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Variances and Hardship

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Walnut Acres Neighborhood Ass'n v City of Los Angeles

Cities may want more eldercare facilities located within their municipal borders, but a neighborhood homeowner association inside the city might feel the other way if the project is going to be located too near to its members' residences. If the local officials mess up in complying with the enabling standards in approving the project, that fact simply gives the opposition all the more ammunition to block the development.

As described in *Walnut Acres Neighborhood Ass'n v City of Los Angeles* (2015) 235 CA4th 1303, reported on p 79, the city's eldercare ordinance (Los Angeles Mun C §14.3.1) declared that eldercare facilities provided "much needed service and housing for the growing senior population of the city of Los Angeles," which made it appear that the city wanted to encourage this activity. However, its ordinance requires its zoning administrator, in order to approve such a project, to find that there were "practical difficulties" or "unnecessary hardship" resulting from strict compliance with the zoning regulations, which hardly seems to give much encouragement. This linguistic contradiction between wanting more eldercare while also wanting it more limited made it easier for the opposition to get a project stopped. In the concrete, the city certainly seemed in favor of the project, since it was approved by the zoning administrator, the city council's Land Use Management Committee, and the city council itself. But the neighbors were against it, and they prevailed in a mandate proceeding in the superior court and court of appeal. The judiciary held that there was no showing of sufficient hardship (a word I'll use to cover both the "practical difficulties" and "unnecessary hardship" phrases) to support the municipal endorsements.

The eldercare ordinance's phrases "practical difficulties" and "unnecessary hardship" are also what Los Angeles requires for a zoning variance (Los Angeles Mun C §12.27), which the developers needed in this case because they wanted a structure of 50,000 square feet in an area where the regulations permitted only 12,600 square feet. Because the language in the eldercare and general variance provisions is identical, the court found there is no difference in the

definition of "unnecessary hardship" in the two provisions and applied the variance provision in this case. In any event, some serious and unique burden had to be found to support this project over neighborhood opposition.

"Unnecessary hardship" was a requirement included in the original Standard State Zoning Enabling Act, adopted everywhere, regarding what had to be found for a "Board of Adjustment" to grant a variance (§7). California's Government Code does not use either phrase today, instead allowing local governments to grant variances only when "the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity." Govt C §65906. But since Los Angeles is a charter city, it was free to set its own standards for variances—which it has done, making either form of hardship sufficient in both its eldercare and variance ordinances. (San Francisco may go even further, seeming to permit (1) practical difficulty, or (2) unnecessary hardship, or (3) "where the result would be inconsistent with the general principles of the Code" (SF Plan C §305(c).) However, the "unnecessary hardship" formulation generally trumps its less demanding cousin "practical difficulty" when courts are asked to decide whether a variance was properly granted.

In *Walnut Acres*, it appears that both the project developer and the local officials believed that the hardship requirement would not be a serious obstacle because

- Practical difficulties alone, without any concomitant undue hardship, should be enough; and/or
- The desirability of eldercare housing also should be sufficient to satisfy either formulation.

Those assumptions turned out to be wrong. The loss of "economies of scale" that would arise from building a bigger project might have financial consequences to the developer, but they constitute neither undue hardships nor practical difficulties; any landowner could claim to make a greater profit if a more intense project could be undertaken. Zoning would collapse if all it took to get around its restrictions was for owners to say they could do better without them.

The variance procedure was originally designed to ward off an owner's challenge when application of a broad-based zoning ordinance (*e.g.*, one covering an entire neighborhood) to a particular parcel would cause that owner demonstrable special harm (*i.e.*, one not suffered by everyone else) because of the unique characteristics of his particular parcel (*e.g.*, its shape or topography). Rather than risk having a court throw the ordinance out, zoning officials gave themselves the escape hatch of being able to grant that owner a variance, thus both appeasing him and defusing the danger that the entire ordinance could be held invalid. It is designed to

apply in unique hardship cases, not to bring about more diversity in zoning ordinances or zoning maps, or to create some new form of zoning classification, or to further some other land use policies. It is thus very different from the conditional use, which is how communities deal with those peculiar activities that they do not know whether to treat "as of right" (and get too many of them) or as prohibited (*e.g.*, corner groceries in residential zones). It is also different from a rezoning—even a spot rezone—in which something has changed from the time a parcel was first zoned.

The Los Angeles land use officials appear to have conflated the variances with a conditional use, deciding that an eldercare facility was a good thing, rather than determining that a 12,000-foot building limitation imposed too heavy a burden on a landowner who could otherwise build a 50,000-foot one. Perhaps this was due to confusion caused by the similar wording of the variance and eldercare ordinances on this issue. (It does seem odd for Los Angeles to say, "We want to encourage more eldercare facilities, but only when applicant landowners can show they will suffer hardship if the facilities are not built.") However, whether the Los Angeles Municipal Code uses the wrong standard or not, such an "error" cannot be corrected by its administrators' converting it to the right standard and deciding to grant a variance because an acceptable conditional use is being proposed. The city may have to amend its Municipal Code, perhaps eliminate hardship of any kind from its eldercare provisions, and also perhaps eliminate practical difficulties from its variance provision.

"Practical difficulties" language appears in many land use ordinances and statutes, sometimes as a companion to an undue hardship requirement, sometimes as an alternative to it, and sometimes playing a separate role (such as being required for an area variance but not for a use variance). Nobody knows what the language really means, although developers hope that it implies some kind of balancing test, letting them show both the burden cast on them and the benefits that will inure to the community (which this decision shows to be an unlikely standard) or that it will amount to a weaker financial burden standard. (Minnesota recently enacted a practical difficulties alternative to its undue hardship standard, to overcome a judicial ruling that the undue hardship test required an owner to be literally incapable of using the property without the variance. Charter cities in California, unconstrained by our state enabling act, could probably borrow the same requirement and definition if they want to make life easier for their officials.)

But the neighbors may react differently. Variances may not have been devised to produce more flexibility and diversity, but that is often their effect. If the local residents like things just as they are, variance provisions in their ordinances will remain narrow and challenges to the grants of variances will remain plentiful. Until local governments clean up the language of their ordinances and more carefully discriminate between variances and their other land use devices, developers are going to have to be much more cautious in threading their way through the local planning process if they hope to survive the attacks likely to follow.