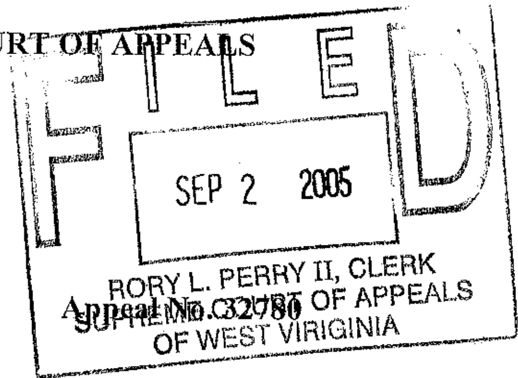
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



Maplewood Estates Homeowners Association,
An unincorporated association,

Petitioners Below /Appellees

v.

Appeal No. 32780

Putnam County Planning Commission and
Sherman and Helene Bennett,

Respondents Below /Appellants

RESPONSE TO JOINT BRIEF OF THE PETITIONERS, SHERMAN AND HELENE BENNETT AND THE PUTNAM COUNTY PLANNING COMMISSION

Gordon C. Lane (WV Bar No. 2137)
Kelly M. Young (WV Bar No. 7938)
Brian O. Casto (WV Bar No. 7608)
Lane & Young
1538 Kanawha Boulevard, East
Charleston, WV 25311
(304) 345-6000
Counsel for Petitioner/Appellee

TABLE OF CONTENTS

1. Kind of Proceeding and Nature of the Ruling Below 1
2. Statement of the Facts of the Case 2
3. Points and Authorities Relied Upon 7
4. Argument 8
5 Conclusion 25

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Maplewood Estates Homeowners Association,
An unincorporated association,

Petitioners Below /Appellees

v. **Appeal No. 32780**

Putnam County Planning Commission and
Sherman and Helene Bennett,

Respondents Below /Appellants

RESPONSE TO JOINT BRIEF
OF THE PETITIONERS,
SHERMAN AND HELENE BENNETT
AND THE PUTNAM COUNTY PLANNING COMMISSION

---

1. Background

On July 5, 2005, Appeal was granted to the petition of Appellants Sherman and Helene Bennett and the Putnam County Planning Commission. The matter before the Court stems from an action commencing on April 21, 2004, when Maplewood Estates Homeowners Association, hereinafter referred to as ("Maplewood") filed a Petition for Appeal from the Order of the Putnam County Planning Commission appealing from an Order (hereinafter referred to as the "Order") of the Putnam County Planning Commission (hereinafter referred to as the "Commission") entered by authority of the Commission on March 23, 2004.

In that Order, the Commission approved a variance to a divide a subdivision lot owned by Sherman and Helen Bennett, situated in the Maplewood Estates subdivision in Putnam

County. Following this adverse ruling, Maplewood appealed to the Circuit Court for a review of the Order. Hearing was had upon this matter, and after review of the issues on November 19, 2004, Judge N. Edward Eagloski correctly interpreted Article 1400.13 of the *Putnam County Subdivision Regulations*, thereby reversing the Commission's Order, and denied the Commission's variance to divide the Bennett lot. Appellees seek to preserve undisturbed this ruling of Judge Eagloski.

2. Statement of the Facts of the Case

As reflected in the Putnam County Planning Commissions "Final Findings of Fact," Sherman C. and Helene F. Bennett, Jr. own Tract 17 in Section One of Maplewood Estate subdivision. This property is tax parcel 18 on tax map 223E. Tract 17 is a corner lot adjacent to the main street of Maplewood Estates, Maplewood Drive and also to Linden Road, a street in East Maplewood Estates. Both streets have an existing 30' wide right-of-way.

Maplewood Estates subdivision was developed in 1951, and was one of the first subdivisions in Putnam County. At the time of its inception Maplewood Estates had in place a series of restrictive covenants that prohibited the division of any lot in the subdivision. Those covenants ran for fifty years and had no language allowing for their extension. The covenants have since expired, and consequently any lot owner whose lot is capable of being divided into two or more lots, each separately large enough to meet the minimum size requirements, is now free to do so.

On September 3, 2002, Sherman C. Bennett, Jr. submitted a plat to the Office of Planning

and Infrastructure to divide 0.46 acre (19,991.62 sq. ft.) from Tract 17 in Section One of Maplewood Estates for his granddaughter, Tonya Wiersma. The application contemplates the 0.46 acre being divided off two 30' wide rights-of-way. Planning Commission staff informed Sherman and Helene Bennett that, before the Tract 17 subdivision process could ensue, a variance from the minimum 40' wide right-of-way requirement must be requested.

Moreover, the 0.46 acre tract is accessed off a street known as Linden Road, which is not contained in the Maplewood Estates development, but, rather, is contained in a neighboring and entirely separate and distinct subdivision known as East Maplewood Estates Because the Bennett property lies entirely within Maplewood Estates and not in East Maplewood Estates, it originally had no clear title to any rights of way or any other easement in East Maplewood Estates, Planning Commission staff requested verification that the proposed .46 acre lot had the legal ability to use a right-of-way from Linden Road.

On December 26, 2002, Sherman C. and Helene F. Bennett, Jr. submitted a Planning Commission Appeal Application to the Office of Planning and Infrastructure. On January 5, 2003, Jimmy C. Calhoun, P.E., agent for Sherman C. and Helene F. Bennett, Jr., requested the variance request regarding a 30' wide right-of-way be withdrawn. Following this withdrawal, the Bennetts filed suit in Putnam County Circuit Court against East Maplewood, a fact omitted from Appellant's Brief.

The Bennett's case against East Maplewood was resolved via a successful mediation, another pertinent fact also omitted from Appellant's Brief. Harvey D. Peyton ("Peyton"),

counsel for the Bennetts, then submitted to the Commission a copy of the signed Order in the Circuit Court of Putnam County, West Virginia in the matter of Sherman C. Bennett and Helene F. Bennett, Plaintiffs v. Homeowners Association of East Maplewood Estates, Defendants. It stated that on December 18, 2003, all counsel and parties participated in a Court ordered mediation in accordance with a prior Order and that a settlement and compromise was reached. In effectuation of that settlement, Peyton also submitted to the Commission a deed dated January 12, 2004, of record in the Putnam County Clerk's Office in Deed Book 444, page 214, between the East Maplewood Estates Homeowners' Association and Sherman Bennett, Helene Bennett, and Tonya Wiersma. This instrument conveys the right to use Linden Road as a means of ingress and egress to and from that portion of Lot 17, Maplewood Estates shown on the subdivision plat as 0.46 acre parcel.

Appellants do not contest that three other existing lots in Maplewood Estates also border Linden Road in East Maplewood Estates. These lots, like the Bennett lot, are relatively large lots and fully capable of subdivision. While, at present, these lots do not have a right of way allowing for access via Linden Road, given the relative ease with which such right of way was obtained by the Bennetts, such an occurrence cannot be dismissed as a remote, unique, or unlikely probability. East Maplewood Estates owes no duty to the residents of Maplewood Estates to prevent such access, nor has it been shown that it is adverse or likely to be adverse to the homeowners of East Maplewood Estates' interests to allow such access via Linden Road to the other tracts.

A Planning Commission Appeal Application signed by Sherman C. and Helene F.

Bennett dated January 30, 2004 was submitted to the Office of Planning and Infrastructure requesting a variance from the 40' wide right-of-way requirement in the Putnam County Subdivision Regulations. Again, due to the age of both Maplewood Drive and Linden Drive, both have an existing 30' wide right-of-way; as, both of the Maplewood developments were laid out and constructed prior to the subdivision regulations that Putnam County adopted requiring a 40' right of way.

The relevant portion of the *Putnam County Subdivision Regulations("Regulations")* at issue is Article 1400.13. It is intended to serve as a rule mandating that there be certain facts in evidence in order for the Planning Commission to grant variances from the *Regulations.* Specifically at issue in this Appeal, are the applications of two of the first three sub-parts of Article 1400.3. That Article states as follows (emphasis added):

> Where the Planning Commission finds that extraordinary hardships or practical difficulties may result from strict compliance with these regulations and/or the purposes of these regulations may be served to a greater extent by an alternative proposal, it may approve variances to these subdivision regulations so that substantial justice may be done and the public interest secured, provided that such variance shall not have the effect of nullifying the intent and purpose of these regulations, and further provided the Planning Commission shall not approve variances unless it shall make written findings based upon the evidence presented to it that all of the following conditions are met:
>
> a. The granting of the variance will not be detrimental to the public safety, health or welfare or injurious to other property.
>
> **b. The conditions upon which the request for a variance is based are unique to the property for which the variance is sought and not applicable generally to other property.**
>
> **c. Because of the particular physical surroundings, shape of topographical conditions or the specific property involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, if the strict letter of these regulations are carried out.**
>
> d. The variances will not in any manner vary the provisions of any other

regulations, ordinances, or plans adopted by the County.

e. In approving variances, the Planning Commission may require such conditions as will, in its judgment, secure substantially the objections of the standards or requirements of these regulations.

f. A petition for any such variance shall be submitted in writing by the subdivider. The petition shall state fully the grounds for the application and all of the facts relied upon by the Petitioner.

A hearing was held before the Putnam County Planning Commission on March 23, 2004. At the conclusion of that hearing, a Motion was made to approve the variance. The Motion carried with 7 yes votes and 5 no votes, indicative of the sharp division of the Commission as to the propriety of this action. Following this hearing, "Final Findings of Fact" were entered by the Putnam County Planning Commission.

An appeal was filed in the Circuit Court of Putnam County on April 21, 2004 by Maplewood in order to have the Putnam County Planning Commission's decision reversed. On November 19, 2004, Judge N. Edward Eagloski reversed the Commission's decision and denied the variance to divide the subdivision lot. See *Opinion Order Reversing the Decision of the Planning Commission* (hereinafter referred to as the "Opinion"). In the Opinion, Judge Eagloski specifically noted that there was no showing of an extraordinary hardship such as is contemplated, the circumstances presented in this matter were not unique to the property for which the variance is sought and that there was no showing of a hardship due to the particular physical surroundings, shape of topographical conditions or the specific property involved. For all of these good and sufficient reasons, the Commission's decision was reversed.

3. Points and Authorities Relied Upon

Wolfe v. Forbes, 159 W.Va. 34, 217 S.E. 2d 899 (1975)

Syl. Pt. 2, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E. 2d 518 (1996)

Putnam County Subdivision Regulations. Article 1400.13

Henry v. Jefferson County Planning Commission, 496 SE2d 239 (W.Va. 1997)

Webster's New Collegiate Dictionary, G. & C. Merriam Co. 1973.

The American Heritage® Book of English usage: A practical and authoritative guide to contemporary English Boston: Houghton Mifflin Company, 1996.

State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968).

Matthew v. Smith, 707 S.W.2d 411 (Mo. 1986)

Otto v. Steinhilber, 24 N.E.2d 851 (NY 1939).

101A *CJS Zoning and Land Planning* § 312

Belvoir Farms v. North, 734 A.2d 227, 238 (Md. 1999).

Goldstein v. City of South Portland, 728 A.2d 164 (Me 1999)

Baker v. Cornell 488 A.2d 1303 Del. 1988).

Packer v. Hornsby, 267 S.E.2d 140 (Va 1980).

Enterprise Citizens Action Committee v. Clark 112 Nev. 649, 918 P.2d 305 (Nev. 1996)

Wells & Highway 21 Corp. v. Yates, 897 S.W.2d 56 (Mo. Ct. App. 1995)

Miller v. Zoning Hearing Bd. Of Ross Tp. 647 A.2d 966, 969 (Pa. Commw. Ct. 1994)

State v. Winnebago County 540 N.W.2d 6, 9 (Wis. Ct. App. 1995)

Raia v. Board of Appeals of North Reading, 347 N.E.2d 694 (Mass. 1976)

Carney v. City of Baltimore, 93 A. 2d 74, 76 (Md 1952).

Draude v. District of Columbia Bd. Of Zoning Appeals, 527 A.2d 1242 (D.C.1987).

Stop And Shop, Inc. v. Board Of Zoning Appeals Of Westover, Et Al., 184 W. Va. 168, 399 S.E.2d 879 (1990).

Almeida v. Zoning Bd. Of Review of Town of Tiverton 606 A.2d 1318 (R.I. 1992).

Concerned Residents v. Zoning Board of App. 634 N.Y.S.2d 825, 826 (App. Div. 1995).

Nance v. Town of Indiatlantic, 419 So. 2d 1041 (Fla. 1982),

Umerly v. People's Counsel for Baltimore Co. 672 A.2d 173 (Md. 1996)

Restaurant Row Associates v. Horry County, 516 S.E.2d 442 (S.C. 1999)

City of Merriam v. Board of Zoning Appeals of City of Merriam, 748 P.2d 883 (Kan. 1988).

Board of Zoning Adjustment for the City of Fultondale v. Summers, 814 So.2d 851 (Ala. 2001),

Turner v. Richards, 366 A.2d 833 (Del. 1976).

Ex parte Chapman, 485 So.2d 1161, 1164 (Ala. 1986).

83 Am. Jur. 2d *Zoning and Planning* § 915 (1992)

Aronson v. Board of Appeals of Stoneham, 211 NE2d 228 (Mass. 1965),

Matter of Fuhst v. Foley 382 NE2d 756 (NY 1978)

Appeal of Kline 148 A2d 915 (Pa. 1959).

4. Argument

Contrary to the representations of the Appellants, the Supreme Court of Appeals of West Virginia should not disturb the decision of Judge Eagloski in that he did not abuse his discretion. Rather, Judge Eagloski followed the clear letter of the law that is prescribed in Article 1400.13 of the Putnam County Planning Ordinances.

The Standard of review set out by this Court for review of the Planning Commission's decision by the circuit court is clear. "[A] reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E. 2d 899 (1975). In this case, Judge Eagloski reviewed the factual findings of the Planning Commission and found those to be plainly wrong. He himself noted that, applying the same standard this Court articulated again in its holding in *Henry v. Jefferson County Planning Commission*, 496 SE2d 239 (W.Va. 1997) that a "reviewing court <u>should</u> reverse [an] administrative decision where [a] board has applied [an] erroneous principle of law, was plainly wrong in its factual findings or has acted beyond its jurisdiction." Opinion at p.2. (emphasis added).

Once the Circuit Court has reviewed the decision, this Court has clearly set out that "in cases where the Circuit Court has amended the result before the administrative agency, this Court reviews the final Order of the Circuit Court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law de novo." Syl. Pt. 2, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E. 2d 518 (1996). Therefore, since this case involves the Circuit Court reversing on the basis that the factual findings by the Commission were plainly wrong, this Court's standard of review is abuse of discretion.

It is clear that Judge Eagloski carefully reviewed the Planning Commission's decision because he referenced specific findings in his Opinion Order. He found, as detailed more fully in his Opinion, that there were not sufficient facts to support the findings made by the Planning

Commission. It is clear that he did not simply substitute his judgment for that of the Planning Commission. He merely found that the facts, as set forth by the Commission in its "Final Findings of Fact" (hereinafter referred to as "Findings") did not support the required conditions for the granting of a variance. This is in no way an abuse of discretion.

Pursuant to Putnam County Planning Ordinances, and in particular Article 1400.13 in the *Putnam County Subdivision Regulations*, *supra*, there are six conditions, ***all*** of which must be met, in order for a variance to be granted by the Planning Commission. The relevant conditions for purposes of this appeal are, once again, as follows:

> The conditions upon which the request for a variance is based are unique to the property for which the variance is sought and are not applicable generally to other property.
>
> Because of the particular physical surroundings, shape of topographical conditions or the specific property involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, if the strict letter of these regulations are carried out.

As correctly stated in the Bennetts' brief, the Office of Planning and Infrastructure put in place "a specific, written procedure" whereby a landowner could request a variance from the "required forty foot right-of-way." See page 4 of Appellant's Brief. That "written procedure" is summed up in the requirements listed immediately above. However, as the Circuit Court clearly realized, and the Bennetts acknowledge, the Planning Commission did not follow these specific, written procedures. Rather, they followed their "past practice."

As Appellants explain on page 5 of their Brief, the past practice of the Planning Commission was to grant variances in cases where a subdivision lot met all of the size requirements and other requirements for a subdivision lot except for right of way width and this "was particularly true" if the property division is for the purpose of a gift to a child or grandchild. However, the guideline of past practice no longer provides a clear and unambiguous rule to follow; that is why the *Regulations* were put in place.

The Planning Commission, presumably operating under the guidance of their past practice, apparently believed that the gift to a grandchild was sufficient reason to issue the variance. The Circuit Court corrected this mistake of the Commission in its application of the *Regulations* when it reversed the Planning Commission by not following the "past practices," but rather following the specific language set forth in the "written procedure"; i.e., the *Regulations*. The Circuit Court understood that the language of the *Regulations* provides that all six conditions set forth therein <u>must</u> be met. The *Regulations* do not merely list items to address, rather they set forth clear conditions that <u>must</u> be met before a variance can be granted.

In examining the requirements enumerated in the Regulations and comparing them to the situation at bar, there are a number of facts that clearly show why the variance should not have been granted. It is our contention that the Bennetts have not found sufficient facts for the six conditions that are required by the Putnam Planning Commission before a variance can be issued.

More specifically, there were two certain findings of fact set forth in the Commission's findings which were challenged by Appellees herein and Appellants below, when we sought an

Appeal to the Circuit Court, and it was those certain findings of the Commission which the Circuit Court found to be "clearly erroneous". See *Henry, supra.* We note here, *inter alia*, that neither in Maplewood's Appeal below, nor in this current proceeding do we concede that Appellants herein meet all six, or indeed any of the remaining other requirements set forth in the *Regulations*. Our position on those findings relating to any subsections of the Regulations not the subject of the Appeal below shall be discussed *infra*. The first of the findings of the Commission which the Circuit Court found to be "clearly erroneous" was an finding by Commission regarding a condition which was not satisfied, specifically that "the conditions upon which the request for a variance is based are unique to the property for which the variance is sought and are not applicable generally to other property." *Regulations, supra.*

The definition of "unique" in Webster's Dictionary is "being the sole one, being the only one or producing only one result." *Webster's New Collegiate Dictionary*, G. & C. Merriam Co. 1973. This point is reinforced by many guides to word usage and literary style, for example § 293 of *The American Heritage® Book of English usage: A practical and authoritative guide to contemporary English* notes that "unique may be the foremost example of the absolute term—a term that, in the eyes of traditional grammarians, should not allow [any] comparison or modification." *Id.* Boston: Houghton Mifflin Company, 1996. Indeed, even a cursory search reveals that grammarians are struggling with the tendency of this word to be diluted by the use of improper modifiers from its position of standing for an absolutely unmistakably totally irreproducible thing.

If this Court were to apply the standard of uniqueness urged upon it by the Appellants, it would find rather that, in Maplewood Estates, there are four lots that are "unique" in that they have frontage on two roads—specifically it would find four lots having both frontage on Maplewood Drive and Linden Road. See highlighted Map, attached as Exhibit A. The Bennett lot is not asserted by any party to this matter to be the sole lot that fronts on those two streets in the two subdivisions. Therefore, it is impossible, according to the commonly accepted meaning of the word "unique" for this one lot at issue to be unique. It should be noted that none of the property owners of the four lots that are adjacent to the two subdivision roads have signed any new covenants prohibiting the division of lots in the subdivision. There is thus no barrier—given the size of and location of these lots—to prohibit these landowners from subdividing each of the tracts which they hold. Additionally, as has been shown in the matter of the Bennett suit against East Maplewood Estates, there is no reason to suppose that, given a determined request, East Maplewood Estates will not allow these property holders the same access to Linden Road that the Bennetts now enjoy. Therefore, the other three owners can now quite likely come in front of the Planning Commission and request the same variance that the Bennetts have received.

The Findings of Fact of the Planning Commission are also defective in stating: "There are only four lots in Maplewood Estates subdivision that are adjacent to two existing subdivision roads. The Bennett lot is one of those lots. These lots are unique because of the fact they have frontage on two subdivision roads. The other lots in Maplewood Estates do not have this uniqueness." See page 15 of the Finding of Facts attached as Exhibit C to the Joint Petition for Appeal. The Planning Commission failed to define "unique" and, by its own statement, proved that the Bennett lot is not unique. By the definition of the word unique, the Bennett Lot cannot

be "unique" because there are three other lots that are exactly situated as the Bennett Lot. Four is not an acceptable number for uniqueness---only one of anything can, by definition, be unique. To use the phrase "[t]hese lots are unique" is a transparent logical fallacy.

A review of the additional facts provided by the Planning Commission does not support the fact that the Bennett Lot is unique. The Bennetts argue that their lot is "unique" because it is the only one that can use East Maplewood or Linden Drive. The only reason the Bennett lot is the only part of the original Starkey tract with the legal right to use Maplewood Drive and Linden Road is because it is the only lot that has pursued East Maplewood to get this permission. Clearly, if the other three lots also pursued East Maplewood to get a right of way, they would be in the same position as the Bennetts. The fact that the other neighbors with identical lots have not taken this action does not make the Bennetts' lot unique.

In addition, the Bennetts did not present any evidence at the Planning Commission hearing that supports the position taken by the Planning Commission in their Findings of Fact. The only evidence presented about "uniqueness" by the Bennetts was as follows: "The definition of 'uniqueness' that has always been adhered to by the planning commission staff and the commission is if it is a lot that otherwise meets all other requirements of the ordinance but fronts on a street established before the ordinance was adopted that is in and of itself unique and meets the requirement." See page 11 of the Findings of Fact of the Planning Commission attached as Exhibit C of the Joint Petition for Appeal. This definition is obviously not supported by any authority and does not comport with the specific literal requirements of the regulations.

The definition of uniqueness adhered to by the Commission is so at odds with the plain meaning of the term unique that it is impossible to reconcile one with the other. This Court has held that "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). Unique, as it appears in the *Regulations* is a term with an accepted plain meaning, it is clear and unambiguous and, therefore, no interpretation should be attached to pervert it form that ordinary construction.

The second condition not met is the one requiring that "[b]ecause of the particular physical surroundings, shape of topographical conditions or the specific property involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, if the strict letter of these regulations are carried out." The Findings of Fact do not support that the Bennetts have a hardship meriting a variance.

In West Virginia law, the concept of the definition of what precisely presents "a particular hardship" is presently undefined. It is only by turning to other jurisdictions' holdings regarding this point that we can be illuminated as to the precise nature of a hardship and just how far short the Bennett's situation falls of presenting one.

The Missouri Supreme Court in *Matthew v. Smith*, 707 S.W.2d 411 (Mo. 1986) stated that "[i]t is generally said that *Otto v. Steinhilber* contains the classic definition of hardship."*Matthew* at 416. *Otto* is, of course, also a zoning variance case and in it, the Court of Appeals of New York held that before a zoning board may grant a variance for hardship that the

record must display " that 1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; 2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and 3) that the use to be authorized by the variance will not alter the essential character of the locality". *Otto v. Steinhilber*, 24 N.E.2d 851 (NY 1939). Note the similarities of the *Otto* test to the tests promulgated in the *Regulations*, *supra*, to see just how influential it has been.

The *Otto* test is the basis for the definition of hardship and the tests of proof thereof articulated in 101A *CJS Zoning and Land Planning* § 312 which states, that, in order to prove hardship that first "an applicant must prove that a variance is needed to enable the party's reasonable use of the property or that absent a variance, the land cannot provide a reasonable return from any permitted use." The distinction between the "denial of reasonable use" standard and "denial of reasonable return" standard is discussed more fully by the Supreme Court of Maryland in *Belvoir Farms v. North,* 734 A.2d 227, 238 (Md. 1999).

We do not urge the adoption of either particular standard upon this Court, noting that under whichever one this Court chooses to adopt that it is our position, as we intend to demonstrate, that the Appellants would fail to be able to prove either. Moreover, we note that such is a distinction without a difference; under either standard, what is at issue is the ability to use the property. Whether the property is intrinsically enjoyable in its present state, or under older concepts of enjoyment, is useful only for the investment and return to be garnered therein, both are measures of the utility of the tract to its holder. Indeed, one of the few cases clarifying

the application of the reasonable return requirement, *Goldstein v. City of South Portland*, 728 A.2d 164 (Me 1999), says that in order to satisfy the "reasonable return" requirement one must show that compliance with the regulation would result in loss of substantially beneficial use of the land, making the two standards virtually identical. See also *Baker v. Cornell* 488 A.2d 1303 Del. 1988).

In general, courts across the country have not undertaken to announce a uniform definition of hardship but have each articulated ones which vary, usually following the pattern of that in *Otto.* Virginia, which has a much more developed case law upon zoning issues than does West Virginia, adheres to the definition that "hardship occurs when 'the strict application of the terms of the ordinance would effectively prohibit or unreasonable restrict the use of the property' or create 'a clearly demonstrable hardship approaching confiscation' ". *Packer v. Hornsby*, 267 S.E.2d 140 (Va 1980) citing *Va Code* § 15.1-495(b).

Those states which have recently found themselves compelled to announce a standard have invariably adopted ones similar to this. See, for example, the Nevada Supreme Court's ruling in *Enterprise Citizens Action Committee v. Clark* 112 Nev. 649, 918 P.2d 305 (Nev. 1996) which cited approvingly and used for its examination of hardship, among other cases, *Wells & Highway 21 Corp. v. Yates*, 897 S.W.2d 56 (Mo. Ct. App. 1995) (hardship requires showing land cannot yield reasonable return if used only for the purpose allowed in that zone), *Miller v. Zoning Hearing Bd. Of Ross Tp.* 647 A.2d 966, 969 (Pa. Commw. Ct. 1994) (hardship requires showing that land is virtually useless as it is presently zoned) and *State v. Winnebago County* 540 N.W.2d

6, 9 (Wis. Ct. App. 1995) (hardship is a situation where, absent a variance, no use could be made of the land).

Here, there has been no attempt by the Appellants to prove that the value or the use of their property is so impaired as to be effectively prohibited, approach confiscation, be incapable of yielding a reasonable return, or be virtually useless or of no use. Absent even an attempt to show that such standards had been met, the Planning Commission should have found no hardship applying to the Bennetts.

As indicated in the Bennetts' brief, they have owned the property since 1972. Suddenly, after 33 years, they now say for the first time that they own a "valuable lot that meets all existing subdivision regulations, that is served by a road and right-of-way sufficient for future development, and that they would be completely unable to use as a residential lot." Brief at p. 6. This is a ridiculous statement. They have owned and resided at this property since 1972 and **suddenly**, without any change being undertaken, except to add a second right of way to the property, it is supposedly, according to Appellant's assertions, completely unusable as a residential lot. This lot and the house on it have not changed any in the last 33 years except to become more valuable; as, indeed, nearly all of the tracts in Putnam County have appreciated to many times their original purchase values over the past 33 years. Further, as Judge Eagloski correctly pointed out, there was no evidence put before the Planning Commission and no Finding of Fact by the Planning Commission that the Bennetts are experiencing a "hardship." Opinion at p. 3-4. Thus, whether applying the "denial of reasonable use" standard or "denial of reasonable

return" standard, no "particular hardship" can be found, as the Bennetts can continue to use their property as a residence, or can achieve a significant return by selling it.

Instead, the Bennetts provide only evidence of a "desire" or a "wish" to have their granddaughter to live near them. It is more than a stretch to say that not being able to subdivide a lot so their granddaughter can build a house is a "hardship." It is clearly, by such precedent as we have to guide us, not a hardship, as inability to build a second home on any lot has been held explicitly not to constitute a hardship. See *Raia v. Board of Appeals of North Reading,* 347 N.E.2d 694 (Mass. 1976) If the Bennetts' granddaughter truly wants to take care of her grandparents, the Bennetts could build an addition onto the house for her occupancy or she could move to another residence close to her grandparents. "The need sufficient to justify a [hardship] exception must be substantial and urgent and not merely for the convenience of the applicant." *Carney v. City of Baltimore,* 93 A. 2d 74, 76 (Md 1952).

The Bennetts can make alternative arrangements to have their granddaughter live with them and care for them in ways compatible with the present plan, again, constructing an addition to their current home or renovating that home is not forbidden in any manner and would be equally financially feasible as the construction of a new home upon their property. As there are other existing alternatives; therefore, there is not a hardship. This is in line with the trend that a variance cannot be granted "just because the property makes it difficult for the owner to construct a particular building or to pursue a particular use without a variance, if the owner can use or improve the land in other ways compatible with the zoning restriction." *Draude v. District of Columbia Bd. Of Zoning Appeals*, 527 A.2d 1242 (D.C.1987). West Virginia has endorsed this

view, in *Stop And Shop, Inc. v. Board Of Zoning Appeals Of Westover, Et Al.*, 184 W. Va. 168, 399 S.E.2d 879 (1990) a case where a convenience store was seeking permission to expand its commercial operations in a residential neighborhood. Writing for a unanimous court, Justice Neely rejected the argument that even if the store needed additional parking to be viable within the context of the Morgantown area economy that the Court found "that the shortage of parking space may prevent Stop and Shop from operating the largest, most profitable supermarket imaginable, but we cannot find that the zoning ordinances deny Stop and Shop a viable use of its land". Id. at 170, 881 (emphasis added).

Again, as noted by the Circuit Court of Putnam Couty, the Bennetts' attorney presented no evidence of any hardship. He merely presented a video of the road and the property in the subdivision. This is woefully insufficient. Proof must be shown that all beneficial use of the tract is, in its present state, essentially gone. For hardship to be found, a literal application of the zoning ordinance must completely deprive an owner of all beneficial use of the property. *Almeida v. Zoning Bd. Of Review of Town of Tiverton* 606 A.2d 1318 (R.I. 1992). See *Matthew v. Smith, supra*, at 416, citing 8 cases from 7 different jurisdictions, all of which urge that there be proof all beneficial use of the tract at issue is essentially destroyed. Such cannot be merely speculative but there must contrarily be a "dollars and cents" proof that the property cannot yield a reasonable return as currently zoned. *Concerned Residents v. Zoning Board of App.* 634 N.Y.S.2d 825, 826 (App. Div. 1995).

The Bennetts argue that the Court ignored the hardship that by implication they were deprived of a significant portion of the value of their property. The circuit court did not ignore

this fact because any mention of it is non-existent in the record below. There was absolutely no evidence and no mention that the Bennetts were concerned about the "value" of their property. The only evidence relating to the alleged hardship presented below was that they wanted their granddaughter to live there. This "value" argument is a new argument presented to this Court that was never mentioned before, and, again, must of necessity, be construed from evidence which is absent below, despite the requirement of most authorities that proving such value-based damages--"dollars and cents" proof--is an essential pre-condition to obtaining a variance. The effect of the Putnam County Circuit Court's order is not to "deprive Sherman and Helene Bennett of a significant portion of the value of their property" as they argue on page 14 of their Brief or, indeed, any beneficial use of the property in question. Rather, the effect of the Court's order is to correctly and legally interpret the Planning Rules of Putnam County.

Moreover, it is a general rule that a hardship which is sufficient grounds for the issuance of a variance must be peculiar, singular, or unique in nature. *Nance v. Town of Indiatlantic*, 419 So. 2d 1041 (Fla. 1982), *Umerly v. People's Counsel for Baltimore Co.* 672 A.2d 173 (Md. 1996), *Restaurant Row Associates v. Horry County*, 516 S.E.2d 442 (S.C. 1999). This is of course, also the case in the *Regulations*. Again, as discussed, *supra*, the Bennett's situation is far from unique.

The facts are clear that there was no evidence and no Finding of Fact that the circuit court could find to support a finding that "because of the particular physical surroundings, shape of topographical conditions or the specific property involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, if the strict letter of these regulations

are carried out." See, also in support of that language, the Kansas case of *City of Merriam v. Board of Zoning Appeals of City of Merriam*, 748 P.2d 883 (Kan. 1988). The only finding that the facts supported in this case was that there was, at the most, an inconvenience if the Bennetts' granddaughter was unable to build a second house immediately behind their house.

More importantly, counsel for the Bennetts does not inform this court that hardship is not, as discussed, to be measured as being to the person owning the home but is intrinsic to the property itself. *Board of Zoning Adjustment for the City of Fultondale v. Summers*, 814 So.2d 851 (Ala. 2001), *Turner v. Richards*, 366 A.2d 833 (Del. 1976). The age or infirmity of the Bennetts is not, as considered by the Planning Commission in their Findings at p.17, a fit subject for them to review as one, if not, in this matter, the only one, of the grounds of hardship.

The rule upon this point is stated clearly in *Ex parte Chapman*, 485 So.2d 1161, 1164 (Ala. 1986): "[a] factor which should not have been considered [in granting a variance] was [the property owner's] age and health" *citing* 82 *Am. Jur. 2d Zoning and Planning* § 275 for the proposition that hardship relates to the land in controversy not to the personal hardship to the owner. See also 83 *Am. Jur. 2d Zoning and Planning* § 915 (1992) for the same proposition. This is a general rule, applying not merely in Alabama, but also throughout this country; see also the holdings in *Aronson v. Board of Appeals of Stoneham*, 211 NE2d 228 (Mass. 1965), *Matter of Fuhst v. Foley* 382 NE2d 756 (NY 1978), and *Appeal of Kline* 148 A2d 915 (Pa. 1959).

Judge Eagloski noted properly, in accordance with the trend generally when he held merely that "certain health conditions could give rise to hardship for the owner." Opinion at p.4.

Properly, however, he refused to construe this as being "[b]ecause of the particular physical surroundings, shape of topographical conditions or the specific property involved" as cited in the *Regulations*, noting that "hardship within the spirit of the regulation deals with the property itself." Opinion at p.5. Moreover, he explicitly commented upon the failure of the Bennett's counsel to address what supposed hardship would result to his clients if the variance were not granted. *Id.* Again, the only relevant hardship is one that is to the property, not to the person, and no such hardship is here demonstrable and the consideration of the same by the Commission was plainly wrong.

Finally, there is much evidence below from other residents of Maplewood, that this variance would "alter the essential character of the locality". *Otto v. Steinhilber*, 24 N.E.2d 851 (NY 1939). More pertinently, it would as stated in the *Regulations,* "be detrimental to the public safety, health or welfare or injurious to other property." Numerous testimonial statements were introduced from the Bennett's neighbors, all opining that the variance to be granted would undoubtedly lead to changes in "the essential character of the locality". Moreover, they urged that the granting of the variance would "be detrimental to the public safety, health or welfare or injurious to other property."

For example, resident Kathleen Gross noted that allowing this variance would create additional traffic over the one-lane bridge leading into Maplewood, which was tantamount to an additional health and safety problem. See Attachment Q to the Commission's Findings of Fact. Sixty-seven adult residents of Maplewood signed petitions in opposition and numerous residents

sent carefully drafted letters noting the likelihood of further changes to Maplewood and noting their opposition. See Attachment M to the Commission's Findings of Fact.

Most telling, perhaps, are two letters from Roger and Nancy Chaffin in Attachment N to the Commission's Findings of Fact; just as the other residents urge as a likely possibility in their letters of opposition, the Chaffins withdrew a letter opposing the granting of a variance because they note the probability that if this variance is successful they will seek "to file for a variance in order to subdivide our property." The Chaffin letter is important for two reasons. One, it goes far to refute the claimed uniqueness of the Bennett tract, as discussed at length, *supra.* Second, it demonstrates that the thing the residents feared will not be slow to come upon them; the intent of numerous of the property owners will be to further their own holdings and make changes to the use of their tracts in Maplewood which cannot help but lead to changes in "the essential character of the locality", through smaller lot sizes, different kinds of residences and additional neighbors and additional consequent traffic. Given the flimsiness of the pretext seized upon by Commission to grant this variance the residents of Maplewood have no reason to conclude that more such variances will not follow.

For example in discussing the three lots near to the Bennetts also bordering on Linden Drive, the Planning Commission stated that "[t]hey (the other three owners) will also be required to apply to the Planning Commission for approval of a right-of-way variance to be approved by the Planning Commission." See page 15 of the Finding of Facts attached as Exhibit C to the Joint Petition for Appeal. At this point, upon examination of the record of the Commission's action in this matter, who can doubt but that will be simply a rubber stamp process as the

Planning Commission cannot, and in this instance, likely will not, tell one family in Maplewood that it is acceptable to subdivide their lot, but not the other homeowners with identical lots.

As the Chaffin's letters show, this is not a remote danger. The "public safety, health and welfare" are at risk and the granting of the variance here is likely to prove "injurious to other property". The granting of the variance will be detrimental to the long-term survival of Maplewood as it is and lead to changes in "the essential character of the locality". This Court, by affirming Judge Eagloski's decision below, has an opportunity to prevent that.

5. Conclusion

The Circuit Court of Putnam County has reversed the March 23, 2004 order of the Planning Commission of Putnam County as it relates to the granting of Sherman and Helene Bennett a subdivision variance. The Court found, contrary to the Commission's declaration that all six conditions were present and authorized under 1400.13 of the Putnam County Subdivision Regulations, that granting such a variance was not supported by any evidence and as such is plainly wrong.

Maplewood believes the decision of the Putnam County Circuit Court reversing the order of the Planning Commission of Putnam County as it relates to granting of the subdivision variance for Sherman and Helene Bennett to be appropriate, and that, accordingly, this Appeal of the Petitioners before the West Virginia Supreme Court of Appeals should be denied.

MAPLEWOOD ESTATES HOMEOWNERS ASSOCIATION
Respondent/Appellant
By Counsel

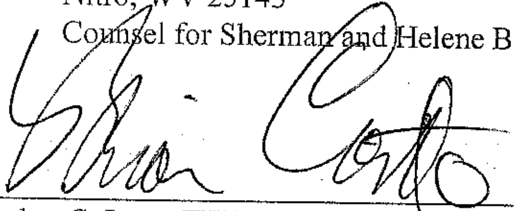
Gordon C. Lane (WV Bar #2137)
Kelly M. Young (WV Bar #7938)
Brian O. Casto (WV Bar #7608)
Lane & Young
1538 Kanawha Boulevard, East
Charleston, WV 25311
(304) 345-6000
Attorneys for Maplewood Estates Homeowners Association

CERTIFICATE OF SERVICE

I, Brian O. Casto, counsel for the Respondent, hereby certify that on this 2nd day of September 2005, I filed with the Clerk's Office of the Supreme Court of Appeals the required number of copies of this ***Response to Joint Brief of the Appellants*** and further certify that I served, via United States mail, postage prepaid, a true and accurate copy of the foregoing ***Response to Joint Brief of the Appellants***, addressed as follows:

Harvey D. Peyton, Esq.
Peyton Law Firm
2801 First Avenue
PO Box 216
Nitro, WV 25143
Counsel for Sherman and Helene Bennett

Jennifer D. Scragg, Esq.
Putnam County Commission
3389 Winfield Road
Winfield, WV 25213
Counsel for Putnam County Planning Commission



Gordon C. Lane (WV Bar No. 2137)
Kelly M. Young (WV Bar No. 7938)
Brian O. Casto (WV Bar No. 7608)
Attorneys for Respondent
LANE & YOUNG
1538 Kanawha Boulevard, East
Charleston, WV 25311
(304) 345-6000
Counsel for Maplewood Estates Homeowners Association

PI/Maplewood Appeal Response

tabbles

EXHIBIT

A

Bennett

PUTNAM COUNTY

STATE OF WEST VIRGINIA

SCOTT

SHEET NO.: