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QUESTIONS FROM THE ZBA TRAINING IN PORT BYRON ON FEBRUARY 7, 2013

Q1. Can existing structures on a parcel be considered as part of the unique circumstances that establish unnecessary hardship for a use variance?

A1. Yes. Unique circumstances of the land can include existing structures on the property. Other unique circumstances can include the dimensions and shape of the lot, or geological conditions.

Relevant court cases, cited in New York Law and Zoning Practice (4th Edition, by Patricia Salkin) at §29:8

- *Fiore v. Zoning Bd. of Appeals of Town of Southeast*, 21 N.Y.2d 393, 288 N.Y.S.2d 62, 235 N.E.2d 121 (1968) upholding the grant of a variance where the applicant's land contained a barn so large that it rendered impractical a conversion to a single-family residence.
- *Banister v. Board of Appeals of Village of East Hampton*, 65 N.Y.S.2d 15 (Sup 1946) upholding the grant of a variance for the establishment of a riding academy where property was occupied for 100-year-old buildings that were in disrepair, which made the land useless for purposes permitted by the zoning regulations.

Q2. If an applicant acquires property while a particular use is permitted on that land, but later the zoning is changed to make the particular use not permitted, the applicant's hardship can be considered not self-created. On the other hand, if the applicant acquired the property after the zoning was already in effect and proposed to develop a use that is not permitted in the existing zoning, then that hardship is self-created. What if the applicant inherited the property from a family member, and the granting family member had a hardship that was not self-created, but the inheritance happened after the zoning was changed to make the proposed use not permitted? Is this applicant's hardship self-created?

A2. The answer is not clear. I reviewed resources that I have in my office, talked with trainers at the NYS Department of State (DOS) Division of Local Government Services, and consulted with an attorney in the DOS Office of General Counsel. There seem to be no laws or court decisions that answer this question clearly.

We did find a few court decisions which clarify that a self-created hardship is not wiped clean by inheritance. A hardship that was self-created by a property owner is still a self-created hardship for an heir who inherits the property from the previous owner. See: *Simpson v. King*, 47 A.D.2d 634 (1975), 38 N.Y.2d 1008 (1976).

But what about the other way around? Is a hardship that is not self-created still not self-created for an heir? In the opinion of Bill Sharp, attorney for the NYS DOS Office of General Counsel, it is up to the zoning board of appeals to make a judgment call. The board should consider whether the applicant is a family member who inherited the property in good faith, and use that fact in making its decision. Similar situations may arise from applicants who acquire property through divorce or a court order.

Mr. Sharp's answer suggests that there may be cases where a zoning board of appeals is justified in granting a variance to someone who inherited a property with an existing hardship that was not self-created. It is up to the board to decide.

As several people mentioned at the training, this consideration will rarely be the deciding factor. For example, the board should consider whether there is any hardship at all, self-created or not. Often, if someone inherits property, they have not paid anything for it and have not made any monetary investment to acquire it. Essentially, it is a windfall. In the Simpson case, cited above, the court used this argument to support denial of a variance. Again, it is up to the board to decide.

- Q3. Do members of the zoning board of appeals have personal liability for their actions or decisions on the board?
- A3. No. To quote from the NYS Court of Appeals in 1883, "no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it." See: *East River Gas-Light Co. v. Donnelly*, 93 N.Y. 631 557 (1883); *Rottkamp v. Young* 21 A.D.2d 373 (1964).

This rule is even stronger than the immunity given to other public officers, such as code enforcement officers, who make "ministerial" or "nondiscretionary" actions. They may be held liable if they do their jobs "wrongfully". In contrast, boards like a zoning board of appeals make acts that are "judicial" or "discretionary". In this case, the board members are immune from liability even if the act is "wrongful".

The immunity for public officers making judicial determinations is rooted in common law, stretching back hundreds of years. It has been upheld by courts in New York and throughout the United States repeatedly over the years, in part because liability "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." See: *Gregoire v. Biddle* 177 F.2d 579 (1949).

If a board makes a wrongful decision, the action may be overturned by a court and the town or village which appointed the board may be liable for damages. However, the individual members of the board remain immune from liability.

Even if you are named in a suit for your actions on the board, §18 of the NYS Public Officers Law empowers your town or village to cover all costs of defending you. Given the common law rule of immunity for public officers, your defense will almost certainly be successful. Fear not, and go forth "in the unflinching discharge" of your duties!