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Employment: Requiring Long-Tenured Employees to Make Additional Retirement Contributions Does Not Constitute Disparate Treatment or Disparate Impact

Bryan v. Government of the Virgin Islands, No. 18-1941(3d Cir. Feb. 19, 2019).

Applying Supreme Court precedent which holds that years of service is not a proxy for age and that an employer need only show a non age-based rationale for its actions, the Virgin Islands has avoided age discrimination claims aimed at its program which incentivizes long-time workers to retire early, while extracting additional retirement contributions if they refuse to retire.

The Virgin Islands enacted the Virgin Islands Economic Stability Act ("VIESA") in 2011 when it was facing a severe budget crisis. Not unexpectedly, the focus of VIESA was reducing government spending without slashing services, and, also not uncommon, one way it sought to do that was by buying out the most expensive government employees. It did that with a unique twist: VIESA offered $10,000 to each long-tenured employee (those with 30 years or more of service)

who chose to retire within three months and, those declining to retire had to contribute an additional 3% of their salary to the Government Employees Retirement System ("the System") starting at the end of those three months. A couple of employees - ultimately certified as a class - challenged the 3% mandatory contribution claiming it violated federal and territorial laws protecting workers over the age of 40 from discrimination based on their age. The district court ruled against the class and it appealed.

The Third Circuit ruled the class failed to make a case under either a disparate treatment or a disparate impact theory. As for the former, the class had the burden of proving that age was a but-for cause of the action, the mirror image of which is that there is *no disparate treatment* at all under the ADEA if the factor motivating the employer was a factor *other than age*. Fatal for the class was that in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) the Supreme Court distinguished age from *years of service*. At the end of the day action based on years of service is deemed as not involving the "inaccurate and stigmatizing" age-based stereotyped at the heart of the ADEA. The argument that VIESA used years of service as a proxy for age since only people over 40 could possibly have 30 years of service in the system, was unsuccessful, with the Court noting it did not provide actual evidence of this being the type of "special case" where age was a proxy (a rare but viable theory).

The disparate impact theory seemed a more viable path for the class since it's a challenge to a facially neutral employment practices "that in fact falls more harshly on one group than another." Fatal, however, for the class on this issue was another Supreme Court case - *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) - where the Court noted that disparate impact liability under the ADEA "is narrower than under Title VII" because the ADEA provides the reasonable-factor-other-than-age ("RFOA") affirmative defense. Under this provision of the statute an employer that provides a reasonable, non-age factor that explains its decision is precluded from liability. The most on-point examples of RFOA that have been accepted by courts before were, critically, "seniority and rank" as well as the goal of "lowering overall employee costs by increasing turnover." The Court found the Virgin Islands was indeed entitled to this affirmative defense and that "stave[d] off the disparate impact claim." The lower court was affirmed.

LINK

Railroads: City Stormwater Charge Imposed on Railroad Based on Extent of Impervious Surfaces is a "Fee," not a "Tax"

***Norfolk Southern Railway Company, v. City of Roanoke*, No. 18-1060 (4th Cir. Feb. 15, 2019).**

A city's stormwater charges imposed on a railroad are a "fee"-and not a "tax" in violation of the Railroad Revitalization and Regulatory Reform Act of 1976-- because the charge is only applied to owners of impervious land and the proceeds are used to defray costs arising from the resultant stormwaters.

The City of Roanoke "(City") operates a stormwater management system, for which it must have a permit from Virginia's Department of Environmental Quality pursuant to the federal Clean Water Act and Environmental Protection Agency regulations. Its permit has maximum limits for the discharges it sends into the Roanoke River, thus as the City's system collects stormwater it must, under the law, implement "management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA] or the State determines appropriate for the control of [] pollutants." To fund these requirements, Virginia enables cities to enact stormwater management charges. In doing so, the City found that "parcels . . . with higher amounts of impervious surfaces contribute greater amounts of stormwater and pollutants to the

city's stormwater management system and that the owners of such parcels should carry a proportionate burden of the cost of such system." The City's ordinance enables owners of parcels with impervious surfaces to reduce their charge by implementing stormwater management techniques up to a maximum of 50% of the charge.

The property owner with the highest percentage of "impervious surfaces" in Roanoke is Norfolk Southern Railway Company ("Norfolk Southern") and, after unsuccessfully arguing that the rock crush beneath its rail tracks were not "impervious," it was assessed a stormwater charge of $416,748.28. It sued Roanoke alleging that the stormwater management charge is a discriminatory tax in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), 49 U.S.C. § 11501, under which cities are prohibited from imposing any "tax that discriminates against a rail carrier." The district court granted the City's motion to dismiss the case, holding the charge is not subject to the 4-R Act's requirements because it is a fee rather than a tax. Norfolk Southern appealed.

The Circuit queued up the issue succinctly: The court had to determine whether "the charge in this case is closer to (1) a paradigmatic tax, which is imposed by a legislature upon many, or all, citizens and raises money, contributed to a general fund, and spent for the benefit of the entire community, or (2) a paradigmatic regulatory fee, which is imposed by an agency upon those subject to its regulation, and serves regulatory purposes by disincentivizing conduct or raising money to defray regulatory expenses." It used a three-part framework to decide the issue: "(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge."

Tackling the first prong of who imposed the charge, the Court noted one imposed by the legislature is more likely to be a tax than one imposed by an administrative agency. The court went no further than pointing out the obvious for this prong: it was imposed by the legislature and thus initially takes on the characteristic of a tax.

Prong two was deemed "largely inconclusive." On one hand, a charge something is more likely to be a tax when imposed on a broad segment of the public and based on ability to pay, rather than the payor's property; but on the other hand, the classic fee is imposed only upon persons subject to regulation by a particular agency. The facts walked this line: the stormwater management charge applies to a broad class of property owners across the City, but it is not based exclusively on property ownership but is instead tied to the amount of impervious surface on the property and the charge can be reduced by up to 50% with voluntary management practices. The latter of these clearly indicates the charge is tied to the costs the parcel at issue imposes on the City.

The third factor - which, notably, Fourth Circuit precedent deems the most important in close cases - holds that a charge is more likely a tax if its primary purpose is to raise revenue for general government activity that benefits the entire community and more likely a fee if it's used to provide individualized benefits or to defray an agency's costs of regulating. Norfolk Southern pointed to two general public benefits it said made the charge more tax-like: reducing water pollution and improving flood control. The Circuit disagreed, because "the charge forms part of a comprehensive regulatory scheme." Though stormwater may have traditionally been a fee-free public benefit, it noted the Clean Water Act imposes a largescale regulatory scheme with mandatory pollutant reductions. In this case many of these pollutants come directly from runoff from Norfolk Southern's property and, ultimately, the waters that receive that runoff. It also noted the City is a "participant" in the regulatory scheme because to enact the charge it was restricted by Virginia's statutory rules on stormwater management charges. The Court did recognize that the City does not directly regulate Norfolk Southern, but that "at bottom" the fee - like classic fees generally - does "address harmful impacts of otherwise permissible activities, and to ensure that the actors responsible for those impacts bear the costs of addressing them." Having thus evaluated each of the three factors individually, the Court took a holistic view and gave the third factor "controlling weight" because the regulatory purpose is the best indication of all. The lower court was affirmed.

LINK

RLUIPA: Board of Appeals Denial of Church's Application to Operate in Residential Area After Local Hostility Gives Rise to RLUIPA Claim

Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County, No. No. 18-1450 (4th Cir. Feb. 25, 2019).

Reversing and remanding, the Fourth Circuit has found that Baltimore County's denial of an African-based church's application to operate in a residential area appears to have been influenced by overt hostility from local residents and gave rie to plausible RLUIPA claims.

Jesus Christ Is the Answer Ministries, Inc. ("Church") was founded in 1997 by Reverend Lucy Ware. It is associated with churches mostly in Africa and has many congregants that emigrated to America from Africa. Without a permanent home the Church's religious mission has suffered and, as a result, Reverend Ware sought and purchased property in Baltimore County, Maryland - a 1.2 acre previously residential property - zoned "Density Residential 3.5" where churches are permitted by right subject to certain conditions, including that parking lots and structures are (1) set back 75 feet from tract boundaries, and (2) separated from adjacent lots by a 50-foot landscaped buffer. New churches are exempt from these conditions if their "site plans have been approved after a public hearing finding that compliance with the conditions will be maintained "to the extent possible," and that the plan "can otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises.'"

Post-purchase, Ware improved the building and parking at the property, held a church service, and hosted a cookout, all of which generated complaints to from neighbors to Baltimore County ("the County") and an inspection that resulted in a notice to Ware that she couldn't use the property as a church unless she complied with applicable zoning requirements. Ware's subsequent application sought complete relief from all zoning requirements. A hearing on the petition was attended by neighbors opposing the Church that "displayed open hostility" to the Church, and included a variety of comments, a representative one of which included that the congregants were "dancing and hollering like they back at their home back in Africa somewhere." The Administrative Law Judge recommended denying Ware's application, which the Board of Appeals did since the "the proposed Church [did] not even minimally comply" with the applicable zoning requirements. Ware thus filed a second application that made substantial changes toward compliance with zoning regulations. The Board of Appeals denied this second application based on res judicata and collateral estoppel. This led to the Church to file suit in federal court alleging the dismissal of the second application violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The district court dismissed the complaint for failure to state a claim and the Fourth Circuit published its decision vacating the lower court ruling.

Under RLUIPA, land use regulations can substantially burden religious exercise where an organization acquires property expecting to use it for a religious purpose but is prevented from doing so by the application of a zoning ordinance. The Fourth Circuit evaluates two questions to determine if this occurred: "First, is the impediment to the organization's religious practice substantial? [And s]econd, who is responsible for the impediment-the government, or the religious organization?" The first question was clearly answered in the affirmative and drove the lower and appellate court straight to the second.

The Circuit found the lower court emphasized incorrect issues with regard to the second question, the most critical of which was its explanation of why *the Board of Appeals had incorrectly dismissed* the second application based on res judicata and collateral estoppel, but

ultimately determined, *despite that,* that the Board of Appeals correctly dismissed the case overall. "The [district] court explained this anomaly by noting that Ware advanced different bases for distinguishing the two petitions before the Board and the district court," but, after identifying how the district court came to its conclusion found it 1) inaccurate because Ware did highlight the differences in both settings and 2) that in fact the applications were "*markedly different*." Since the second application included substantial changes from the first it complied to a much greater extent than the first and, in the Circuit's eyes, potentially so much so that, in the words of the County's land use law, it *may have been "to the extent possible*." That made it easy for the Circuit to find that Ware sufficiently alleged the dismissal of that second application could have imposed a substantial burden on her and the Church's religious practice, leading it to vacate the holding and remand the RLUIPA substantial burden claim.

The second RLUIPA claim was that the County defendants discriminated against the Church based on religion or religious denomination, a claim the district court dismissed by holding the Church failed to demonstrate that similarly situated churches received a special exemption or that there was discriminatory intent at work. While the County argued the discriminatory remarks of the public could not attributed to it, the Church argued the "Board [of Appeals] was knowingly responsive to a hostile community" of bigoted neighbors. The issue here for the County was that RLUIPA does recognize the probative value of the "specific sequence of events leading up to a challenged decision" and that, even if the government decisionmakers do *not display* bias, courts do look whether the government decision was *influenced* by community members' bias. As to the test, the Circuit summed it up as: "Such impermissible influence may be inferred where expressions of community bias are followed by irregularities in government decision-making." Of course being at the complaint stage, Ware and the Church needed only show plausibility, a standard the Circuit found was met because "the alleged sequence of events leading to the challenged decision is highly probative of [the County] Defendants' motives," especially since, it thought, "irregularities in the [] decision-making process followed the neighbors' expressions of animus." Reviewing the alleged facts in a light favorable to the Church, it drew "reasonable inferences in Plaintiffs' favor and consider[ing] RLUIPA's very broad protection for religious liberty," the Circuit found that the "complaint plausibly alleges a prima facie claim of religious discrimination." It vacated the lower court's ruling and remanded the case.

LINK

Speech: Provisions in Chicago's Eight-Foot Abortion Clinic Bubble-Zone are Virtually Identical to those in *Hill* and Survive, Post-*Reed*

Price v. City of Chicago, No. 17-2196 (7th Cir. Feb. 13, 2019).

Acknowledging that *McCullen* and *Reed* each raise questions about the continuing viability of *Hill v. Colorado*,the Seventh Circuit has declined to invalidate Chicago's bubble-zone abortion clinic law which mirrors much of the Colorado law in *Hill*, asserting that until the Supreme Court decides otherwise, *Hill* is still controlling law.

In *Hill v. Colorado*, 530 U.S. 703 (2000) the Supreme Court upheld a "floating bubble zone" in Colorado that created a no-approach zone within a 100-foot radius of an abortion clinic entrance. The Court deemed it was not a content-based restriction on speech and thus was not subject to strict judicial scrutiny. In this case pro-life "sidewalk counselors" sued to enjoin Chicago's "bubble zone" ordinance barring them from approaching within eight feet of a person in the vicinity of an abortion clinic if their purpose is to engage in counseling, education, leafletting, handbilling, or protest. The district court upheld the law under *Hill.* On appeal the Seventh Circuit evaluated *Hill* in light of *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). It held *Hill* was not overruled to this point, ultimately affirming the lower court.

The plaintiff's contentions were identical to those in *Hill:* 1) that Chicago's bubble-zone ordinance is a content-based restriction on speech and is facially unconstitutional under strict scrutiny and, in the alternative, 2) that if subject to intermediate scrutiny, it failed the narrow-tailoring requirement. Knowing that the Supreme Court rejected these theories already, they then argued after *McCullen* and *Reed*, *Hill* was no longer viable, and thus the lower court erred.

The Circuit methodically compared each of the two cases - *McCullen* and *Reed* - to *Hill. McCullen* centered on Massachusetts' law imposing a fixed 35-foot buffer zone around the entrance, exit, and driveway of every abortion clinic in the state and exempted some individuals - "those entering or leaving the clinic; employees or agents of the clinic; law enforcement, firefighters, construction and utility workers, and other municipal agents; and persons using the sidewalk or public way to reach a destination other than the clinic." The Supreme Court held this law was *not* content-based since it did not draw any distinctions based on the content of messages, rather, violations existed based on the location of a person (within 35 feet). The Court found the Achilles heel of the law was that, even though the purpose of the law was sufficient, it was *not narrowly-tailored* enough because it substantially burdened more speech than necessary to further the government's legitimate interests. In short, the speech issues were weighty, and Massachusetts had to demonstrate that alternative measures that burden substantially *less speech* would fail to achieve its interests and the state's argument that a one-size-fits-all 35-foot line was the answer did not meet that benchmark. Having set out the facts generally, the Circuit took the opportunity to highlight a few inconsistencies between *McCullen* and *Hill,* including, among others, that "*McCullen* emphasized that a law is content-based if it is 'concerned with [the] undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech . . . . Yet *Hill* repeatedly cited concern for listeners' reactions as an acceptable justification for Colorado's bubble-zone law."

The Court noted immediately that *Reed* was, of course, a sign case, but that its holding reverberated through First Amendment content-neutrality analysis for speech broadly. With *Reed* the Circuit was honest that it was, in its words, "incompatible" and "incongruous" with *Hill,* pointing out whereas *Hill* started from the premise that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys," *Reed* says that the first step in the content-neutrality inquiry is to ask whether the challenged law is "content based on its face." It also pointed out that, on one hand, *Reed* explains that a law is content based if it draws "more subtle" facial distinctions like those that "defin[e] regulated speech by its function or purpose," and, on the other hand, the law upheld in *Hill* regulates speech undertaken "for the *purpose* of . . . engaging in oral protest, education, or counseling."

After identifying these conflicts within Supreme Court precedent and saying that indeed "*McCullen* and *Reed* have deeply shaken *Hill's* foundation," the Court acknowledge that *Hill* remains "on the books" and directly controlled the issue at hand. It resisted the plaintiff's entreaties that it follow the Third Circuit's lead in *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016) to reverse the dismissal and remand in light of the latter cases - particularly with regard to the narrow-tailoring angle. Instead, the Seventh Circuit intentionally decided against creating a Circuit split and in favor of holding the district court correctly dismissed the case because Chicago's ordinance was a "carbon copy" of the ordinance in *Hill* (excepting a smaller radius, 100-foot in *Hill* versus an eight-foot radius in Chicago). It closed noting that the "road the plaintiffs urge is not open to us in our hierarchical system. Chicago's bubble-zone ordinance is materially identical to-indeed, is narrower than-the law upheld in Hill," and since "only the Supreme Court can bring harmony to these precedents," the holding was affirmed.

LINK

Zoning: City's Refusal to Rezone House for Commercial Use in Residential Neighborhood is Not Class of One Discrimination

Mensie v. City of Little Rock, No. 17-1761 (8th Cir. Feb. 28, 2019).

Little Rock's refusal to rezone a house for use as a beauty salon did not deny equal protection or due process and did not constitute class of one race discrimination; other beauty salons had been allowed to operate in the City's residential neighborhoods under different circumstances.

Kimberly Mensie ("Mensie") purchased property in 2007 in Little Rock, Arkansas ("City") intending to live there and also operate a beauty salon from the premises. Mensie did not realize that her property was exclusively designated for "Single Family" use under the City's Land Use Plan. It was within two blocks of an area zoned for Commercial and Office and an area zoned for Single Family and Suburban Office was just south of her location as well. Her request to rezone the house for use as a salon was denied by the City's Planning Commission ("Commission"). Mensie, an African American female, filed under § 1983 following the denial, alleging the City denied her application in violation of the Equal Protection Clause and Due Process Clause by singling her out as a "class of one," discriminating on the basis of race, and acting "based on capricious and arbitrary conditions." Mensie's case was dismissed by the district court, which held she failed to show the City either treated her less favorably than other similarly situated salon operators or denied her applications based on race.

Mensie's burden on her race discrimination claim required she prove "that a [racially] discriminatory purpose has been a motivating factor in the decision" to deny her rezoning request. Mensie pointed to the fact that City's Director of Planning and Development opposed the idea of rezoning her property before she applied, that the Commission denied her application even after she made the changes staff suggested in a preliminary meeting, and that at the hearing she made other suggestions of her own that were rejected as insufficient. The appellate court rejected the theory, noting the similarity with the Supreme Court's landmark *Village of Arlington Heights*, including that Mensie's house was in a single-family neighborhood, surrounded by exclusively single-family homes, the application proceeded through the normal application process and was devoid of any irregularities, she had a timely public hearing before the Commission and two timely public hearings on appeal, and the fact that the administrative record supported the conclusion because it was based on *exclusively* the zoning elements of her application.

Next Mensie sought to support her allegation that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment - her "class of one" claim - by pointing out a slew of manicurists and beauty salons operated from their homes across the City. Like the district court though, the Circuit found this evidence unpersuasive because Mensie failed to show how any were similarly situated in all *material respects*, including in time, location, the zoning amendment process, and the City's Land Use Plan, to her situation. The Circuit recognized a subset of ten salons Mensie provided a more detailed history and that four of those were residential, but the crux that undercut Mensie was that those four salons were all nonconforming uses in operation prior to the area being annexed within the City. The lower court decision was affirmed.

LINK

Zoning: Equitable Waiver Upheld for House Extending into Setback

Dietz v. Town of Tuftonboro, No. 2017-0536 (N.H. Jan. 8, 2019).

Affirming the lower court, the Supreme Court of New Hampshire has upheld the grant of an "equitable waiver" by a zoning board of adjustment to a homeowner who built into a lakeside setback-despite caselaw and language in New Hampshire's equitable waiver statute suggesting that such relief was not appropriate in this instance.

Sawyer Point Realty, LLC ("Sawyer Point") owns a house located along the shore of Lake Winnipesaukee and within the Town of Tuftonboro, New Hampshire's ("Town") Lakefront Residential Zoning District ("District"). David and Katherine Dietz own the neighboring property (also within the District). The Town's zoning code requires a minimum 50-foot setback from the lake for buildings located within the District. In 1999 and 2008, Sawyer Point constructed two separate additions. For the 1999 application Sawyer Point and its builder recognized the house was located within the setback, and that the second floor addition would, therefore, also be within the setback, and reflected that on the drawings included within its application to the Town. The Town issued the building permit, noting the addition would cause "no change in footprint."

In 2008, Sawyer Point and its same builder recognized the setback issue and submitted a variance application to the zoning board of adjustment ("ZBA"), which, after a hearing, the ZBA unanimously approved. The Town issued another building permit. When Sawyer Point surveyed the property, however, in 2014 it became clear that, in regard to the 2008 Addition, more of the new structure was within the setback than had been represented to the ZBA. The Dietz's, learning this, sought injunctive relief and requested a court to order the removal of the unlawful construction. After the suit was filed, Sawyer Point applied for and received an "equitable waiver" for the Town's ZBA. The Dietzes sought rehearing on the waiver grant; when it was denied they appealed to the superior court. After that court upheld the ZBA, the Dietzes appealed to the Supreme Court of New Hampshire.

An equitable waiver arises under state law in New Hampshire via RSA 674:33-a, which states:

1. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:
    - *That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;*
    - *That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;*
    - *That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and*
    - *That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected*.

The Dietzes' first line of attack focused on the language of Paragraph I and its provision that "the zoning board of adjustment shall . . . grant an equitable waiver from the requirement, *if and only if*

the board makes all of the following findings," which they argued meant the factual findings had to be in writing. Since the ZBA did not make its findings in writing, they argued the lower court erred. Looking to standard rules of statutory interpretation, the text at issue, and reviewing some precedent, the Hew Hampshire Supreme Court found no such requirement, noting that "if the legislature intended to require the ZBA to make written findings as a prerequisite to the granting of an equitable waiver it would have said so expressly." The court refused to *infer* a writing requirement even though similar language had persuaded the court to infer such a requirement in statutes before. In essence, the statutory language was analogous enough to those it had previously evaluated.

The Dietzes' second argument was that the trial court erred by ignoring the language in Paragraph I(d) requiring that the "past construction or investment [was] made in ignorance of the facts constituting the violation." They pointed out that Sawyer Point admitted knowing the 1999 addition extended into the setback, as indicated via the floor plan submitted. The lower court had ruled in Sawyer Point's favor on this issue in a roundabout manner - discussing a related portion of the statute and ultimately ruling this language needed to be "disregarded" because otherwise it would render inoperable other portions of the section. The Supreme Court concurred in the result but not the reasoning; instead holding that Paragraph 1(d) and 1(b) had to be harmonized - and easily were. It noted "Paragraph I(b) requires an applicant to show either a good faith error in measurement or calculation, or "an error in ordinance interpretation or applicability made by a municipal official" when issuing a permit. RSA 674:33- a, I(b). If it adopted the interpretation of Paragraph I(d) advanced by the Dietzes - that an applicant must always be ignorant of the underlying facts - then there would never be a situation in which an applicant would be eligible for a waiver based on an error made by a municipal official without the applicant also having erred in measurement or calculation. In the end, the court agreed that Sawyer Point indeed knew the 1999 addition would be built in the setback, but that it relied on the building official's erroneous application of the ordinance - that the addition would cause "no change in footprint" - and thus the waiver was properly granted by the ZBA and properly affirmed by the superior court.

The Dietzes' last argument of note was that the lower court erred in the balancing test of Paragraph 1(d) with regard to the "public benefit to be gained" by correcting the violation. They posited the ZBA failed to consider the cumulative effect of the failure to enforce the lakefront setback throughout the Town, incorrectly focusing only on the impact of the specific violations at issue in this case. While the Court recognized this argument was persuasive in a different land use context, it held it "should not be *extended*" to the equitable waiver context. The primary reason was that, unlike the statute in the precedential case cited by the Dietzes, the statute here specified that "due to the degree of past construction or investment made in ignorance of the facts constituting *the violation*, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require *the violation* to be corrected." The court found this narrowed the scope such that cumulative impacts were not appropriate considerations in the context of equitable waivers. It affirmed the lower court.

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