State of New Hampshire
Supreme Court

NO. 2003-0493

2003 TERM

DECEMBER SESSION

MICHAEL BOCCIA &a

v.

CITY OF PORTSMOUTH &a.

BRIEF OF MICHAEL BOCCIA (AND OTHERS)

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QUESTIONS PRESENTED

1. By focusing on the whether the development plans of the party seeking a variance were reasonable, rather than whether the zoning ordinance interfered with his reasonable use, did the trial court misinterpret *Simplex Technologies v. Town of Newington*, thereby lowering the burden of proof on the party seeking a variance, and failing to make the findings required by law?

2. By neglecting to consider the residential neighborhood in which the lot exists as required by *Simplex Technologies v. Town of Newington*, did the trial court fail to balance the applicant's reasonable use against the purposes of Portsmouth's setback requirements, thus unlawfully approving a hotel that is too big for the unique setting of its environment?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Raymond Ramsey, a hotelier from Maine, bought a seven-acre parcel of land in Portsmouth in the 1980s. The lot was in a residential zone, which precluded him from building a hotel. In 1987, Mr. Ramsey thus petitioned the City to re-zone the land, which was initially denied. About two years later, he again petitioned the City to re-zone, which was again denied. He appealed to the Rockingham County Superior Court, (*Kenneth McHugh*, J.) which granted the re-zoning on the grounds that the City was unreasonable in its decision to not re-zone. *Ramsey v. City of Portsmouth*, Rock.Cnty.Super. Ct.Dkt. 96-E-374, ORDER (Nov. 23, 1998).

In 2002, Mr. Ramsey requested several variances from the City in order to build a larger hotel than the lot can accommodate. His proposed hotel would have 100 rooms and four storeys, but with a footprint of 63 by 231 feet it cannot fit on the land without waiving setback requirements as set forth in Portsmouth's zoning ordinance.

The ordinance requires a 70 foot front yard, a 50 foot backyard, and 30 foot side yards. It also requires the building and its associated parking lots be 100 feet from residential uses, with a 40 foot barrier of green space. To construct a building of the magnitude wished by Mr. Ramsey, however, the modest lot would allow space of just 51 feet in the front, 30 feet in the back, and only 16 feet on the left side. Moreover, the hotel would be 83 feet from residential uses, and the lot would allow just 15 feet of green-space. ORDER (July 9, 2003), *Appx. to NOA* at 16. In short, the lot is too small for the building Mr. Ramsey proposed.

The City nonetheless granted the variances, and the Zoning Board of Appeals (ZBA) affirmed. Several people residing in the immediate neighborhood, and the owner of the commercial development across the street (the petitioners below and appellants here), appealed

to the Rockingham Superior Court. The court (*Gillian Abramson*, J.) found that the ZBA did not consider the factors necessary to grant variances, and remanded. ORDER (July 9, 2003), *Appx. to NOA* at 17.

The ZBA was thus again presented with Mr. Ramsey's variances, which it again approved. The neighbors again appealed to the Rockingham Superior Court (*Tina Nadeau*, J.), on the grounds that Mr. Ramsey's proposed project was too big for his lot, and that the lot could accommodate a smaller hotel in the zone Mr. Ramsey himself created without any need for variances. The court nonetheless affirmed the ZBA, prompting this appeal.

SUMMARY OF ARGUMENT

Mr. Ramsey proposes to build a 100-room hotel in the Atlantic Heights neighborhood of Portsmouth. Contending that the project is too big for its environment, several people from the immediate neighborhood and the owner of the commercial development across the street appealed from the Rockingham County Superior Court's approval of the Portsmouth Zoning Board of Adjustment's grant of variances from setback requirements contained in the City's zoning ordinance.

The neighbors first argue that the trial court's interpretation of this Court's opinion in *Simplex Technologies v. Town of Newington* is flawed. *Simplex* directs a consideration of whether the ordinance "interferes with the[] reasonable use of the property." The court, however, understood this to mean that "the issue . . . is whether the proposed use . . . is reasonable." The neighbors point out that because *Simplex* by its terms requires a finding of interference, not of reasonableness, the trial court made the wrong findings, and improperly lowered the burden of proof on the party seeking the variance. The trial court thus granted variances paving the way for Mr. Ramsey to build a hotel that is too big for its surroundings.

The neighbors then note that although *Simplex Technologies v. Town of Newington* requires the trial court to consider "the unique setting of the property in its environment," the court did not recognize the residential neighborhood in which the lot exists and the fact that Mr. Ramsey himself created his own environment by defining the terms of the re-zoning. It thus failed to balance the applicant's reasonable use against the purposes of Portsmouth's setback requirements, and therefor unlawfully approved a hotel that is too big for its neighborhood.

ARGUMENT

I. Party Seeking a Variance Must Prove Unnecessary Hardship

By statute, the ZBA may authorize a variance when (1) "it will not be contrary to the public interest"; (2) "owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship"; (3) it is in "the spirit of the ordinance"; and (4) "substantial justice [is] done." RSA 677:33, I(b). In addition, a variance cannot be granted if it diminishes the value of surrounding properties. *Ryan v. City of Manchester Zoning Board*, 123 N.H. 170, 173 (1983). "The party seeking a variance . . . bears the burden of establishing each of the requirements for a variance." *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243 (1992).

In variance cases the contentious issue generally is, as here, whether there is an unnecessary hardship. *Margate Motel, Inc. v. Town of Gilford*, 130 N.H. 91, 93 (1987) ("As do many zoning variance cases, this one presents the question whether there was sufficient evidentiary support for a finding of unnecessary hardship, an element which is necessary for the granting of a variance."). Until recently, the law had developed so that hardship had to be "so great as to effectively prevent the owner from making any reasonable use of the land," *Governor's Island Club v. Town of Gilford*, 124 N.H. 126, 130 (1983), and therefore overly difficult to prove with regard to constitutional property rights.

While there was no change in the basic concepts of variance law, Loughlin, 15 NEW HAMPSHIRE PRACTICE: LAND USE PLANNING AND ZONING § 24.16B (2002), in *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001), this Court redefined the standard for demonstrating unnecessary hardship. The relaxed standard states that unnecessary hardship now

requires applicants prove that:

> (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

Simplex, 145 N.H. at 732; *see also Rancourt v. City of Manchester*, 149 N.H. 51 (2003); *Plaistow Bd. of Selectmen v. Plaistow ZBA*, 146 N.H. 263 (2001).

The Supreme Court will reverse the trial court when its decision is not supported by the evidence, *Plaistow ZBA*, 146 N.H. at 264, or when it has erred as a matter of law. *Campbell Marine Const., Inc. v. Town of Gilford*, 132 N.H. 495, 496 (1989). In making its decision, the Court is required to give full effect to the purpose of the zoning ordinance. *St. Onge v. Concord*, 95 N.H. 306 (1949).

In this case the court was asked to interpret *Simplex*'s new definition of unnecessary hardship. Although *Simplex* was a substantial change, it did not alter basic concepts in the law of zoning or variances. *Simplex* did not change the burden for proving hardship to merely whether an applicant's proposed use is reasonable. Rather *Simplex* first requires a finding that the ordinance interferes with a reasonable use, and that the proposed use is reasonable considering the unique setting of the property in its environment. Second, it requires a finding that the setback as applied to the particular property does not serve the general purpose of the zoning ordinance. And third, it requires a finding that the variance does not injury the rights of others. Yet here, the court's ruling was both unsupported by the evidence and wrong as a matter of law because it upheld the ZBA's decision merely on the grounds that Mr. Ramsey's proposed use is reasonable.

II. The Trial Court's Order

The trial court issued a ten-page order. The first three pages explains the background and procedural history of this case. Page 4 describes the parties' positions. On page 5 the court determines the neighbors have standing. Page 6 quotes *Simplex* and reaches merits of the case that are not relevant here. Page 7 describes the ZBA's findings and the parties' positions regarding hardship. Page 8 determines that the procedural background of this case does not provide Mr. Ramsey an automatic variance, announces its holding that the ZBA properly found hardship, and further describes *Simplex*. Skipping to page 10, the court discusses its standard of review and affirms the ZBA. *See* ORDER (July 9, 2003), *Appx. to NOA* at 15 *et seq.*

The court addresses the issue here on appeal on page 9, and spends just one paragraph cursorily applying the law to the facts. The court posits as the *Simplex* test that "the issue a ZBA must consider is whether the proposed use of the property is reasonable, not whether the proposed use of the property is the *only* reasonable use of the land. ORDER (July 9, 2003), *Appx. to NOA* at 23 (emphasis in original). The court finds that "[w]here, as here, the ZBA's discussion of [Mr. Ramsey's] requested variances makes clear it found [Mr. Ramsey's] proposed use of the property to be reasonable, the first prong of *Simplex* is satisfied upon also finding, as the ZBA did, that the zoning restrictions interfere with the proposed use of the property, considering the unique setting of the property." ORDER (July 9, 2003), *Appx. to NOA* at 23.

III. The Trial Court Misinterpreted *Simplex*

A. Court's Misinterpretation of *Simplex* Lead it to Improperly Make a Finding of Reasonableness Rather Than The Required Finding of Interference

The court's interpretation of *Simplex* is flawed. *Simplex* directs a consideration of whether the ordinance "interferes with the[] reasonable use of the property." The court, however, understood this to mean that "the issue . . . is whether the proposed use . . . is reasonable." But *Simplex* by its terms requires a finding of interference, not of reasonableness.

By misunderstanding *Simplex*, the court lessened Mr. Ramsey's burden of proof and made findings that do not fully address this case. Under the court's formulation, all he had to do was demonstrate that his hotel plan is reasonable. Under the proper *Simplex* reading, he must show that the *ordinance interferes* with his use of the lot.

Mr. Ramsey proposed building a 63 by 231 foot, 100-room hotel. To show that the ordinance did not interfere with a reasonable use, the neighbors submitted to the ZBA and the court two architectural renderings depicting sixty-room hotels on footprints of 60 by 120 feet. *See* PLAN FOR 60 UNIT HOTEL, OPTION 1 and OPTION 2, *ZBA Exhibit Notebook* behind tab P (undated); *6/4/03 Trn.* at 7. Each of these plans comports with the zoning ordinance and requires no variances. Each has compliant front, back, and side yards, adequate distances from residential uses, and sufficient greenery. The neighbors also brought to the ZBA's and the court's attention several economically viable hotels in the Portsmouth area that contain in the range of 60 rooms. *See* MARKET & SITE ANALYSIS, *ZBA Exhibit Notebook* behind tab 11 at p. 15 (Nov. 2002); *6/4/03 Trn.* at 8. The architectural drawings and the examples of other hotels show that Mr. Ramsey can make a reasonable use of his lot such that the zoning ordinance does not interfere.

Thus Mr. Ramsey has failed to prove that the ordinance interferes with the use of his lot.

By misstating the *Simplex* test, the court eased his burden of proof. Rather than requiring him to show interference, it allowed a variance by a mere showing that his proposed use is reasonable. The court's misstatement of the law thus had significant ramifications.

By misstating the *Simplex* test, the court also misunderstood why the neighbors submitted alternative hotel plans. The court wrote that "the proposed 100-unit hotel is not unreasonable simply because alternative uses exist that may require fewer or less drastic deviations from the zoning restrictions." ORDER (July 9, 2003), *Appx. to NOA* at 23. As noted, the court wrongly interpreted *Simplex* to mean that Mr. Ramsey merely had to show that his proposed use is reasonable. Thus, it wrongly understood that the offering of alternative uses was somehow intended to demonstrate that Mr. Ramsey's plan was unreasonable.

But the neighbors have never complained that Mr. Ramsey's proposal is unreasonable on the grounds that alternative uses exist. *C.f. Margate Motel*, 130 N.H. at 95 ("alternative permitted uses for this property abound"). They have complained only that his proposal is too big for his lot. It is Mr. Ramsey's burden to show, in order to procure variances to build a bigger building than the ordinance allows, that the ordinance interferes with the reasonable use of his lot. The neighbors tendered alternative reasonable uses to which his property can be put without variances merely to point out that Mr. Ramsey had not met his burden. There *are* ordinance-complaint alternative reasonable uses for the lot. Thus, Mr. Ramsey cannot prove, and made no effort to prove, that the zoning ordinance interferes with reasonable use. *See e.g., Husnander v. Town of Barnstead*, 139 N.H. 476 (1995) (failure to grant setback variances would render lot unbuildable); *Sprague v. Town of Acworth*, 120 N.H. 641 (1980) (failure to grant setback

variances would render lot unbuildable except for small triangle); *Richardson v. Town of Salisbury*, 123 N.H. 93 (1983) (although property unique in frontage and depth, because it could be used for residential or agricultural purposes similar to those in vicinity, variance not justified).

B. Court's Misinterpretation of *Simplex* Lead it to Improperly Apply the Law to Mr. Ramsey's Proposed Use Rather Than a Reasonableness Use

The court misunderstood *Simplex* in another way as well. It stated that *Simplex* was satisfied when the ZBA found "the zoning restrictions interfere[d] with the *proposed* use of the property." ORDER (July 9, 2003), *Appx. to NOA* at 23 (emphasis added). The court thus based its determination of hardship merely on the fact that the setbacks interfered with Mr. Ramsey's plan. Any developer can meet that burden by merely making his plan big enough. If, for example, he wished to build a 500-room hotel, the ordinance would clearly interfere. Under *Simplex*, however, a developer should get a variance only if the ordinance interferes with a *reasonable* use. By misstating the standard, it misunderstood why the neighbors submitted a complaint 60-room hotel plan, and rewarded Mr. Ramsey with an unduly low burden of proof.

C. *Simplex* Means What It Says

Correctly interpreted, *Simplex* means what it says. In order to get a variance, the applicant must show, among other things, unnecessary hardship. Unnecessary hardship requires a showing that the zoning setbacks interfere with reasonable use of the property, that the proposed use is reasonable considering the unique setting of the lot in its environment, that the setbacks do not serve the general purpose of the zoning ordinance, and that the variance does not injury the rights of others.

If the court has not made findings on all these elements, no variance will be granted.

As noted, the neighbors submitted plans showing that it is possible to build a ordinance-compliant 60-room hotel. In his presentation to the ZBA and the court, Mr. Ramsey made no effort to rebut the plans, to show that a smaller hotel would not be a reasonable use of his property, to prove that the zoning ordinance interferes with a hotel on his property, to argue the setbacks do not advance the zoning scheme, nor to rebut the neighbor's claim that their rights and those of the public will be injured by his too-large hotel plans. *C.f. Margate Motel*, 130 N.H. at 95 ("it is obvious that [owner's] parcel is not ideally configured for the construction of a motel that is both economically feasible and within industry standards, at least not without a variance").[1] Likewise, the court made no findings regarding these elements.

D. Mr. Ramsey's Project Is Too Big for His Property

The *Simplex* standard is that the applicant must prove the ordinance interferes with his reasonable use. Mr. Ramsey has alternative reasonable uses with which the zoning ordinance does not interfere. In short, the zoning ordinance allows a financially workable 60-room hotel on Mr. Ramsey's lot, but the project he proposes is just too big for his property.

Because the variances were unlawfully granted based on a misstatement of the law, this Court should reverse the lower court's decision.

[1]To the extent that Mr. Ramsey raised the issue, even after *Simplex* financial hardship is not sufficient to excuse compliance with zoning setbacks. *Olszak v. Town of New Hampton*, 139 N.H. 723 (1995); *Carbonneau v. Exeter*, 119 N.H. 259 (1979) (characteristics of the land, and not plight of owner, are proper considerations); Loughlin, 15 NEW HAMPSHIRE PRACTICE: LAND USE PLANNING AND ZONING § 24.16B (2002).

IV. Court's Misinterpretation of *Simplex* Fails to Consider the Unique Setting of the Property in its Environment

In *Simplex* this Court recognized that its former test for hardship was too tight and therefore loosened it. *Simplex* thus strikes a careful balance, requiring not only consideration of the property owner's interest in the use of his land, but also "the unique setting of the property in its environment." *Simplex*, 145 N.H. at 732. If either half of the balance is ignored, the test becomes either too permissive, or too restrictive. *See e.g., Rancourt v. City of Manchester*, 149 N.H. at 51.

The court clearly took into account Mr. Ramsey's interests. Its order, however, made no attempt to consider the environment into which Mr. Ramsey proposes to place his big hotel. Beyond a quotation of *Simplex*, the issue is just not addressed. The court thus failed to give any credence to neighborhood concerns, or to balance them against Mr. Ramsey's private interest.

Across the street from Mr. Ramsey's property exists a hotel, with 130 rooms. Its presence was the basis on which the court in 1998 ordered a zoning change, and on which the ZBA and the court repeatedly relied in this variance case. But a hotel in front of Mr. Ramsey's property is not a full description of the landscape – his lot backs up to an existing residential neighborhood. In the neighborhood, called Atlantic Heights, the lots happen to be configured and the roads routed so that the back of the proposed hotel borders residential uses and places the hotel squarely in the residential neighborhood. *See* UNTITLED MAP, *ZBA Exhibit Notebook* behind tab E (April 1, 2000); UNTITLED MAP, *ZBA Exhibit Notebook* behind tab 15 (undated);

Setback regulations in zoning ordinances exist to control the size and volume of structures in relation to the area of land, and to generally keep buildings from being too big for

the environment they share with others. RSA 674:16; *Devaney v. Town of Windham*, 132 N.H. 302 (1989). For this purpose, they specify, among other things, the size of front, back, and side yards, and contain setback rules. RSA 674:16, I(b). The Portsmouth zoning ordinance is typical.

The proposed hotel, however, is too big for its vicinity. If it were half or 60 percent of its proposed size, it would not unacceptably encroach. *Richardson v. Town of Salisbury*, 123 N.H. 93 (1983) (size and dimensions of a parcel alone do not create an unnecessary hardship when the land could still be used for the purposes permitted by the zoning ordinance). The neighbors are not opposed to growth or to a hotel. Rather, they are glad to see productive use of Mr. Ramsey's lot, which has become blighted. Nonetheless, as demonstrated by the fact that his plan butts up against the setbacks, Mr. Ramsey's proposed hotel is too big for his lot, and too big for the zoning district in which it lies. *See e.g.*, *Healey v. Town of New Durham*, 140 N.H. 232, 237 (1995) (violation of setback requirements when owners built two-car rather than one-car garage).

Because the court failed to consider the residential setting in which Mr. Ramsey's lot exists, it failed to adequately balance reasonable use against the purposes of Portsmouth's setback requirements. *Rancourt v. City of Manchester*, 149 N.H. at 53-54. It also failed to recognize that Mr. Ramsey created his own setting, which accommodates a hotel, by initially seeking rezoning on terms he was in a position to define. The court's failure to consider the "unique setting of the property in its environment" upsets the careful balance this Court established in *Simplex*. While the pre-*Simplex* rule was overly restrictive, it is essential that post-*Simplex*, the rule does not inadvertently become overly permissive. Reversal will thus ensure that *Simplex* remains in balance.

CONCLUSION

Based on the foregoing, the neighbors request a reversal of the trial court's approval of the ZBA's grant of variances, which allow Mr. Ramsey to build a project too big for his lot.

Respectfully submitted,

Michael Boccia, Michael Boccia as Trustee of Atlantic Heights Historic Realty Trust, Theodore Place, Roberta Place, Eric Place, Kerry Place, Monte Bounds, Eric Goodrich, Stephanie Goodrich, Dan Jolly, Kara Jolly, Kevin Rex, Kevin LaFond, Portoff, LLC, and 100 Market Street Corporation as Trustee of 976 Realty Trust

By their Attorney,

Law Office of Joshua L. Gordon

Dated: December 15, 2003

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

The appellants request that their counsel, Joshua L. Gordon, or Thomas M. Keane, be allowed 15 minutes for oral argument.

I hereby certify that on December 15, 2003, copies of the foregoing will be forwarded to Thomas M. Keane, Esq.; Charles A. Griffin, Esq; and to Robert P. Sullivan, Esq.

Dated: December 15, 2003

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