



By Wendy Lathrop, LS

Wendy Lathrop is licensed as a Professional Land Surveyor in New Jersey, Pennsylvania, Delaware, and Maryland, and as a Professional Planner in New Jersey. She has been involved since 1974 in surveying projects ranging from construction to boundary to environmental land use disputes.

The Big Picture

Frequently our clients wish to use their properties to the fullest extent, but that “fullest extent” might require a bit of leeway from the local powers that be.

When the process requires applying for a variance, emotions and tempers rise to the occasion, and sometimes lawsuits are the result. Argument over the letter of the law versus the spirit of the law can become central arguments, often citing technical requirements either as arbitrary or necessary, depending upon which side is presenting the point. Two recent cases underscore our need as design professionals to look at the big picture, beyond the boundaries of the site on which we have been contracted to work, to understand why our clients may not be granted a waiver to a zoning ordinance when it seems that would be the reasonable thing to do.

The New Hampshire Supreme Court recently published its verdict on the 2003 case of *Bacon v. Town of Enfield* (840 A.2d 788). The Bacons live year-round in their home along the shore of Crystal Lake in Enfield, and decided to change the heating system from wood and electricity to propane gas. They hired a contractor to install a propane boiler outside their house, which required construction of a four foot by five and a half foot shed, attached to their house, to shelter the boiler. Enfield has an ordinance requiring a 50-foot setback from the seasonal high water mark of Crystal Lake. Like most houses in the area, the Bacons’ home lies almost entirely within the 50-foot setback, a condition pre-existing and non-conforming to the ordinance. The Bacons did not contact the town prior to erecting the shed, but a neighbor brought the con-



struction to the town’s attention, at which point the Bacons sought a variance. Their request was denied. The Bacons sued.

Enfield’s Zoning Board of Adjustment (ZBA) interprets its ordinance as applicable to all new construction, and forbids any addition to a structure’s footprint in the lake setback area without a variance. The ZBA denied the Bacons a variance because the application did not meet “hardship” cri-

teria, the variance “violated the spirit of the zoning ordinance”, and the variance was not in the public interest.

There were alternatives to the location chosen by the Bacons for their propane boiler, including within the house itself. Further, the existing heating system was fully functional; merely wishing greater efficiency does not create a hardship. Despite the Bacons’ arguments that other

variances had been granted in Enfield, none were in the same district or under the same restrictions, and so the Bacons had not been singled out, treated differently, or denied use of their land beyond the restrictions uniformly placed on all of their neighbors.

The ordinance had been written to when the town had recognized a clear relationship between increased development and the amount of run-off into the lake. Enfield argued that it was in the public interest to control development congestion along waterways to protect those natural resources. The court agreed: "In this case, the fifty-foot setback restriction addresses not just the potential peril of construction on a single lot, but also the threat posed by overdevelopment in general. While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant."

Larger Considerations

This decision forces us to take off the

blinders and see beyond the limits of our own site to see what the larger implications might be. The concurring opinion (the court was not unanimous, and the concurrence confirmed the outcome but for different reasons) points out some further distinctions that we should take into account before advising our clients to go ahead and seek that variance: "A use variance allows the landowner to 'engage in a use of the land prohibited by the zoning ordinance.' . . . An area variance, however, involves a use permitted by the zoning ordinance but 'grants the landowner an exception from strict compliance with physical standards such as . . . setback line, frontage requirements, height limitations, lot size restrictions, density regulations and yard requirements' . . . the area variance is 'a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by the ordinance.' Accordingly, courts generally have been less likely to approve use variances than area variances."

With those thoughts in mind, we can see that the cumulative effect of upholding zoning ordinances should be considered as in the public's best inter-

est, and that variances need not be granted just because "it's such a small infraction" or because of an inconvenience to an individual landowner. We progress to the case of *Levin v. Upper Makefield Township*, decided by the U.S. Court of Appeals in early 2004 (90 Fed. Appx. 653). In 1997, Mr. Levin bought two vacant lots, totaling about seven acres, bisected by River Road, bounded by the Delaware River on one side and the Pennsylvania Canal on the opposite. Both the local zoning maps and the Flood Insurance Rate Maps identify this area as floodplain. Levin applied to build a residence on the lot bounding the canal. He was denied.

The Township claimed that Levin knew the site was in a floodplain subject to restrictions before he bought the land, and that he knew the prior owner had been denied a variance to build there; Levin had even bought the property at a substantial discount. But Levin claimed he had talked with the Township code enforcement officer, and had decided to purchase the land in reliance on that person's representation that Levin would only have to comply with specific zoning ordinances and that there was no official policy preventing him from building his home, although he would need to seek a variance.

Levin accused the Township of actions that "shock the conscience" on a number of fronts, one of which is that the process for variance applications is a "sham" if no variances will be granted within certain areas, such as the floodplain within which his property lies. Upper Makefield defended its ordinances, which reflect state and federal guidelines for protecting lives and property, and noted that Levin's property had been underwater several times, with floodwaters once killing a woman on the road crossing his lot. The expense to the Township (read "taxpayers") and danger to rescuers of allowing construction exceeds any "hardship" this individual might suffer by denying him use of the land he bought with at least some knowledge of its difficult situation. In the end, the District Court upheld the denial of any variance, concluding that "when all is said and done, and all the dust has settled, this suit appears to be little more than a resident's inability to understand why the Township might not think it prudent land use planning to allow someone to build a home in a flood plain." *A*

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The American Surveyor
905 West Seventh Street, #331
Frederick, MD 21701

