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Overcoming the strong disfavor of variances under Mass. law - by Jess Oyer

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Real estate owners planning to construct a new addition or make any other improvement to their property might have to petition for a “variance” to allow for the contemplated construction. When a variance is required and justified, the variance petitioner should do some homework prior to the variance proceedings to ensure that he or she, his or her attorney, and the relevant town or municipal authorities follow the letter of the law when granting the variance. A failure to do so could result in the annulment of the variance should it be challenged in later judicial proceedings. This article will address certain risks associated with variance petitions and offer a suggested method of mitigating those risks.

Background

By way of background, a variance is required when contemplated construction would run afoul of applicable town or municipal zoning bylaws. The variance itself constitutes official permission from the town or municipal authority to construct the contemplated improvement in a way that varies from the requirements of the town zoning bylaws.

For example, most towns have “setback” requirements, according to which any structure built on a given parcel of real property must be set back from the boundary lines of the property to a specified distance. The purpose of setback requirements is generally to ensure that individual parcels in a given zoning district do not overcrowd one another.

If a property owner wants to add a garage to the side of his existing structure but the dimensions of his property do not allow for the construction of a sufficiently sized garage within the confines of the applicable setback requirements, then he may petition his town board of zoning appeals to grant him a variance from the setback limitation. The board will hold a public hearing at which the property owner seeking the variance will be required to make certain showings to justify the grant of the variance; any affected abutters to the property may attend the hearing and oppose the variance petition. If the variance is granted despite the opposition of abutters, the abutters may appeal the board’s decision to the Massachusetts Superior Court. In that forum, the property owner has a substantial burden to demonstrate that the board properly granted the variance.

The Heavy Burden of the Variance Petitioner

In Massachusetts, the law disfavors variances. See Blackman v. Bd. of Appeals of Barnstable, 334 Mass. 446, 450 (1956). The Massachusetts Supreme Judicial Court (SJC) has stated that "the power to vary the application of a zoning ordinance must be sparingly exercised and only in rare instances and under exceptional circumstances..." Id. at 450. Because the law disfavors variances, a town zoning board of appeals is not required to make rigorous findings of fact when the board denies a petition for a variance, but the board is required to make rigorous findings of fact when it grants a petition for a variance. See Gamache v. Acushnet, 14 Mass. App. Ct. 215, 220 (1982); Davis v. Zoning Bd. of Chatham, 52 Mass. App. Ct. 349 (2001). Consequently, upon appeal of a zoning board decision there are two very different burdens of proof imposed depending on whether the decision concerned the grant or the denial of the variance petition.

Where an appellate action concerns the review of a decision denying a variance, the burden of proof is on the party challenging the zoning board's decision to show that "the variance was denied solely on a legally untenable ground… or [that] the decision was arbitrary or capricious." Geryk v. Zoning Appeals Bd. of Easthampton, 8 Mass. App. Ct. 683, 684 (1979). Alternatively, where an action concerns the review of a zoning board's decision granting a variance, "the burden rests upon the person seeking a variance and the board ordering a variance to produce evidence at the hearing in the Superior Court that the statutory prerequisites have been met and that the variance is justified." See Dion v. Bd. of Appeals of Waltham, 344 Mass. 547, 555-56 (1992). The operative portion of this burden is the reference to "statutory prerequisites."

The statute referenced here is Massachusetts General Laws (M.G.L.), Chapter 40A, Section 10. There are four individual prerequisites prescribed by M.G.L., c. 40A, § 10, which are conjunctive, and which must all be satisfied to justify the grant of a variance. The SJC has parsed the words of the statute as follows to highlight the four conjunctive requirements:

"[G.L. c. 40A, s. 10]… authorizes a board of appeals to grant a variance with respect to particular land where it 'specifically finds (a) that owing to circumstances relating to the soil conditions, shape, or topography of such land ... and especially affecting such land ... but not affecting generally the zoning district in which it is located, (b) a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, ... (c) that desirable relief may be granted without substantial detriment to the public good and (d) without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.'" Warren v. Zoning Bd. of Appeals of Amherst, 383 Mass. 1, 9 (1981).

Risks Associated with Failing to Satisfy the Variance Petitioner's Burden

Massachusetts superior and appellate courts do not interpret this language lightly, and will find a given board of appeals decision granting a variance to be invalid on its face if that decision does not make sufficient findings of fact pertaining to each of the four above-described statutory prerequisites. In so finding, courts are empowered, and arguably compelled, to annul the decision of the zoning board granting the variance. See, e.g., McNeely v. Bd. of Appeal of Boston, 358 Mass. 94, 103 (1970); Barnhart v. Bd. of Appeals of Scituate, 343 Mass. 455, 458 (1962). Ultimately, such an annulment could have a devastating effect on the property owner, requiring him to deconstruct

his new garage or other addition which he may have already built in reliance on the zoning board of appeals' decision.

Suggested Solution to Mitigate Risk

The best course of action when pursuing a variance is to ensure that you, the property owner, are aware of these potential pitfalls and act to avoid them to the greatest extent possible. From a practical perspective, zoning boards of appeals are made up of busy folks, usually with distinct day jobs, who are gathering at inconvenient hours to hear your variance petition. Therefore, it is not uncommon for such boards inadvertently to neglect to make sufficient findings of fact supporting the grant of your variance.

To protect against that possible outcome and the consequent annulment of your freshly won variance, proper steps must be taken at the stage of the hearing in front of the zoning board of appeals to ensure that the board creates a thorough and sufficient record that will withstand the scrutiny of a reviewing court. One potentially effective method to accomplish this is to have an experienced attorney draft proposed findings of fact demonstrating the satisfaction of each the four statutory prerequisites described above. The attorney can then submit those proposed findings to the board of appeals and, assuming the board of appeals agrees that the variance is justified, the board may adopt those findings as their own and incorporate them into the public record. Your experienced attorney's well-thought-out proposed findings would likely have a far better chance of withstanding a reviewing court's scrutiny than would potentially hastily drafted findings by a zoning board which is likely inundated with other similar petitions and proceedings.

In other words, when you want something done correctly, you're better off doing it through competent counsel.

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