

Whining? You Bet.

By Judith Johanssen

Must be human nature - when we don't get the answer we want, we ask someone else, hoping that the new answer will be more to our liking, and an August 2010 Appellate Court decision proves this very point.

Here's what happened. The executor of an estate needed to sell his deceased mother's Greenwich residence to help settle the estate, but he foresaw a major problem with marketing the property - the lot was an irregular shape and if the current structure were torn down, under strict application of the changed zoning regulations, any new structure built would have to be smaller than what already existed. Building a smaller home would be a disappointment and not be keeping pace with the neighborhood.

Well, no matter - the executor decided to ask the zoning board for a variance. Now the rule on variances is that for a zoning board to grant a variance, there has to be a hardship due to a change in the zoning regulations that reduces a lot's area and, therefore, makes the lot non-conforming.

Under the statutes and case law, an exceptional difficulty or unusual hardship is an absolute necessity before a variance can be granted. Personal hardships, though compelling, are not sufficient grounds for a variance because zoning regulations directly affect the land, not the land owners. The zoning board granted the executor the variance.

Great news for the executor, but not so great for the abutting landowners who claimed their interests were specifically and injuriously affected by the decision. So, the unhappy neighbors appealed the zoning board's decision to the Superior Court claiming the zoning board acted in an arbitrary and capricious manner and that the evidence presented did not support the decision.

The Superior Court commented that "a unique hardship, imposed by conditions outside the property owner's control, is a condition precedent to the issuance of a zoning variance." However, in this case, the court held that 1) the fact that the lot size was reduced was not a unique hardship that justified the variance and 2) the zoning board had precious little basis to grant a variance based on a hardship.

The executor did not like that answer so he took his case up the judicial ladder to the Appellate Court. The Appellate Court's role is not to second-guess the trial court's findings, but to establish that the trial court's decision was not illegal, not an abuse of discretion, and to feel certain the court acted fairly and upon valid reasons.

The Appellate Court concluded that the Superior Court got it right, using the executor's presentation to the zoning board against him where he cited as his reasons for a variance a *personal* hardship in that the marketing of the property would be difficult and that it was a *disappointment* that only a smaller home could be built once this home were demolished.

The final note? This case began in 2007 with a request for a variance to a zoning board so as to sell a property to settle an estate and which was resolved in 2010 by the Appellate Court that showed us that, yes, while the wheels of justice do move at a glacial pace, in this case, they proved that slow and steady wins the race, not whining cloaked as a unique hardship.

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