

Zoning Law for the Virginia Zoning Official

Zoning Officials Certification Test Preparation Program

**Charlottesville Omni Hotel
Charlottesville, Virginia**

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13-615 Undue hardship not found

Following are brief summaries of cases in which an undue hardship was not found to exist. The Virginia Supreme Court's analysis in *Cochran/MacNeal/Pennington* will support a locality's reliance on any of the cases below. However, as noted in section 13-614, the standard under which these cases were decided required the applicant to show a demonstrable hardship *approaching confiscation*, a phrase that was deleted from Virginia Code § 15.2-2309(2) effective July 1, 2009 (see section 13-520). Despite this change in the State law, it does not appear that any of the cases below turned on whether the hardship approached confiscation or even something less than approaching confiscation but, instead turned on whether there was, in fact, an undue hardship at all.

- **Setback:** Owners of a 36' by 44' lot sought variances to reduce required side and rear yard setbacks; in prior applications, city staff described the lot as "level," "large," "buildable," and "not unique," with "characteristics . . . similar to other lots within this section of Prince Street" and that granting the variance would be "detrimental to the adjacent property"; city staff also stated that a house in compliance with setbacks could be built; in most recent application for side (3' variance) and rear (13' variance) yard setbacks, city staff described the application as a "good development" compatible with its historic context, was unique because the historic overlay district regulations designed to apply to old building, lot shallower than 2/3 of lots in area, variances allowed for "more historically appropriate width and depth." The Virginia Supreme Court rejected the argument that deletion of the phrase "approaching confiscation" from the applicant's burden to show a "clearly demonstrable hardship" now authorized BZA's to grant variances in cases previously not authorized because the change to the law did not change the findings required for the BZA to grant a variance; the Court also rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of lots in the area were even more shallow, yet they complied with the zoning ordinance; lastly, the Court rejected the argument that the lot was undevelopable without a variance on the theory that alternative designs could not comply with the base and historic overlay district regulations because the applicants admitted that they could submit a design that complied with the zoning regulations, it was "mere speculation" that the BAR would not approve an alternative design, and there was no factual support for the claim that the condition was unique because all lots in the area had to comply with the regulations. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (applying charter provisions virtually identical to Virginia Code § 15.2-2309(2)).
- **Setback:** Owner sought multiple variances from overlapping setbacks imposed by the county's zoning ordinance (including those implementing the Chesapeake Bay Preservation Act) on 4 out of 5 lots in a 6.594 acre purported subdivision recorded soon after the owner purchased the property in 2004, and long after the setback regulations were imposed; without the variances the 4 lots were unbuildable; no undue hardship existed because the owner could have treated the property as a single 6.594 acre parcel and constructed a single residence on the property on that part which was not subject to the overlapping setbacks. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670, 628 S.E.2d 324 (2006).
- **Setback:** Owner sought variance from setback to expand the existing house closer to ocean; no hardship because expansion could be constructed on other side of house without violating the setback requirement. *Packer v. Hornsby*, 221 Va. 117, 121-122, 267 S.E.2d 140, 142 (1980) ("proximity to the ocean is doubtless a 'privilege or convenience' coveted by every homeowner along the beach").
- **Setback:** Owner sought variance from setback so house could be constructed in the position desired by owner; no hardship because the house could be constructed without variance by shifting position of house. *Board of Zoning Appeals of City of Virginia Beach v. Nowak*, 227 Va. 201, 205, 315 S.E.2d 221, 223 (1984) ("to grant him a variance under these circumstances would bestow upon him a 'special privilege or convenience'").
- **Setback:** Owner sought variance from setbacks to allow a pier to be constructed on his property over wetlands, but the inability to build a pier did not leave the property with no reasonable beneficial use since there was already a single family residence on the property and no zoning regulation interfered with that use. *Gardner v. Board of Zoning Appeals and Kim*, 77 Va. Cir. 296 (2008) (noting that the BZA's concerns that, without a variance,