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# A Further Tightening in the Standards for Variances?

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Practicing land use law in Connecticut can be unpredictable and is heavily fact-driven, as no two parcels of property are alike. Nonetheless, there are certain rules of thumb. One is that in a court challenge to a zoning board of appeals decision on a variance application, usually the granting of a variance will be overturned and a denial will be upheld. This is due to the elusive "unusual hardship" test, which is regularly honored in the breach throughout our state but is very difficult to satisfy.

Recent decisions by state courts have ignited debate in the land use bar as to whether satisfying the hardship standard has become even more difficult. The most recent among them, *Caruso v. Zoning Board of Appeals of the City of Meriden,* 320 Conn. 315, a Feb. 2 decision by the Connecticut Supreme Court, provides useful guidance to practitioners about what constitutes evidence of "practical confiscation" sufficient to justify the granting of a variance.

In 2003, Mark Development LLC purchased 48 undeveloped acres in Meriden with the intention of developing a large used-car dealership. The land was one of three Meriden properties zoned as a Regional Development District, where six uses are permitted by right. A used-car dealership was not one of the permitted uses.

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After unsuccessfully attempting to amend zoning regulations, Mark Development convinced the Meriden Zoning Board of Appeals that the regulations resulted in a "practical confiscation" of its property, and the board approved a use variance that would allow a car dealership on that property. Meriden, its city planner and zoning enforcement officer, represented by the authors, appealed.

The trial court sustained the appeal on the basis of a conflict-of-interest claim, but found that the record supported the board's decision to grant the variance. Both sides appealed. The Appellate Court reversed the trial court's ruling, finding that the developer had failed to prove practical confiscation, and remanded with direction to sustain the plaintiffs' appeal.

The Supreme Court affirmed. The court recognized that practical confiscation is a form of unusual hardship where a landowner is prevented from making any beneficial use of its land. The test is whether the zoning regulations render the property "practically worthless" and deprive it of any reasonable use.

## All Reasonable Use

Notably, in *Caruso*, the Supreme Court stated for the first time that the standard for practical confiscation in variance cases is the same test as that for establishing a taking under the Constitution (an area in which the court has not been known for its generosity). But

*Caruso* is most instructive because of what it teaches about the high bar for proving practical confiscation.

The Supreme Court held that Mark Development failed to prove practical confiscation because it did not demonstrate that its property had been deprived of all reasonable use and value. The developer did present some evidence that the use and value of the property had been impacted by the regulations. This evidence included a letter from an appraiser opining that there was no demand for several of the uses permitted in the district, the purchase price was below market, and the zoning placed the property at a competitive disadvantage, as well as a similar opinion by local land use counsel. However, the court noted, Mark Development presented no evidence that the property was unfit for any permitted use, of value other than the purchase price of more than $1 million, or of its efforts to market, sell or develop the property for a permitted use. The evidence did not explain why the property was suitable for a used-car dealership but not for offices or other permitted uses.

The Supreme Court distinguished its earlier decisions finding practical confiscation without proof of diminution in value where the property owner demonstrated that no reasonable use was available. It also confirmed that deference is afforded to zoning board decisions but stated that "a court cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty." Finally, the court reiterated that it is not proper for a board to grant a variance "merely because the regulations hinder landowners and entrepreneurs from putting their property to a more profitable use," and that any grievances with the zoning plan should be directed to the zoning commission that adopted it, not the zoning board of appeals.

*Caruso* instructs practitioners that in order to satisfy the hardship test on grounds of practical confiscation, a variance applicant must provide specific evidence that its property has no reasonable use or monetary value under the zoning regulations. Evidence that some of the value or some of the uses have been lost will not suffice.

Read in conjunction with *E&F Associates v. Zoning Board of Appeals,* 320 Conn. 9, which was decided by the Supreme Court on Dec. 22 (overruling three prior Appellate Court decisions applying looser hardship requirements), *Caruso* affirms that the variance power is to be sparingly exercised and reserved for exceptional circumstances. What are those circumstances? After *E&F Associates,* it remains to be seen whether any set of facts can satisfy the hardship test when a property has other viable uses and economic value without the requested variance. But that debate must await other forums. Shrewd land use counsel may wish to focus their strategy on satisfying the only available exception to the hardship test: where the proposed variance reduces nonconformities such as setbacks or a nonconforming use is reduced to a less offensive use.

In another recent decision, *Verrillo v. Zoning Board of Appeals,* 155 Conn. App. 657 (2015), the Appellate Court suggested in dicta that noncompliance with fire or building codes might constitute a hardship sufficient to justify a variance in order to attain compliance. But the court subsequently rejected a similar argument (bringing a grocery store and deli up to code and increasing accessibility) in *347 Humphrey Street v. Board of Zoning Appeals,* 160 Conn. App. 214 (2015). The Appellate Court in recent years also has held that there is no de minimis deviation exception that would excuse the need for property owners to prove hardship, *Morikawa v. Zoning Board of Appeals,* 126 Conn. App. 400 (2011); and that the variance power rests solely in the zoning board of appeals, not the zoning commission. *MacKenzie v. Planning and Zoning Commission,* 146 Conn. App. 406 (2013).

*Caruso* and other recent appellate decisions arguably raise the bar with respect to both the evidence required and the standards applied to variances. How much the bar has been raised will undoubtedly be the subject of nightly chatter in town halls across our state. ■

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