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Zoning Regulation Variances: Hardship Rule

When a Connecticut property owner wants to use his property for a use or in a manner which would violate the local zoning regulations, the property owner must obtain a "variance" from the local Zoning Board of Appeals (ZBA). In granting a variance, the ZBA orders that the regulation to be violated is waived for the applicant's property only so that the applicant does not have to comply with the specific requirement waived. For instance, if a property owner wishes to enlarge a garage or add a second vehicle bay or construct a building addition within the front, side or rear setback lines, or subdivide an undersized parcel of land into more than one building lot, the owner or other eligible applicant would need a variance waiving the applicable zoning regulations of the town.

(a) To be granted a variance, the applicant must satisfy the requirements of Section 8-6(a) (3) of the Connecticut General Statutes. Those requirements include proof that (i) the granting of the variance will not be out of harmony with the town's comprehensive plan; and (ii) "owing to conditions especially affecting such parcel but not affecting generally the district… a literal enforcement of such…regulations would result in exceptional difficulty or unusual hardship, and (iii) substantial justice will be done and the public safety and welfare secured...." The most difficult requirement to satisfy is the "hardship" requirement. The hardship (1) must be unique to and affect only the applicant's property and not the other properties in the neighborhood, (2) cannot be financial in nature except in rare and extreme circumstances when evidence presented shows that enforcement of the regulation would destroy the economic utility of the property; (3) cannot be self created by the applicant's own acts or omissions, and (4) must result if the regulation is literally enforced in the practical confiscation of the applicant's property. The hardship requirement as interpreted by the Connecticut courts is rarely satisfied.

(b) ZBAs in many towns follow an unwritten custom of granting variances when no one objects and when the ZBA is sympathetic to the applicant's case and feels that the variance is justified on equitable grounds. Legally, the mere fact that no one has objected or there are no apparent adverse effects or that it would be equitable to grant the variance is not the proper standard to be applied. The granting of a variance will be upheld only when the statute is adhered to and each element is satisfied by evidence in the record of the public hearing held on the application.

There is at least one instance, however, when an applicant will not be required to prove hardship. The elimination or at least reduction of a non-conforming use or condition on property may serve as an independent basis for granting a variance. A variance request which reduces a non-conformity to a less offensive use even though still nonconforming may be approved by a ZBA and upheld in court.

> "It should be understood when filing a request for a variance that most of the time you are not legally entitled to the variance...."

A brief comment about the "deminimis doctrine:" In a recent Superior Court decision, *Wine Cellar Spirits v Fairfield ZBA*, 2006 Conn. Super. LEXUS 619, decided March 1, 2006, Judge Owens of the Superior Court confirmed that Connecticut has not recognized the diminimis doctrine although some other states have and he declined to recognize it in this case. The deminimis doctrine allows a variance to be granted if the ZBA determines that the deviation from the zoning regulation(s) is a minor one and that the public health, welfare and the public policy underlying the regulation would not be adversely affected. Even small variances, i.e., one foot in a setback situation still require proof of hardship in Connecticut.

Because the standard practice of many ZBAs differs from the legal standards set forth in Section 8-6 CGS, people are confused when some applications before their local ZBA's are granted for little or no legal justification and

others are denied for no apparent reason or based on a verbalized finding of no hardship. The legal standards are applied in some cases and used as an excuse for denial or are ignored in other cases. In many municipalities there is inconsistency in the adherence to the statutory requirements for variances. It should be understood when filing a request for a variance that most of the time you are not legally entitled to the variance because there is no provable hardship. It is still, however, worth applying for the variance if you have a good practical reason for requesting it and you don't expect any opposition from neighbors or competitors.

For additional information about this topic, please contact the author, James P. White, Jr. at 203-330-2132 or at jwhite@pullcom.com.

Tax Breaks for Land Preservation

When President Bush signed the Pension Protection Act of 2006 he commended the bill for strengthening pension insurance and keeping workers better informed about their pension plans. Meanwhile, environmentalists have hailed the bill for protecting open space through the encouragement of conservation easements. And, at least for a limited time, conservation-minded taxpayers can reap the benefits.

Buried in this lengthy piece of legislation is a significant income tax deduction available to individuals who donate a qualified conservation easement on their property. A landowner who makes a qualified conservation easement donation in 2006 or 2007 is eligible to receive a deduction valued at 50 percent of the donors adjusted gross income and can carry forward any amount in excess at the same rate for 15 years.

A conservation easement is an agreement between a landowner and the government or a land trust to restrict development on the land for some conservation reason. Conservation purposes can include the preservation of the land as open space for recreation or scenic enjoyment, protection of natural wildlife habitats or the preservation of a historically important land area or a certified historic structure.

For those individuals that donate such a qualified easement, the Pension Protection Act provides a sizable income tax deduction. Individuals may deduct the full value of the easement, up to 50 percent of their adjusted gross income. For qualified farmers or ranchers, the limit is increased to 100 percent of adjusted gross income. Any additional value not accounted for in this initial deduction can be rolled over at the same rate for the next 15 years.

However, the time to act is now, as this provision is set to expire on December 31, 2007. Thus, in order to qualify for these tax deductions the qualifying donation must already have been made, or must be made before the end of the year. Unless ongoing efforts in Congress to extend this benefit are successful, easement contribution made on or after January 1, 2008, will be limited to 30 percent of the donor's adjusted gross income for the year of donation and any excess value could be carried forward for up to 5 additional tax years (subject to the same 30 percent limitation).

This article was written by Stephen J. Stafstrom Jr., a third year law student at the University of St. Louis Law School and reviewed and edited by Pullman & Comley attorney Diane Whitney. For more information please contact Diane Whitney at 860-424-4330 or at dwhitney@pullcom.com.

Proper Titling Of Out-Of-State Realty Can Save Money

Many of our individual clients own real estate in more than one state -- a Connecticut resident may hold out-of-state realty or a non-resident of Connecticut may own property located in Connecticut. In both cases, how an individual holds title to the realty will determine how costly it may be to accomplish a transfer after death to the individual's beneficiaries.

From an estate planning perspective, it is usually advisable for real estate owned outside of one's home state not be titled in one's own name. This is true whether the property is a second home or business or investment property.

Here's why: Ownership of out-of-state realty in one's own name will generally require probate or similar

procedures in the state where the realty is situated. A second set of probate procedures will generally require the services of an attorney in that state and can be quite expensive. Furthermore, delays often result since the other state's probate courts will often first require the appointment of an executor in the decedent's home state before beginning its proceedings.

In addition to multiple probate proceedings, there often will be additional tax proceedings and additional state death taxes. The amount of total state death taxes will depend on the tax rates and other provisions of the laws of both states. Connecticut, for instance, currently bases its state estate tax on all of a resident's assets, but will allow a credit for death taxes paid to the state where the realty is located. However, the credit allowed by Connecticut may be less than the tax actually paid to the other state resulting in a greater total tax burden. In any event, even if there is no increase in the total taxes, dealing with an additional set of tax authorities will result in additional administrative expenses and expenditures of time on the part of fiduciaries. Similar issues arise in the less usual circumstances of tangible personal property located in another state. Certain investments in oil and gas interests and other mineral rights may also be treated as real estate for legal purposes.

There are several methods of overcoming these potential pitfalls. Some of them avoid only the need for probate proceedings in the non-resident state. Others will avoid both the tax and probate issues. Helpful techniques include joint tenancy with rights of survivorship, trusts, and the use of entities, such as an LLC, to own the real estate. Many times the use of an entity can result in other estate planning benefits, such as transferring management and equity to younger generations. In some cases, however, there may be tax (other than the state death tax) and non-tax disadvantages to one or more of those approaches.

Pullman & Comley's trust and estates attorneys deal with all of these issues under many different circumstances.

For additional information on this topic, please contact the author, Herbert M. Moorin at 203-330-2124 or at hmoorin@pullcom.com.

Environmental Victory

You cannot wait ten years to bring an action based on contamination of property if you knew about the spill when it happened. That is the conclusion of Judge Pittman in *Longobardi v. Shree Ram Corporation, et. al.* The Longobardis, owners of the property, were very well aware in 1996 that there had been an accidental spill on the property where Shree Ram operated a dry cleaner. In 2006, long after the dry cleaning business had left the property, the property owners sued Shree Ram over the ten-year-old spill.

In a decision issued in August 2006, Judge Pittman granted summary judgment for Pullman & Comley's client Shree Ram Corporation. The decision finds that the statute of limitations begins to run at the time of the incident, putting an accidental spill in 1996 far outside any statute of limitations that might be applied to the situation.

For additional information on this topic, please contact the author, Diane W. Whitney at 860-424-4330 or at dwhitney@pullcom.com.

Editor's Notes

Diane W. Whitney, Lee D. Hoffman and Christopher P. McCormack were recently noted in the 2007 edition of Chambers USA as among the top lawyers in Connecticut for their work in environmental law.

Whitney also moderated a panel discussion on "Toxic Torts: Managing the Liability and Managing the Perception" at the Air and Waste Management Association's Annual Conference on June 27, 2007.

Hoffman chaired a panel discussion on "Environmental Enforcement - Public and Private Perspectives" at the 100th Annual Conference and Exhibition of the Air and Waste Management Association on June 26, 2007.

James P. White Jr.
Editor

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