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## How “Hard” Must “Hardship” Be?



5571 Easton Road, Plumsteadville, PA 18949

Our governments, whether local, state, or federal, have a certain amount of say-so and control over our real estate. All three have the power to exercise their powers of eminent domain to condemn private property for public uses, providing that just compensation is paid to the landowner. The definition of “public use” became a national debate a few years ago after the *Kelo v. New London* suit in Connecticut, but there is a second means by which local jurisdictions in particular control our realty, and that is through “police power” as exercised through land use and zoning ordinances. Police powers do not take away a person’s rights as condemnation does, but instead directs or restricts them. Just as in condemnation proceedings, the affected landowner has the right to appeal police actions relating to land. Recently a disgruntled landowner in Plumstead Township, Montgomery County, Pennsylvania exercised that right, and first won in trial court but then lost in the Township’s appeals to the State Supreme Court, making land use news throughout the country.

Mr. A. Rhodes Wilson had bought property on US Route 611 (known

locally as Easton Road) that was zoned R-2, a residential zone allowing home occupations, which are defined as a use “conducted within an existing dwelling which is the bona fide residence of the principal practitioner....” A house did exist on the property, and Wilson began to renovate it. After a zoning officer notified Wilson that he needed a building permit, Wilson made the application and received approval for the plans he had submitted to the Township entitled “Wilson Residence”. As the renovations proceeded, the building inspector noticed that improvements throughout the structure were all typical of an office, but Wilson assured him that they were for a residence with a “home occupation”.

After the renovations, however, the zoning inspector found that Wilson was not living there, and was instead using the building only as an office, an impermissible professional office use inconsistent with R-2 zoning. Wilson’s response to the Enforcement Notice was to file an appeal, which the Township rejected because the building could reasonably be used as zoned. Mere desires to maximize financial gain are not the grounds for a use variance, and any hardship was self-inflicted. Wilson’s appeal to the trial court succeeded,

based on additional evidence identifying various commercial entities operating nearby that made the property “not conducive to residential living or raising a family” and testifying that he would not “enjoy living there because of traffic and traffic noises.” The Township, of course, was not happy with this outcome, and both the Commonwealth Court and Supreme Court of Pennsylvania upheld Plumstead’s actions in denying the variance.

What is the burden on the applicant for a variance? The upper courts here defined that as a showing of unnecessary hardship resulting from denial of a variance, that the use will not be contrary to public interests, and that the requested variance would be the minimum action that would afford relief from the hardship.

According to *Black’s Law Dictionary*, a hardship is “In general, privation, suffering, adversity. As used in zoning statutes as grounds for variance, it refers to fact that zoning ordinance or restriction as applied to a particular property is unduly oppressive.”

When is a hardship really a hardship, warranting a variance, and when is it self-inflicted? Because land use regulation was applied uniformly throughout the R-2 zone, there was no special hardship inflicted upon Wilson by enforcement of

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Aerial view of Plumsteadville property

those same ordinances on his particular property; every other landowner in the same R-2 area was subject to the same circumstances. There was no difference between his house that was eligible for home occupation and any other house on that stretch of highway eligible for the same uses. He was not being singled out, he was not being denied use of his property, and his house was suitable for the zoned uses imposed by the Township.

Wilson was aware of the zoning before he bought the property, and was aware of the busy nature of the area. As a side note, his "additional evidence" presented to the trial court included nearby tracts that he failed to disclose as being zoned for the strictly commercial uses they supported. Knowing, then, what he was getting into, were Wilson's circumstances "self-inflicted"? To be self-inflicted, the property owner would have to have created the conditions leading to the hardship. Wilson did not affect the zoning, and he did not pay more than the property was worth as a house eligible for "home occupation".

This brings up a significant point in arguing for hardship variances—or against them. About ten years ago, a developer in my area pressured a local jurisdiction to change the zoning for a certain area from commercial to residential use. Against public urging to the contrary, the community made the change. But then

publicity about environmentally unsafe conditions making residential use hazardous became a very hot topic. Restraining their great desire to shout, "We told you so," the original opponents moved to oppose the variances that the zoning board was now granting to the developer to build in that same area, and failing that, pressed suit in Commonwealth Court to stop the development.

On the heels of the opponents' win, the developer immediately appealed to the next higher court, which overturned the lower court and upheld the variances granted by the zoning board. Why? Because obviously there was a hardship! If the developer did not receive the requested variances to complete its project as it planned, it would suffer great economic loss, and since the site was zoned for residential use, it could not possibly be used for anything else. What the court failed to acknowledge, and what had not been an issue in the lower court, was that the zoning change had been implemented at the developer's own request. Without that prime piece of information, the upper court would not believe that this was a self-inflicted hardship. *AS*

**Author Note:** For those wishing to read *Wilson v. Plumstead Township Zoning Hearing Board*, the citation is 926 A.2d 1061, Supreme Ct. of PA, 2007.