose that Bill just recently bought the property and clearly knew how the fencing protection requirements would affect the property when he bought it. If he later applies for a variance, does the fact that he knew that a variance would be necessary for the property to be used for its intended use mean that the hardship involved is self-induced? The traditional view was that one who purchased property with actual or constructive knowledge of the restrictions that zoning placed on the property was barred from qualifying for a variance. The owner's conduct caused the problem, not the strict application of the ordinance, so relief is not appropriate. One other argument in support of the traditional view is that because the purchase price of the property probably reflected the applicable zoning restrictions, any grant of a variance to them serves as an unjustifiable windfall to the purchaser.

The validity of this "purchase-with-knowledge" version of the self-created hardship doctrine was one of the issues in Chapel Hill Title and Abstract Co., Inc. v. Town of Chapel Hill, 362 N.C. 649, 669 S.E. 2d 286 (2008). Chapel Hill Title had purchased a vacant residential lot after the lot was already subject to substantial development restrictions caused by both private restrictive covenants and the town's resource conservation regulations. In denying the variance, the Chapel Hill Board of Adjustment ruled against the applicant because the title company knew that a variance would be required for the lot to be used in the most profitable way. Both the superior court judge and a dissenting judge on the Court of Appeals panel that heard the case on appeal would have overruled the board's position on this issue, embracing the emerging modern view that a lot owner who has knowledge of the need for the variance before purchasing property is not precluded from qualifying for a variance. Such knowledge is merely an element to be considered in determining the existence of hardship. It is the condition of the property, not the identity of the owner, that is central to determining whether the variance should be granted.

However, the North Carolina Supreme Court chose to dispose of Chapel Hill Title on other grounds, declaring that "we need not consider the arguments offered as to the rule applicable to a self-created hardship." As a result, a definitive ruling on the "purchase-with-knowledge" aspect of the self-created hardship still has not been adopted by a North Carolina appellate court.

Now about Bill. A local government that chooses to embrace the modern view should not block Bill from qualifying for a variance just because he bought property knowing that the fencing requirements would make his privacy preferences difficult to achieve. But if the board refuses his request for a variance after Bill violates the ordinance and he throws himself at the mercy of the board, then he may wish he had sought permission rather than forgiveness.

Links

- www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H276v6.pdf
- appellate.nccourts.org/opinions/?c=2&pdf=2007/06-141-1.pdf
- appellate.nccourts.org/opinions/?c=1&pdf=2008/275A08-1.pdf

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