THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0753, Neale Anthony Hubbard v. City of Dover, the court on September 21, 2009, issued the following order:

The petitioner, Neale Anthony Hubbard, appeals an order of the trial court that denied his appeal from a City of Dover Zoning Board of Adjustment (ZBA) decision that denied his request for a variance. He argues that the ZBA and trial court erred in: (1) considering evidence of the use of the two lots that would be created by the proposed subdivision when only one of the lots would be non-conforming; and (2) denying the variance in the absence of evidence that the reduced frontage in one lot was contrary to any of the five variance requirements.

The superior court's review in zoning cases is limited. Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007). Factual findings of the ZBA are deemed prima facie lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable. Id. The party seeking to set aside the ZBA decision bears the burden of proof in the superior court. Id. The trial court's review is not to determine whether it agrees with the ZBA's findings, but, rather, to determine whether there is evidence upon which the findings could reasonably have been made. Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 583 (2005). We will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. Malachy Glen Assocs., 155 N.H. at 105.

At the outset, we note that the parties agree that the use proposed by the petitioner is allowed under Dover ordinances. The only issue before the ZBA was whether to grant an area variance to allow a proposed subdivided lot to have 75 feet of frontage rather than the 100 feet required by the ordinance.

An applicant seeking a variance must demonstrate that: (1) it will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the provisions of the ordinance will result in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) granting the variance will not diminish the value of surrounding properties. Id.

The ZBA found that the petitioner had met his burden to establish hardship. The ZBA then considered the public interest and spirit of the ordinance factors and determined that the petitioner had failed to satisfy his burden. The ZBA cited the testimony of the City Planner who had researched the 266 lots created in the original subdivision created 102 years earlier. He

noted there were a total of 60 lots on the current tax map, six of which did not meet the frontage requirement. Three of the six lots were city-owned; two others were owned by abutters. Of the remaining 56 lots in the neighborhood, only one did not comply with the 100-foot frontage requirement. The ZBA further found that the increased number of lots would increase the traffic on a very narrow, substandard street with no sidewalks.

The ZBA then considered the substantial justice factor and found: "Allowing this variance would create an injustice to the current residents of Earl Street due to the likely loss of the localized essential character that the dead end street with lots of comparable road frontage provides." See id. at 109 ("Perhaps the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." (brackets and quotations omitted)).

The ZBA also considered the effect that the variance would have upon surrounding properties. The ZBA found that the creation of a new lot with substandard frontage would affect the uniqueness of the current properties due to their frontages which exceed the minimum road frontage requirements. The ZBA found the testimony of the neighborhood residents more compelling than that of the petitioner's expert who was not a professional property appraiser and who, the ZBA found, did not provide persuasive testimony that creation of a nonconforming lot with reduced frontage would not affect values of surrounding property.

Because the findings of the ZBA are supported by the record and the petitioner failed to establish that the ZBA erred in its review of his application, the trial court correctly denied his appeal.

Affirmed.

BRODERICK, C.J., and DALIANIS and HICKS, JJ., concurred.

Eileen Fox,
Clerk