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THE SELF-INFLICTED HARDSHIP RULE IN PENNSYLVANIA VARIANCE LAW

I. INTRODUCTION

As a result of several Pennsylvania Supreme Court decisions dealing with the issue of self-inflicted hardship in variance applications, confusion has developed over the status of that doctrine in Pennsylvania.¹ The subsequent interpretations of these decisions by the Pennsylvania Commonwealth Court have done little to reconcile these cases and establish a clear self-inflicted hardship rule in the state.²

The purpose of this comment is to analyze the supreme court cases in order to determine if this confusion can be eliminated by reconciling these decisions, thereby creating a unified, concise rule.³ In addition, the commonwealth court's interpretations of these decisions will be examined in order to determine if the lower court has been faithful to supreme court precedent, and whether the commonwealth court's decisions are consistent with each other.⁴ Finally, this comment will examine the supreme court's decisions to determine if they indeed effectuate the policy underlying the variance provisions,⁵ and suggest a rule which would better achieve this policy.⁶

II. VARIANCE LAW

A variance has been defined as the authority for the construction or maintenance of a building or structure, or the establishment or maintenance of a use of land which is prohibited by the zoning ordinance.⁷ The basic policy underlying the variance statute is the cor-

1. For a discussion of the various theories of the self-inflicted hardship rule in Pennsylvania, *see* notes 35-71 and accompanying text *infra*.

2. For an analysis of Pennsylvania Commonwealth Court interpretations of the self-inflicted hardship rule, *see* notes 115-84 and accompanying text *infra*.

3. For a discussion of the possible reconciliation of the Pennsylvania Supreme Court decisions, *see* notes 86-106 and accompanying text *infra*.

4. For an analysis of the Pennsylvania Commonwealth Court decisions, *see* notes 170-84 and accompanying text *infra*.

5. For an analysis of the Pennsylvania Supreme Court's application of the policies underlying the variance provisions, *see* notes 187-90 and accompanying text *infra*.

6. For a discussion of the suggested rule, *see* notes 91-106 and accompanying text *infra*.

7. R. ANDERSON, *AMERICAN LAW OF ZONING*, §14.02 (1968). Another writer has defined a variance as an "authorization for a property owner to

rection of inequities created by the operation of the general zoning ordinance.⁸ By providing an "escape hatch" or "safety valve" from the literal terms of the ordinance, a variance prevents challenges that the statute is unconstitutionally confiscatory by property owners denied the beneficial use of their land.⁹

The utility of the variance procedure as a "safety valve" was recognized by the Pennsylvania Supreme Court in *National Land & Investment Co. v. Kohn*.¹⁰ The supreme court stated that "the variance

depart from the literal requirements of a zoning ordinance as it applies to his land." 6 J. ROHAN, *ZONING & LAND USE CONTROLS*, § 43.01[2] at 43-3 (1981).

There are two specific types of variances. The use variance allows the landowner to use existing property in a manner not permitted by the ordinance. *Id.* at 43-4. See also 2 ANDERSON, at §§ 14.06, 14.08-14.15. On the other hand, the area variance allows deviations from restrictions on construction and placement of buildings and other structures. 6 ROHAN, § 43.01[2] at 43-4. See also 2 ANDERSON, at § 14.07. The effect of this distinction is to require a stricter showing of need for a use variance than for an area variance, primarily because the use variance has a greater impact on the surrounding area and its residents. *Brennan v. Zoning Bd. of Adjustments*, 409 Pa. 376, 187 A.2d 180 (1963).

The standard of proof necessary for variances generally is to prove that the effect of the ordinance burdens the property with an unnecessary hardship that is unique to the particular property, and that the variance would not have an adverse effect on the public health, safety, or welfare. *Sposato v. Radnor Township Bd. of Adjustment*, 440 Pa. 107, 270 A.2d 616 (1970); *Appeal of Bilotta*, 440 Pa. 105, 270 A.2d 619 (1970); *Appeal of Patti*, 440 Pa. 101, 270 A.2d 400 (1970); *Pyzdrowski v. Bd. of Adjustment*, 437 Pa. 481, 263 A.2d 426 (1970).

For a general discussion of variances, see Green, *The Power of the Zoning Board of Adjusters to Grant Variances from the Zoning Ordinances*, 29 N.C.L. REV. 254 (1951); Note, *Zoning Variances*, 74 HARV. L. REV. 1396 (1961); Note, *Zoning Variances: The "Unnecessary Hardship" Rule*, 8 SYRACUSE L. REV. 85 (1956).

8. 2 ANDERSON, *supra* note 7, at § 14.02. Additional policies supporting the granting of variances are to prevent undue interference with private property through the zoning restrictions, and to insure that property capable of practical use will not remain unused. 6 ROHAN, *supra* note 7, § 43.01[4][a] at 43-13 to 43-14.

9. 2 ANDERSON, *supra* note 7, at § 14.02. The "taking clause" of the fourteenth amendment's due process clause provides in pertinent part: "No State shall . . . deprive any person of . . . property, without due process of law." U.S. CONST., amend. XIV, § 1. Because zoning ordinances do not generally provide notice or a hearing for landowners whose property is affected, the challenge is that the property is "taken", *i.e.*, restricted in its use, without due process. Thus, by allowing variances to be granted in certain individual cases when specific criteria are met, repeated challenges to the constitutionality of the zoning ordinance are prevented.

One writer has described the practical effects of a variance by stating:

The variance . . . affords more immediate and less complicated relief to individual owners who suffer hardships caused by the enforcement of local land use laws. Moreover, it may be less costly and far more feasible to secure a variance than to obtain a judicial determination that the ordinance is invalid or unconstitutional.

6 ROHAN, *supra* note 7, § 43.01[2] at 43-4.

10. 419 Pa. 504, 512, 215 A.2d 597, 602 (1965). See also *Forest Hills Borough Appeal*, 409 Pa. 392, 187 A.2d 166 (1963); *Colligan Zoning Case*, 401 Pa. 125, 162 A.2d 652 (1960).

provision of the enabling act functions as an 'escape valve' so that when regulations which apply to all are unnecessarily burdensome to a few because of certain unique circumstances, a means of relief from the mandates of the ordinance is provided."¹¹ Therefore, the proper application of the variance procedure is to insure that the land can be put to a practical use, rather than having the land remain unused.¹²

Variances also promote the important policy against "spot zoning."¹³ Spot zoning is the zoning of a specific property which is not in conformity with the classification applicable to the surrounding property.¹⁴ An administrative dispensation from such an undue restriction by means of a variance is preferable to the legislative action of rezoning, which in effect weakens the uniformity and effectiveness of the zoning ordinance.¹⁵

The Pennsylvania Supreme Court has developed certain principles which govern the disposition of variance cases.¹⁶ These principles were most concisely enunciated in *O'Neill v. Zoning Board of Adjustment*,¹⁷ where the court stated:

In considering the merits of this appeal, we bear in mind the following principles which govern the disposition of variance cases: . . . variances should be granted only sparingly and only under exceptional circumstances, . . . in order to obtain a variance, the petitioner must prove (1) that the variance will not be contrary to the public interest and (2) that unnecessary hardship will result if the variance is not granted; . . . a variance will not be granted solely because the petitioner will suffer an economic hardship if he does not receive one.¹⁸

In addition to the principles enunciated in *O'Neill*, the supreme court has stated:

11. 419 Pa. at 512, 215 A.2d at 602.

12. 6 ROHAN, *supra* note 7, § 43-01[4][a] at 43-13. For a discussion of the economic justifications of zoning variance provisions, see Green, *supra* note 7.

13. 6 ROHAN, *supra* note 7, § 43-01[4][a] at 43-13.

14. *Id.* at 43-14.

15. *Id.* See also Comment, *General Welfare, Welfare Economics, and Zoning Variances*, 38 So. CAL. L. REV. 548 (1965).

16. See notes 17-19 and accompanying text *infra*.

17. 434 Pa. 331, 254 A.2d 12 (1969).

18. *Id.* at 334-35, 254 A.2d at 14. The Pennsylvania Supreme Court reversed the granting of a variance that would have permitted the appellee to erect an apartment building with an amount of floor space in excess of zoning regulations. *Id.* at 333, 254 A.2d at 14. Because economic hardship was the only justification for the variance offered by the appellee, the court disallowed the variance. *Id.* at 335, 254 A.2d at 15. The court noted that the appellee failed to prove two other elements necessary to secure a variance: first, that the property cannot be utilized in its present state; and second, that it could not profitably be used for another purpose consistent with the ordinance. *Id.*

The sole justification for the grant of a variance is that a strict application of the terms of the zoning statute will result in an "unnecessary hardship," and even then, the variance can be granted only if "the spirit of the ordinance shall be observed, the public health, safety, and general welfare secured and substantial justice done."¹⁹

It is apparent that even though a variance is intended as a "safety valve" in order to protect the constitutionality of the zoning ordinance,²⁰ they are not to be granted freely. It would be a fallacy to assume that "every lot is guaranteed the right to be used at maximum residential density regardless of its size."²¹ In order to get a variance under the principles set forth in *O'Neill*, a petitioner has a substantial burden, and a variance is given only if it maintains the public health, safety, and welfare.²²

When the variance provisions of the Municipalities Planning Code were enacted in 1968, it was the intent of the Pennsylvania Legislature to merely codify the law which had developed in regard to the granting of a variance.²³ Section 10912 of the Municipalities Planning Code provides:

The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. . . . The board may grant a variance provided the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provi-

19. *Richman v. Zoning Bd. of Adjustment*, 391 Pa. 254, 259-60, 137 A.2d 280, 283 (1958), quoting *Jury's Appeal (No. 1)*, 89 Pa. Super. Ct. 543, 546 (1926). In discussing the key requirement of "unnecessary hardship", the court noted that such an analysis turns on the circumstances of each case. 391 Pa. at 260, 137 A.2d at 284. It emphasized, however, that the hardship must be unnecessary and unique to the property involved, not to the entire district, and that an increase or decrease in property value is by itself insufficient to constitute grounds for a variance. *Id.*

20. For a discussion of the policies regarding the constitutionality of the zoning ordinance, see notes 7-12 and accompanying text *supra*.

21. *Christner v. Zoning Hearing Bd.*, 40 Pa. Commw. Ct. 87, 94, 397 A.2d 30, 32 (1979).

22. See text accompanying note 18 *supra*.

23. See *Sisko v. Zoning Bd. of Adjustment*, 36 Pa. Commw. Ct. 556, 559, 389 A.2d 231, 233 (1978); *Campbell v. Zoning Hearing Bd.*, 10 Pa. Commw. Ct. 251, 255, 310 A.2d 444, 446 (1973).

sions of the zoning ordinance in the neighborhood or district in which the property is located;

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

(3) That such unnecessary hardship has not been created by the appellant;

(4) That the variance, if authorized, will not alter the essential character of the neighborhood, or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and zoning ordinance.²⁴

Such strong requirements are indicative of a policy favoring the provisions of the zoning ordinance, and the granting of variances only in extraordinary situations.

The portion of the variance statute under consideration in this comment is section 10912(3), which provides "that such unnecessary hardship has not been created by the appellant."²⁵ It is this section of the statute which is designed to prevent the granting of a variance to one who has created his own hardship, and alleges this hardship as the sole basis for his variance application.

III. THE PENNSYLVANIA SUPREME COURT DECISIONS

Conceptually, the supreme court cases dealing with the issue of self-inflicted hardship in variance applications can be grouped into three principal categories. The first of these categories is represented by *McClure Appeal*,²⁶ which held that no variance could be granted if the purchaser had knowledge of the zoning restriction when the

24. PA. STAT. ANN. tit. 53, §10912 (Purdon 1972). Section 10601 of the Municipalities Planning Code delegates to the governing body of each municipality the power to "enact, amend and repeal zoning ordinances." *Id.* §10601. The purpose of such an enabling statute is "to protect and promote safety, health and morals [and] to provide for the general welfare." *Id.* §10105.

25. *Id.* §10912(3).

26. 415 Pa. 285, 203 A.2d 534 (1964).

property was purchased.²⁷ A second approach is that stated in *Appeal of Gro*²⁸ where the supreme court focuses on the purchase price paid for the property in question.²⁹ The third approach is represented by *Poster Advertising Company v. Zoning Board of Adjustment*³⁰ in which the supreme court concentrated on the denial to the owner of any productive use of the land.³¹ A possible fourth category is represented by the case of *Upper Leacock Township Supervisors v. Zoning Hearing Board*.³² It is suggested that this case may be placed in its own category, not because it presents a new approach, but because it is the latest case decided by the supreme court dealing with self-inflicted hardship, and therefore may indicate the direction which the court is taking with respect to reconciling the above cases.³³

A. Knowledge of Restriction at the Time of Purchase

In *McClure Appeal*,³⁴ the Fidelity-Philadelphia Trust Company applied for a permit to erect a branch bank on land zoned as residential.³⁵ After the permit was denied,³⁶ Fidelity successfully applied for a variance under the zoning ordinance.³⁷ In reversing the granting of the variance,³⁸ the *McClure* court focused on the fact that when Fidelity purchased the property, it knew that the area was zoned residential,

27. *Id.* at 291, 203 A.2d at 537. For an analysis of the *McClure* decision, see notes 34-40 and accompanying text *infra*.

28. 440 Pa. 552, 269 A.2d 876 (1970).

29. *Id.* at 560, 269 A.2d at 880-81. For a discussion of the *Gro* decision, see notes 44-60 and accompanying text *infra*.

30. 408 Pa. 248, 182 A.2d 521 (1962).

31. *Id.* at 252, 182 A.2d at 524. For a discussion of the *Poster* decision, see notes 61-68 and accompanying text *infra*.

32. 481 Pa. 479, 393 A.2d 5 (1978).

33. For a discussion of the *Upper Leacock* decision, see notes 72-85 and accompanying text *infra*.

34. 415 Pa. 285, 203 A.2d 534 (1964).

35. *Id.* at 286, 203 A.2d at 535.

36. *Id.* The permit was denied because "1) a business building was not a permitted use, 2) the proposed building would violate front and side yard setback provisions of the zoning ordinance, and 3) the proposed signs were not permitted under the ordinance and, as proposed, violated the front yard setback provisions." *Id.* at n.2.

37. *Id.* at 287, 203 A.2d at 535. The Board granted the variance, determining that the branch would be in the public interest. *Id.* at 290, 203 A.2d at 537.

38. *Id.* at 292, 203 A.2d at 538. The scope of review on appeal is to determine whether the Board committed an abuse of discretion, or an error of law. *Brennan v. Zoning Bd. of Adjustment*, 409 Pa. 376, 187 A.2d 180 (1963); *Crafton Borough Appeal*, 409 Pa. 82, 185 A.2d 533 (1962). The court noted that the Board's power to grant a variance "is to be sparingly exercised and only under peculiar and exceptional circumstances." 415 Pa. at 287, 203 A.2d at 535, citing *Sglarlat v. Board of Adjustment*, 407 Pa. 324, 180 A.2d 769 (1962); *Cresko Zoning Case*, 400 Pa. 467, 162 A.2d 219 (1960).

and despite such knowledge, still purchased the lot.³⁹ The court concluded, therefore, that Fidelity was in no position to claim an unnecessary hardship, stating: "[O]ne who seeks a variance cannot be heard to complain of a hardship involved when the same condition was present to his knowledge when he purchased the property."⁴⁰

The holding in *McClure* was subsequently relied on by the *O'Neill* court in 1969,⁴¹ where the court emphasized that "[e]specially is a variance not to be granted when the petitioners purchased the property with the knowledge of the existing zoning regulations or when he should have been aware of the zoning regulation."⁴² The following year, three cases were decided by the supreme court that reaffirmed the knowledge rationale.⁴³

39. 415 Pa. at 291, 203 A.2d at 537. The court assumed that the land could not be used practically for residential purposes. *Id.* However, because Fidelity purchased the land "despite such knowledge and with its eyes open," the court held that it was estopped to claim unnecessary hardship. *Id.*

40. *Id.* at 288, 203 A.2d at 536, citing *Cresko Zoning Case*, 400 Pa. 467, 162 A.2d 219 (1960); *Upper St. Clair Township Grange Zoning Case*, 397 Pa. 67, 152 A.2d 768 (1959). The court stated further:

[w]here the hardship is, as here, self-inflicted, it is not the function of the court to grant redress in the form of a variance. The [applicant for a variance] cannot now be heard to complain of the economic hardship involved as the same conditions were present when [he] purchased the property.

415 Pa. at 291-92, 203 A.2d at 537-38. The court had an extensive background of precedent to support its decision. See *Hasage v. Philadelphia Zoning Bd. of Adjustment*, 415 Pa. 31, 202 A.2d 61 (1964); *Dishler v. Zoning Bd. of Adjustment*, 414 Pa. 244, 199 A.2d 418 (1964); *Cooper v. Bd. of Adjustment*, 412 Pa. 429, 195 A.2d 101 (1963); *Andress v. Zoning Bd. of Adjustment*, 410 Pa. 77, 188 A.2d 709 (1963); *Di Santo v. Zoning Bd. of Adjustment*, 410 Pa. 331, 189 A.2d 135 (1963); *MacLean v. Zoning Bd. of Adjustment*, 409 Pa. 82, 185 A.2d 533 (1962).

41. 434 Pa. at 335, 254 A.2d at 14. For a discussion of another portion of the *O'Neill* opinion, see notes 16-18 and accompanying text *supra*.

42. 434 Pa. at 335, 254 A.2d at 14.

43. See *Appeal of Patti*, 440 Pa. 101, 104, 270 A.2d 400, 402 (1970) ("a purchaser who knew or should have known how his property was zoned cannot subsequently rely upon the economic hardship allegedly caused [by the zoning] in order to obtain a variance"); *Bilotta v. Haverford Township Zoning Bd.*, 440 Pa. 105, 107, 270 A.2d 619, 620 (1970) (economic hardship alone will not justify a variance, particularly when the purchaser knew of the restricting zoning regulation at the time of acquisition); *Sposato v. Radnor Township Bd.*, 440 Pa. 107, 112, 270 A.2d 616, 618 (1970) (error to grant variance to one who agreed to purchase the land, knowing that his proposed use was impermissible without rezoning).

A sub-category to the *McClure* line of cases appears in *Volpe Appeal*, 384 Pa. 374, 121 A.2d 97 (1956). In *Volpe Appeal*, two lots were purchased in 1944 or 1945 totaling approximately 32,000 square feet. *Id.* at 375, 121 A.2d at 98. The property was zoned in 1929 as "AA" residential, and the zoning ordinance was amended in 1941 to require that a lot be at least 20,000 square feet in order to permit a building to be erected on the property. *Id.* In 1949, after building a dwelling on this tract, the owner conveyed a portion of the tract. *Id.* The area of the lot conveyed was 20,130 square feet. *Id.* Therefore, the lot retained by the owner was only 12,448 square feet, and

*B. Payment of an Inflated Purchase Price in
Anticipation of a Variance*

On the same day that the three decisions affirming the knowledge rule were handed down,⁴⁴ *Appeal of Gro*⁴⁵ was decided by the Pennsylvania Supreme Court. *Gro* was an appeal from a lower court decision granting a variance permitting construction of fifty-nine apartment units.⁴⁶ The topography of the lot was such that extensive grading and other improvements would be required to prepare the site either for single family residential or apartment development.⁴⁷ Based on expert testimony, the lower court found that if six single family dwellings were constructed on the property, the price of these dwellings would be approximately \$70,000, and that no market for single family homes in this price range existed in this immediate area.⁴⁸ The lower court concluded, therefore, that this was a unique and unnecessary hardship justifying the grant of a variance.⁴⁹

The supreme court began its analysis by stating that although economic hardship alone is an insufficient reason to grant a variance, this doctrine had only been applied where the economic "hardship" was a denial of the *most* profitable choice.⁵⁰ The *Gro* court noted that the evidence here demonstrated an inability for *any* profitable use in accordance with the zoning regulation.⁵¹ Although the lack of any profitable use for property had been used in other cases as a factor in favor of a

the owner desired to construct a dwelling on this remaining tract. *Id.* The owner had been engaged in the building business for twenty-six years and had actual knowledge of the zoning regulations. *Id.* at 376, 121 A.2d at 98. The owner applied for a variance to construct a dwelling on the under-sized lot, and the variance was denied. *Id.* at 375-76, 121 A.2d at 98. The supreme court, in affirming the denial of the variance, held that the owner himself created the hardship by conveying part of his tract, and leaving himself with a lot which did not meet the criteria of the zoning regulation. *Id.* at 378, 121 A.2d at 100. Because the owner did this with full knowledge of the applicable zoning restrictions, his hardship was found to be self-inflicted. *Id.*

44. See note 43 and accompanying text *supra*.

45. 440 Pa. at 552, 269 A.2d at 876.

46. *Id.* at 553, 269 A.2d at 877.

47. *Id.* at 554, 269 A.2d at 878. The cost of such improvements was estimated to be \$44,000. *Id.*, 269 A.2d at 877.

48. *Id.* at 554-55, 269 A.2d at 877.

49. *Id.* at 554, 269 A.2d at 878.

50. *Id.* See, e.g., *MacLean v. Zoning Bd. of Adjustment*, 409 Pa. 82, 185 A.2d 533 (1962) (variance denied although a service station would be much more profitable than the permitted residential use).

51. 440 Pa. at 556, 269 A.2d at 878. See also text accompanying notes 47-49 *supra*.

variance,⁵² the court distinguished *Gro* in that the purchaser had full knowledge of the unfavorable restriction when the land was acquired.⁵³

The supreme court continued its analysis by stating that when the purchaser "acquired the property he did so with the conditions of economic hardship staring [him] in the face, and [he] cannot now be heard to complain. In order for a hardship to be unnecessary, it cannot be self-inflicted."⁵⁴ In the instant case it was the purchaser, by paying an inflated purchase price for the property,⁵⁵ who made it economically impossible to construct homes on his property in accordance with the zoning ordinance.⁵⁶

52. See, e.g., *Ferry v. Kownacki*, 396 Pa. 283, 152 A.2d 456 (1959) (variance to construct gas station granted where residential construction would be priced out of area market due to terrain); *Appeal of Garbev*, 385 Pa. 328, 122 A.2d 682 (1956) (economically infeasible to develop tract as residential considering heavy traffic, railroad freight yard, and elevated trolley).

53. 440 Pa. at 556, 269 A.2d at 879. The *Garbev* and *Ferry* courts did not deal with the *McClure* issue of the purchaser's knowledge of the zoning restrictions, because it was not alleged that either of the landowners in those cases had purchased the land with the view toward obtaining a variance. For a discussion of the *McClure* knowledge rationale, see notes 34-40 and accompanying text *supra*.

54. 440 Pa. at 557, 269 A.2d at 879.

55. *Id.* The court stated that the property was only worth the \$40,000 purchase price if the anticipated variance were granted. *Id.* at 556, 269 A.2d at 879. There was no evidence presented as to the value of the property with the zoning restriction imposed. *Id.* at 559, 269 A.2d at 880. Nor was it elicited what the price range would be for homes constructed at that site. *Id.* However, the court assumed that, given the evidence of the bleak environment and the \$18,000 price range of other homes in the area, the \$40,000 figure was highly inflated, due to the "gamble that he could obtain a variance which would make his purchase profitable." *Id.* at 557, 269 A.2d at 879.

56. *Id.* at 557, 269 A.2d at 879. The court stated:

Only in a case such as this, which arises after the property has been sold to a new owner who has paid a high price for the property because he assumed that a variance which he anticipated would justify his price, do we hold that the owner cannot prove that the hardship which burdens his land was unnecessary rather than self-inflicted.

Id. at 560, 269 A.2d at 880-81.

The *Gro* court analogized the situation it faced to the earlier *Edwards Zoning Case*, 392 Pa. 188, 140 A.2d 110 (1958). In *Edwards*, the court opined:

When property is purchased pursuant to a plan of development for uses by an existing zoning ordinance, and the plan miscarries, the purchaser is not entitled to a variance to permit his land to be used for other unauthorized purposes, even though he will otherwise suffer financial loss, if the property can reasonably be used for purposes permitted by the ordinance.

Appellee bought the property with the full knowledge of the terms of the ordinance. At the time he made his purchase, at a highly inflated price, he should have investigated whether he could recoup his investment in the event that his plans to erect an office building for the hospital physicians did not materialize. Instead, *Edwards* chose to gamble that the hospital would agree to use the proposed building and that the commissioners would rezone the area to permit

Justice Roberts, in a dissenting opinion, argued that the hardship was not self-inflicted, but was due to inherent topographical problems of the land.⁵⁷ Assuming the land cost the developer nothing, Justice Roberts, using the majority's cost formula,⁵⁸ determined that residential construction on the property would cost twice as much as the going price in the neighborhood.⁵⁹ The dissent concluded, therefore, that any use in accordance with the zoning regulation would be economically impossible.⁶⁰

C. No Productive Use for the Land

In *Poster Advertising Co. v. Zoning Board of Adjustment*,⁶¹ one Dopkis owned a small vacant piece of land, which at one time had been substantially larger, but because of condemnation had been whittled away.⁶² Poster Advertising subsequently leased the remaining land for the erection of outdoor advertising signs, but was denied a variance from the zoning ordinance.⁶³ The supreme court initially stated in its analysis that ordinarily economic hardship is not sufficient in itself to warrant the granting of a variance.⁶⁴ The court, however, went on to say that *Poster* was not a case in which the owner seeks to use the land in a more profitable manner, but rather, is a case where any productive use of the land will be denied altogether.⁶⁵ The court found therefore, that there existed a substantial hardship peculiar to this particular piece of property.⁶⁶ The court rejected the argument that no

the construction thereof. It now appears that his gamble has been lost, and Edwards seeks to avoid the adverse financial consequences. However, neither his present loss nor his prospective financial advantage are sufficient justification for authorizing a departure from the Lower Merion Zoning Ordinance.

* * *

One who acquires property intending to circumvent the use restrictions of a zoning ordinance does so at his financial peril.
Id. at 194-95, 140 A.2d at 113 (footnote omitted).

57. 440 Pa. at 556, 269 A.2d at 878 (Roberts, J., dissenting).

58. *Id.* at 562, 269 A.2d at 881 (Roberts, J., dissenting). See text accompanying note 48 *supra*.

59. 440 Pa. at 562, 269 A.2d at 88 (Roberts, J., dissenting).

60. *Id.* Justice Roberts stated: "The developer did not bring this hardship upon himself. Single-family dwellings cannot profitably be erected on this property regardless of the price paid for the land . . . [A]ccordingly the land is subject to a unique and unnecessary hardship." *Id.*

61. 408 Pa. at 248, 182 A.2d at 521.

62. *Id.* at 249, 182 A.2d at 522-23.

63. *Id.* at 250, 182 A.2d at 523. In denying the variance, the Board concluded that: 1) the land was able to be used residentially; 2) the owner was sufficiently compensated by the government for the loss of his land in the condemnation proceedings; 3) the erection of the signs would be contrary to the public interest and "constitute 'a commercial inroad in a predominately residential district'"; and 4) such use would adversely affect the public health, safety and welfare. *Id.* at 250-51, 182 A.2d at 523.

64. *Id.*, 182 A.2d at 524.

65. *Id.* at 252, 182 A.2d at 524.

66. *Id.*

variance should be granted because the lessee leased the property with *complete knowledge* of the zoning regulations,⁶⁷ stating that the lessee stands in the same position as the owner, and the owner could not be charged with buying into a situation where any productive use of the land was denied.⁶⁸

The approach taken by the *Poster* court was similar to that subsequently taken in *O'Neill*.⁶⁹ The *O'Neill* court, in discussing economic hardship, distinguished cases where the property could not be used profitably for any purpose under the applicable zoning ordinance, from those situations in which the issue was which type of development would be more profitable.⁷⁰ The *O'Neill* court stated:

The effect of the zoning ordinance and the development of the area is to destroy the value of these people's land altogether, or at least to the distress level where buying sharks can always be found: that is not real value. It is not a case . . . where there was basic value but the siren voice of progress made a variance seem a luscious thing to have.⁷¹

D. *The Supreme Court's Most Recent Treatment of Self-Inflicted Hardship*

Although *Upper Leacock Township Supervisors v. Zoning Hearing Board*⁷² does not express any new principles with respect to the self-inflicted hardship rule, it deserves separate discussion because it is a recent opinion,⁷³ in which the supreme court failed to take advantage

67. For a discussion of knowledge precluding the granting of a variance, see notes 34-43 and accompanying text *supra*.

68. 408 Pa. at 252, 182 A.2d at 524.

69. 434 Pa. at 336, 254 A.2d at 15. For a discussion of *O'Neill*, see notes 17-18 & 41-42 and accompanying text *supra*.

70. 434 Pa. at 336, 254 A.2d at 15. The former situation is an example of the *Poster* case, where if the variance was not granted to permit the erection of the advertising signs, the land would likely remain unused. See 408 Pa. at 251, 182 A.2d at 524. The *Poster* court noted: "If this use is denied, the owner will be compelled to continue to pay taxes thereon, maintain the actual surface and adjoining sidewalks in a clean and reasonably safe condition in order to escape possible damage claims, without any return from the use of the property whatsoever." *Id.* The latter situation mentioned in *O'Neill* is a description of the *Gro* line of cases. For a discussion of the *Gro* decision and its progeny, see notes 44-56 and accompanying text *supra*.

71. 434 Pa. at 336, 254 A.2d at 15-16, citing *Ferry v. Kownacki*, 396 Pa. 283, 152 A.2d 456 (1959). In *Ferry*, the Pennsylvania Supreme Court upheld the granting of a variance to the owner of land who wanted to build a gas station in an area zoned residentially. 396 Pa. at 287, 152 A.2d at 457. There was evidence to prove that because of the topography and surrounding conditions, the land had virtually no residential value, and hence constituted a hardship unique and peculiar to itself. *Id.* at 285, 152 A.2d at 458.

72. 481 Pa. at 479, 393 A.2d at 5.

73. The date of this opinion, 1978, is of significance not only because it is the most recent Pennsylvania Supreme Court case dealing with this issue, but it is the only supreme court case since 1970 to address the self-inflicted hardship rule.

of the opportunity to concisely restate the Pennsylvania self-inflicted hardship rule.⁷⁴ In *Upper Leacock*, appellant leased land for use as a gift shop.⁷⁵ After the lessee made extensive repairs to the premises, a zoning ordinance was enacted which zoned the property residential, and established a minimum lot width.⁷⁶ Subsequent to the enactment of the ordinance, the owner of the property agreed to sell that part of the land being leased to the lessee.⁷⁷ The lot offered was less than the minimum lot width provisions of the zoning ordinance, causing the lessee/purchaser to apply for a variance.⁷⁸ The variance was subsequently granted by the zoning board, but was then, on appeal, set aside by the court of common pleas.⁷⁹

The supreme court began its analysis by noting that the nature of the lessee's expenditures were such that she would suffer serious financial loss if a variance were denied.⁸⁰ Although the court recognized that economic hardship alone is an insufficient basis on which to grant a variance, it stated that the rule is applicable only where one type of development will be more profitable than another.⁸¹

The court rejected the contention that the hardship was self-inflicted, stating that the ordinance was not in effect when the property was developed, and there was no indication that she knew, or had reason to know, that her prospective purchase would be barred by any zoning regulation.⁸² Here the lessee did not cause her lot to be reduced below that required by the ordinance, nor did she fail to apprise herself of the zoning regulations in effect when she developed the property.⁸³ Furthermore, the property was not developed in reliance on the ability to get a variance.⁸⁴ The court concluded that the hardship was due to

74. See notes 80-85 and accompanying text *supra*.

75. 481 Pa. at 481, 393 A.2d at 6.

76. *Id.* The effect of the ordinance was to make the gift shop a non-conforming use. *Id.*

77. *Id.* at 482, 393 A.2d at 6.

78. *Id.*

79. *Id.* The commonwealth court subsequently affirmed the decision of the lower court. 26 Pa. Commw. Ct. 451, 363 A.2d 1330 (1976).

80. 481 Pa. at 483-84, 393 A.2d at 7.

81. *Id.* at 484, 393 A.2d at 7. The court relied upon the *Gro* decision for this distinction, but held *Gro* inapplicable to the present situation. *Id.* "Appellant desires to continue the use she has been making of the property rather than to develop it in a new way." *Id.* For a discussion of *Gro*, see notes 44-56 and accompanying text *supra*.

82. 481 Pa. at 484, 393 A.2d at 7.

83. *Id.*, 393 A.2d at 8.

84. *Id.* The court therefore distinguished the present case from where the alleged hardship was determined to be self-inflicted. *Id.* 393 A.2d at 8, citing *Upper St. Clair Township Grange Zoning Case*, 397 Pa. 67, 152 A.2d 768 (1959) (variance denied because zoning regulations known at time of purchase); *Richman v. Zoning Bd. of Adjustment*, 391 Pa. 254, 137 A.2d 280 (1958) (variance denied because purchase was in reliance on ability to

the unique characteristics of the property and the purchaser's inability to increase the width of the lot, and therefore permitted the variance.⁸⁵

E. *Analysis of the Supreme Court Cases*

It is contended that the approaches taken by the *McClure*,⁸⁶ *Gro*,⁸⁷ and *Poster*⁸⁸ opinions, although focusing on different elements, can be reconciled under a general analysis.⁸⁹ The starting point from which to analyze the consistency of the *McClure*, *Gro*, and *Poster* holdings will be a discussion of the knowledge rule. The *McClure* line of cases holds that a buyer purchasing property with knowledge, either actual or constructive, of the existing zoning, will not be granted a variance because the hardship was self-inflicted.⁹⁰

Upon comparing this line of cases to the holding of *Gro*, an inconsistency might develop because in *Gro*, the court appeared to focus on the inflated purchase price paid by the buyer in the expectation of obtaining a variance.⁹¹ In the course of its analysis, however, the *Gro* court cited with approval earlier supreme court holdings which referred to buyers purchasing property with full knowledge of the terms of the zoning ordinance.⁹² Because the *Gro* court could have based its holding solely on the fact that the purchaser had knowledge of the zoning ordinance at the time of the purchase (as it did in the three other cases decided that same day),⁹³ it is significant that the court purposely went on to discuss the purchase price.⁹⁴ It is suggested the court intentionally did this in an effort to narrow the holdings of the *McClure* line of cases which had made knowledge the determining factor. As a result of *Gro*, the knowledge test has been incorporated into the self-inflicted hardship rule because it cannot be said that one

acquire a variance); *Volpe Appeal*, 384 Pa. 574, 121 A.2d 97 (1956) (variance denied because landowner caused land to be reduced below the requirements of the ordinance). See also notes 61-68 and accompanying text *supra*.

85. 481 Pa. at 484, 393 A.2d at 8. The uniqueness of the property was determined to be its narrowness. *Id.* "The size of the tract available to appellant may be a basis for relief. . . . This especially so in view of the fact that she is unable to acquire more land." *Id.*, 393 A.2d at 7 (citations omitted).

86. See notes 34-40 and accompanying text *supra*.

87. See notes 44-56 and accompanying text *supra*.

88. See notes 61-68 and accompanying text *supra*.

89. See notes 91-106 and accompanying text *infra*.

90. For a discussion of the knowledge rule, see notes 34-43 and accompanying text *supra*.

91. See 440 Pa. at 556, 269 A.2d at 879.

92. *Id.* at 557-58, 269 A.2d at 879.

93. See note 43 *supra*.

94. See 440 Pa. at 556-58, 269 A.2d at 878-79.

purchased the property at a premium in hope that a variance could be obtained, unless the purchaser had knowledge of the zoning ordinance as it applied to his property prior to the purchase.

Gro indicates that the supreme court desired to limit the knowledge test to only those situations where the hardship alleged by the purchaser was that of an economic hardship arising from the actual purchase.⁹⁵ Indeed in *McClure*, the only hardship discussed was an economic hardship, because the land could be used more profitably, with respect to the purchase price, if the variance were granted.⁹⁶ In the *McClure* progeny, however, it can be seen that the knowledge rule was being applied to situations in which hardships existed that were not arising solely out of the purchase price paid.⁹⁷ Therefore, the *Gro* court intended that the knowledge rule be limited to denying a variance only when an inflated purchase price was paid in anticipation of a variance, but not where unique topography prevented the land from being used productively under the zoning ordinance.⁹⁸

The analysis then must be to determine whether the *Poster* holding of economic sterilization⁹⁹ is consistent with the reconciled *McClure* and *Gro* approaches.¹⁰⁰ Although *Poster* involved a lessee, rather than a purchaser, the lessee was permitted to stand in the shoes of the owner, as long as the owner had done nothing to buy into the impossible situation.¹⁰¹

Before *Gro*, it was perceived that the *McClure* knowledge test could be used to preclude variances in all situations, regardless of the hardship.¹⁰² In other words, the *McClure* line of cases contemplated that in no situation where there was knowledge of the zoning ordinance, could a buyer stand in the shoes of the seller. The holding of *Gro*, however, indicates that while the court was limiting the knowledge rule, it was also expanding the number of situations in which the purchaser could stand in his seller's shoes with respect to the claimed hardship. As a result of *Gro*, the buyer, except when he has paid an inflated purchase price, can now stand in the shoes of his seller with respect to all other claimed hardships, except possibly those intentionally created by the seller himself. This can now be done because knowledge of the zoning regulations is only relevant when a high

95. See notes 50-53 and accompanying text *supra*.

96. See 415 Pa. at 287, 203 A.2d at 535.

97. See note 43 *supra*.

98. See note 50 and accompanying text *supra*.

99. For a discussion of *Poster*, see notes 61-68 and accompanying text *supra*.

100. See notes 91-98 and accompanying text *supra*.

101. 408 Pa. at 252, 182 A.2d at 524.

102. See the cases cited in note 43 *supra*.

purchase price is paid.¹⁰³ Therefore, once it can be determined that indeed the supreme court will, in some situations, allow the buyer to stand in the seller's shoes with respect to certain hardships, this determination permits *Gro* to be reconciled with *Poster*.¹⁰⁴

Therefore, upon analysis, it is suggested that these three supreme court approaches may indeed be reconciled into a general two step rule. The first step would be that the self-inflicted hardship rule will only be invoked to deny a variance when the purchaser has paid an inflated premium for the land.¹⁰⁵ In the appropriate case, however, where other hardships were argued in addition to the mere economic hardship, the court will continue on to the second step. This step will involve an analysis of these other hardships, such as topography and cost to prepare the land for development, in order to determine if the land can be productively used under the present zoning regulation. It is only with respect to these other hardships that the purchaser will be able to stand in the shoes of his seller.¹⁰⁶

The *Upper Leacock* case, decided in 1978, has significance because it was the first self-inflicted hardship case decided by the supreme court in eight years, and therefore presented the court with the opportunity to clearly state the law with respect to self-inflicted hardship and eliminate any confusion as to whether there was one general rule or three distinct approaches.¹⁰⁷ The supreme court's analysis in *Upper Leacock* reiterated part of the *Poster* analysis by stating that economic hardship may be considered in determining if a variance should be granted where the issue is not whether a certain type of development will be more profitable than another.¹⁰⁸

Beyond this analysis, however, the supreme court squandered an opportunity to clearly state the rule with respect to self-inflicted hard-

103. See text accompanying notes 55-56 *supra*.

104. A close reading of *Gro* indicates that the *Poster* situation was anticipated in the earlier decision. In *Gro*, the court stated that there was no evidence of the value of the land if the residential limitation was enforced. 440 Pa. at 559, 269 A.2d at 880. The court concluded that it was not possible to determine if the requirement imposed an unnecessary hardship on the property. *Id.* This language indicates that had evidence been introduced on this point, the court may have undertaken an examination of whether the owner's hardship was due to the inherent topographical problems of the land, and not his knowledge *per se*.

The dissent in *Gro* explicitly acknowledged this possibility by assuming the property had been acquired for free. 440 Pa. at 560, 269 A.2d at 880 (Roberts, J., dissenting). Justice Roberts concluded that the land was incapable of any use in compliance with the zoning regulation and that the hardship was, therefore, not self-inflicted. *Id.* For a further discussion of the dissenting opinion in *Gro*, see notes 57-60 and accompanying text *supra*.

105. See notes 91-98 and accompanying text *supra*.

106. See notes 99-104 and accompanying text *supra*.

107. For a discussion of *Upper Leacock*, see notes 72-85 and accompanying text *supra*.

108. 481 Pa. at 484, 393 A.2d at 7.

ship. This was an opportunity for the court to establish its position with respect to knowledge of the zoning ordinance at the time of purchase, and the effect of the purchase price paid. The court, however, did not deal with the purchase price issue, and therefore expressed no opinion as to the vitality of *Gro* with respect to the *McClure* knowledge test.¹⁰⁹ The approach taken by the supreme court was one in which it distinguished other cases where self-inflicted hardship had been determined.¹¹⁰ The court stated, and it is suggested erroneously, that there was no indication that the purchaser knew or had reason to know that her prospective purchase would be barred by any zoning regulation.¹¹¹

An analysis of the court's rationale in *Upper Leacock* leaves one with the impression that the supreme court considered the *Gro*, *McClure*, and *Poster* approaches as being distinct, and therefore, not one concise rule.¹¹² The *Upper Leacock* decision gives renewed vitality to the strict *McClure* knowledge rule, while implicitly relegating *Gro* to an inferior position, because the court, although presented with the opportunity, failed to discuss the purchase price even though the transaction occurred a year after the zoning ordinance.¹¹³ Therefore, if a general rule on self-inflicted hardship were to be based on the *Upper Leacock* decision, such a rule would not be the unified rule, as suggested earlier, but rather a list of various approaches in which a particular case is to be categorized.¹¹⁴

IV. PENNSYLVANIA COMMONWEALTH COURT DECISIONS

A. Case Law

As will be shown by the analysis of the Pennsylvania Commonwealth Court decisions, this court has often merely categorized the case before it within one of the three supreme court approaches, and mechanically applied that rule with no apparent regard to the other lines of cases. For discussion purposes, the commonwealth court cases will be grouped by the approaches on which their decisions relied.

1. The *McClure* Approach.

In 1972, the commonwealth court decided *Drop v. Board of Adjustment*.¹¹⁵ In this case a landowner was granted a variance to construct an apartment in an area zoned residential.¹¹⁶ The commonwealth

109. *See id.*, 393 A.2d at 7-8.

110. 481 Pa. at 484, 393 A.2d at 7.

111. *Id.*

112. *See* notes 91-104 and accompanying text *supra*.

113. *See* 481 Pa. at 484, 393 A.2d at 7.

114. For an enumeration of the different approaches taken by the court, *see* notes 26-31 and accompanying text *supra*.

115. 6 Pa. Commw. Ct. 64, 293 A.2d 144 (1972).

116. *Id.* at 65-66, 293 A.2d at 145.

court held that the record in *Drop* indicated that the land was purchased with knowledge of the existing zoning regulations,¹¹⁷ and stated that, "Drop's knowledge of the zoning restriction of the use of this land when he purchased it effectively bars his assertion of his self-imposed economic hardship as a basis for obtaining a variance."¹¹⁸ Although *Gro* had been decided at this time, there was no reference to the purchase price paid, nor was there any citation to the *Gro* opinion.¹¹⁹

The rationale of *Drop* was applied in 1976 to the case of *Hager v. Zoning Hearing Board*.¹²⁰ In *Hager*, the appellant was denied a variance to an off-street parking restriction which was in effect when the property was purchased.¹²¹ The commonwealth court, in affirming the denial of the variance, cited *Drop*,¹²² and held, "[i]t is clear that a variance to a zoning ordinance will not be granted if when the applicant purchased the property he knew or should have known of the restrictive zoning regulations applicable to the property."¹²³ Again, there was no reference to the *Gro* holding with respect to the purchase price paid for the property.¹²⁴

In 1976, it appeared as if the commonwealth court added a limiting factor to the knowledge test in the case of *Ephross v. Solebury Township Zoning Hearing Board*.¹²⁵ In *Ephross*, the purchasers were experienced developers familiar with subdivision plans and zoning regulations.¹²⁶ The purchasers were denied a variance for certain lots which

117. *Id.* at 67, 293 A.2d at 145-46. The court pointed to landowner's testimony that he bought the land intending to apply for a variance to support this conclusion. *Id.* at 68, 292 A.2d at 146.

118. *Id.*, citing McClure Appeal, 415 Pa. 285, 203 A.2d 534 (1964).

119. See 6 Pa. Commw. Ct. 64, 293 A.2d 144. For a discussion of *Gro*, see notes 44-56 and accompanying text *supra*. The failure to discuss *Gro* is surprising in light of the strong factual resemblance of *Drop* to that case. In both instances, the purchaser acquired the land with the stated intention of not developing the property in accordance with the existing zoning regulations. Compare 6 Pa. Commw. Ct. at 68, 293 A.2d at 146 with 440 Pa. at 557, 269 A.2d at 879.

120. 23 Pa. Commw. Ct. 361, 352 A.2d 248 (1976).

121. *Id.* at 363, 352 A.2d at 250.

122. *Id.* at 366, 352 A.2d at 251. For a discussion of *Drop*, see notes 115-19 and accompanying text *supra*.

123. *Id.* The court noted that the zoning restriction was in effect when the property was purchased. *Id.*

124. See *id.* at 361-67, 352 A.2d at 248-52.

125. 25 Pa. Commw. Ct. 140, 359 A.2d 182 (1976).

126. *Id.* at 142, 359 A.2d at 183.

did not meet the size requirements of the ordinance.¹²⁷ The commonwealth court, in affirming the denial of the variance,¹²⁸ stated:

We also agree with the authorities below in their conclusion that an *experienced developer* who purchases a large subdivision with express knowledge of existing zoning regulations and their applicability to that subdivision cannot be allowed to frustrate an express provision of a zoning ordinance by developing a vacant irregular lot in violation of the law.¹²⁹

From a close reading of the language in *Ephross*, it appeared that the court would limit the knowledge test to situations involving only *experienced developers*.¹³⁰ The two most recent commonwealth court cases discussing the knowledge requisite, however, have not recognized this language from *Ephross*.¹³¹

The Pennsylvania Commonwealth Court granted a variance to a developer, despite knowledge of the zoning restriction, in *McCarron v. Zoning Hearing Board*.¹³² In *McCarron*, the developer and the borough mutually mistook the effect of vacating a street on frontage requirements, leaving the property in noncompliance with the ordinance.¹³³ The court held that because of the mutual error, the developer's hardship was not self-inflicted.¹³⁴

2. The *Gro* Approach

The first commonwealth court case to rely heavily on *Gro*¹³⁵ was *Pfile v. Zoning Board of Adjustment*.¹³⁶ The applicant, at the time he

127. *Id.* When the purchasers acquired the land, they were aware that two of the parcels failed to meet existing zoning requirements. *Id.*

128. *Id.* at 145, 359 A.2d at 184. The court also noted that there was no proof that the land had little or no value under the ordinance, evidencing a lack of economic hardship. *Id.* at 144, 359 A.2d at 184.

129. *Id.* (emphasis added).

130. See text accompanying note 129 *supra*.

131. See *Fotomat Corp. v. Zoning Hearing Bd.*, 51 Pa. Commw. Ct. 267, 414 A.2d 718 (1980); *Sisko v. Zoning Bd. of Adjustment*, 36 Pa. Commw. Ct. 556, 389 A.2d 231 (1978). In *Sisko*, the court denied a variance to an individual who had no expertise in building or developments, but had knowledge of the regulation he sought relief from. 36 Pa. Commw. Ct. at 560, 389 A.2d at 234. In *Fotomat*, the court charged the applicant with constructive knowledge of the zoning laws at the time the property was leased, and therefore denied the variance. 51 Pa. Commw. Ct. at 271 n.2, 414 A.2d at 720 n.2. Although inferably *Fotomat Corporation* is an experienced developer of roadside film centers, the court did not discuss this fact or the *Ephross* case. See *id.*, at 267-71, 414 A.2d at 718-20.

132. 53 Pa. Commw. Ct. 16, 416 A.2d at 1150 (1980).

133. *Id.* at 17, 416 A.2d at 1151. The developer had relied on the agreed upon effect of vacating the street in laying out plans for the development. *Id.* at 18-19, 416 A.2d at 1152.

134. *Id.* at 19, 416 A.2d at 1152.

135. For a discussion of *Gro*, see notes 44-56 and accompanying text *supra*.

136. 7 Pa. Commw. Ct. 226, 298 A.2d 598 (1972).

purchased the property, was undecided as to whether he would use the property for residential or commercial purposes.¹³⁷ Subsequently, an agreement was entered into with an oil company conditioned on the granting of a variance so that the property could be used commercially.¹³⁸ The Board, in denying the application for the variance, relied on the fact that the purchaser had bought the property for investment purposes knowing the property was zoned residential.¹³⁹ The commonwealth court, however, held that the variance should be granted,¹⁴⁰ and stated:

Only in a case such as [*Gro*], which arises after the property has been sold to a new owner who has paid a high price for the property because he assumed that a variance which he anticipated would justify his price, do we hold that the owner cannot prove that the hardship which burdens his land was unnecessary rather than self-inflicted.¹⁴¹

The *Pfile* court determined, therefore, that self-inflicted hardship could only be found in those situations where a purchaser paid a high price for the property in anticipation of a variance being granted to justify the price.¹⁴² Here there was no evidence that a purchase under such conditions was made, and therefore, there could be no self-inflicted hardship.¹⁴³

The first commonwealth court case to take the position that *Gro* was in fact a limitation on the *McClure* knowledge rule, was *Harper v. Ridley Township*.¹⁴⁴ In *Harper*, a consolidated appeal,¹⁴⁵ all of the owners sought variances to avoid the minimum dimensional requirements of the zoning ordinance.¹⁴⁶ The commonwealth court stated

137. *Id.* at 229, 298 A.2d at 600. The property was zoned for residential use. *Id.* at 228, 298 A.2d at 600.

138. *Id.* at 229, 298 A.2d at 600. The lessee oil company desired to build a gas station on the property. *Id.*

139. *Id.* at 236, 298 A.2d at 603.

140. *Id.* at 237, 298 A.2d at 604.

141. *Id.* at 236, 298 A.2d at 603 (citation omitted).

142. 7 Pa. Commw. Ct. at 236, 298 A.2d at 603.

143. *Id.* at 236, 298 A.2d at 604. The court noted that there was no evidence indicating that the variance was necessary to justify the price, and concluded the investment could have been for residential resale. *Id.* at 236, 298 A.2d at 603-04. See also text accompanying note 137 *supra*.

In a dissenting opinion, Judge Blatt opined that *McClure* dictated a denial of a variance because the purchaser knew of the regulation at the time he acquired the property. 7 Pa. Commw. Ct. at 238, 298 A.2d at 606 (Blatt, J., dissenting).

144. 21 Pa. Commw. Ct. 93, 343 A.2d 381 (1975).

145. *Id.* at 95, 343 A.2d at 382. Three different owners sought a variance from the same regulation. *Id.* at 96-97, 343 A.2d at 382-83.

146. *Id.* at 96, 343 A.2d at 383. The Board, citing *McClure*, denied one variance on the basis of the owner's knowledge of the ordinance. *Id.* at 97-98, 343 A.2d at 384.

that the supreme court in *Gro* narrowed the circumstances in which a landowner who purchases with knowledge of the property's condition and the existing zoning classification will be prevented from obtaining a variance.¹⁴⁷ The *Harper* court stated that under *Gro*, a landowner's hardship is self-inflicted only where he has paid a high price for the property because an anticipated variance would justify the price.¹⁴⁸ The mere fact that the property was purchased with knowledge of the hardship, standing alone, would not preclude the granting of a variance.¹⁴⁹

The *Harper* analysis of *Gro*'s impact on *McClure* has been relied upon by the commonwealth court several times since it was first enunciated.¹⁵⁰ These cases, however, have been interspersed with opinions applying the knowledge test in its strict form.¹⁵¹

3. The *Poster* Approach

As the Pennsylvania Supreme Court did in *McClure* and *Gro*, several Pennsylvania Commonwealth Court decisions rely on *Poster*¹⁵² without acknowledging the other strands of the self-inflicted hardship rule.¹⁵³ The first such case was *Jacquelin v. Horsham Township*.¹⁵⁴ In *Jacquelin* appellants purchased property which the seller had owned since before the zoning ordinance was enacted.¹⁵⁵ The lot was such that if the purchaser desired to construct a dwelling on the property, variances from the setback criteria would have to be obtained.¹⁵⁶ The commonwealth court granted the variance, and relied on the *Poster* language which indicated that if the land could not be productively employed under the zoning ordinance, relief would be proper.¹⁵⁷ Although the case was decided after *McClure* and *Gro*, there was no mention of either the purchase price paid, or the personal knowledge

147. *Id.* at 98, 343 A.2d at 384.

148. *Id.*

149. *Id.* For a discussion of the *Gro* case as a limitation on the *McClure* knowledge rule, see notes 91-98 and accompanying text *supra*.

150. See, e.g., *Marlowe v. Zoning Hearing Bd.*, 52 Pa. Commw. Ct. 224, 415 A.2d 946 (1980); *Franklin Towne Realty, Inc. v. Zoning Hearing Bd.*, 37 Pa. Commw. Ct. 632, 391 A.2d 63 (1978); *Scott v. Fox*, 36 Pa. Commw. Ct. 88, 387 A.2d 965 (1978) (adopting lower court opinion which relied on *Harper*). See also *Scott v. Fox*, 63 Del. County 401 (1976).

151. See notes 115-34 and accompanying text *supra*.

152. For a discussion of *Poster*, see notes 61-68 and accompanying text *supra*.

153. See notes 26-31 and accompanying text *supra*.

154. 10 Pa. Commw. Ct. 473, 312 A.2d 124 (1973).

155. *Id.* at 475, 312 A.2d at 125.

156. *Id.*

157. *Id.* at 476, 312 A.2d at 125-26. See also note 65 and accompanying text *supra*. The court noted that without a variance, the owners would be forced to pay taxes on property that was vacant. 10 Pa. Commw. Ct. at 475, 312 A.2d at 126.

of the purchaser with respect to the zoning ordinance at the time of the sale.¹⁵⁸

The *Jacquelin* rationale was the basis of the commonwealth court decision in *Schaaf v. Zoning Hearing Board*.¹⁵⁹ In *Schaaf*, the purchaser was denied a variance from the front and side yard requirements of the zoning ordinance.¹⁶⁰ On appeal, the commonwealth court rejected the argument that Schaaf had created his own hardship because he purchased the property when he knew, or should have known, of the zoning classification of the lot.¹⁶¹ The court stated that this case was controlled by *Jacquelin*, and the resulting hardship was a consequence of the zoning ordinance, and not the purchase itself.¹⁶² The court concluded that a variance was needed, or the property would be useless in the hands of the purchaser.¹⁶³

In 1979, the commonwealth court expanded on its *Schaaf* analysis in *Appeal of Grace Building Co.*¹⁶⁴ In *Grace Building*, the owner acquired the property through a tax sale, and subsequently was denied a variance in order to build a single family dwelling on the property.¹⁶⁵ On appeal, the commonwealth court remanded to the Board, and offered certain points for consideration.¹⁶⁶ The court stated that a subsequent purchaser can succeed to the position held by the pre-zoning owner.¹⁶⁷ The court further stated that, as was noted in *Schaaf*, acquisition subsequent to zoning does not constitute a self-imposed hardship because the hardship was not created by the purchase itself.¹⁶⁸ Thus, the commonwealth court concluded that:

Certainly, the mere fact that property changes hands after the adoption of zoning cannot be a basis for holding that no variance can thereafter be granted with respect to any matter of which the purchaser could be aware. Because zoning considerations relate primarily to the circumstances of the property and not to the identity of the owners, it would seem that subsequent purchasers can stand in the shoes of the original owner with respect to a variance, provided that the claimed hardship does not arise out of the purchase itself, as was the case in *McClure Appeal . . .* where the alleged hardship arose out of the

158. See 10 Pa. Commw. Ct. at 473-76, 312 A.2d at 124-26.

159. 22 Pa. Commw. Ct. 50, 347 A.2d 740 (1975).

160. *Id.* at 52, 347 A.2d at 741.

161. *Id.* at 56, 347 A.2d at 743.

162. *Id.*

163. *Id.*

164. 39 Pa. Commw. Ct. 552, 395 A.2d 1049 (1979).

165. *Id.* at 554, 395 A.2d at 1050.

166. *Id.* at 557, 395 A.2d at 1051.

167. *Id.*, citing *Jacquelin v. Horsham Township*, 10 Pa. Commw. Ct. 473, 312 A.2d 124 (1974).

168. 39 Pa. Commw. Ct. at 558, 395 A.2d at 1052.

purchase price paid or . . . where the physical size and shape of the land was affected by the purchase transaction itself.¹⁶⁹

B. Analysis of the Commonwealth Court Cases

The commonwealth court decisions have not recognized the unified rule that was suggested earlier.¹⁷⁰ Rather, like the supreme court, the commonwealth court has generally categorized a given factual situation as falling within one type of rubric, and failed to consider an overall analysis for self-inflicted hardship cases.¹⁷¹

Accepting the suggested premise that the *McClure* knowledge rule only applies to situations where an inflated purchase price was paid in anticipation of a variance,¹⁷² the Pennsylvania Commonwealth Court has continued in many instances to strictly apply *McClure*.¹⁷³ But other cases have recognized the *Gro* decision and its limitation on the knowledge rule.¹⁷⁴

The line of commonwealth court cases discussing *Poster*¹⁷⁵ attempt to develop a rule similar to that suggested in this comment reconciling *McClure*, *Gro*, and *Poster*.¹⁷⁶ It is this line of cases which may be the most faithful to supreme court guidelines. This approach is most clearly expressed by the *Schaaf*¹⁷⁷ and *Grace Building*¹⁷⁸ cases. In *Grace Building*, the court addressed the issue of knowledge, and stated that a subsequent purchaser can stand in the shoes of the original owner with respect to a variance, unless the claimed hardship arose out of the purchase itself.¹⁷⁹ That part of the *Grace* analysis is an attempt to reconcile the *Gro* and *McClure* cases, and to limit the knowledge

169. *Id.* See also, *Haverford v. Zoning Hearing Bd.*, 55 Pa. Commw. Ct. 209, 423 A.2d 757 (1980) (purchase of land with knowledge of zoning problem does not preclude variance unless acquisition itself gave birth to hardship); *Steen Indus. v. Zoning Hearing Bd.*, 48 Pa. Commw. Ct. 469, 410 A.2d 386 (1980) (*Poster* dictates that land put in unusable position by eminent domain deserves variance, irrespective of fact that land was purchased by one with knowledge of problem).

170. For a discussion of the reconciliation of the *McClure*, *Gro* and *Poster* decisions, see notes 88-106 and accompanying text *supra*.

171. See notes 115-69 and accompanying text *supra*.

172. For a discussion of *McClure*, see notes 34-40 and accompanying text *supra*. For the suggested analysis of *McClure* read in conjunction with *Gro*, see notes 91-98 and accompanying text *supra*.

173. See notes 115-34 and accompanying text *supra*.

174. For a discussion of the commonwealth court cases adhering to *Gro*, see notes 135-51 and accompanying text *supra*.

175. For a discussion of the commonwealth court cases following *Poster's* analysis, see notes 61-68 and accompanying text *supra*.

176. See notes 105-06 and accompanying text *supra*.

177. For a discussion of *Schaaf*, see notes 159-63 and accompanying text *supra*.

178. For a discussion of *Grace Building*, see notes 164-69 and accompanying text *supra*.

179. 39 Pa. Commw. Ct. at 558, 395 A.2d at 1052.

rule to only those situations in which the hardship arises out of the purchase. This is also indicated by the *Schaaf* opinion, where the court rejected the knowledge argument in the face of other factors which prevented any productive use of the property under the zoning ordinance.¹⁸⁰ Furthermore, the *Schaaf* court concluded that where other factors exist rendering the property nonproductive under the ordinance, and where these factors do not result from the purchase but are a consequence of the land itself, the hardship is not self-inflicted.¹⁸¹

Despite the line of commonwealth court cases faithful to *Poster*, the court has interspersed these decisions with others adhering to *McClure* or *Gro*.¹⁸² It can only be concluded, therefore, that the commonwealth court is unsure as to the direction of the supreme court, especially in light of *Upper Leacock*,¹⁸³ and is only categorizing a case in a manner that presupposes the holding.¹⁸⁴ It is suggested that the commonwealth court decisions are more a function of categorization of a case under one rule or another, than a sound analysis of the principles involved.

V. ANALYSIS

Although not readily discernible, the Pennsylvania Supreme Court can be said to have fashioned a two step rule to be applied in self-inflicted hardship cases.¹⁸⁵ The rule looks first at whether an inflated price was paid for the property in anticipation of a variance. If the price was inflated because of such an expectation, a variance will be denied unless other topographical factors inherent in the land indicate a lack of any use consistent with the zoning laws.¹⁸⁶

In analyzing this two step test, the first consideration is whether such a rule is consistent with the underlying policy that the variance provisions are intended to effectuate. As discussed earlier, the underlying purposes of the variance provisions are to: 1) act as a "safety valve" to prevent constitutional attacks on the zoning ordinance that allege undue interference with private property; 2) economically allow certain property to be put to practical use where under the strict terms

180. 22 Pa. Commw. Ct. at 56, 347 A.2d at 743.

181. *Id.*

182. For a discussion of these cases, see notes 115-51 and accompanying text *supra*.

183. For a discussion of *Upper Leacock*, see notes 72-85 and accompanying text *supra*.

184. For example, the cases applying the *McClure* rule have all found that the applicant had knowledge of the restriction, and therefore suffered from a self-inflicted hardship. See notes 115-34 and accompanying text *supra*. On the other hand, cases following *Gro* and *Poster* tend to rule in favor of the applicant. See notes 135-69 and accompanying text *supra*.

185. For a discussion of this rule, see notes 91-106 and accompanying text *supra*.

186. See notes 102-04 and accompanying text *supra*.

of the zoning ordinance no practical use was available; 3) prevent spot zoning and help preserve the uniformity and effectiveness of the zoning ordinance; and 4) allow variances to be granted sparingly only in exceptional situations and when consistent with the public health, safety, and welfare.¹⁸⁷

An analysis of the supreme court decisions in light of the policies underlying the variance procedure adds weight to the premise that *McClure*, *Gro* and *Poster* establish one rule to be applied in self-inflicted hardship cases.¹⁸⁸ Under the *McClure* approach, the knowledge test is strictly applied, and therefore satisfies the policy that a variance should be granted sparingly. A strict application of the knowledge test, however, is such a demanding standard that it does not satisfy the "safety valve" policy. Treating *Gro* as only a limit on the *McClure* analysis, such that a variance will not be granted only in the situation where an inflated purchase price was paid, shifts the pendulum too far to the other side. In this situation, the supreme court would define so narrowly the situations in which a variance cannot be granted, *i.e.* when a high purchase price is paid, that, although the "safety valve" policy is satisfied, variances are no longer limited to exceptional circumstances.¹⁸⁹

Therefore, by applying the two step analysis, a more complete rule is created which tends to better effectuate the underlying policy. The first step limits the strict application of the knowledge test, and promotes the safety valve policy. The second step of the analysis, based on the *Poster* decision, goes further than just consideration of economic hardship arising from the purchase price.¹⁹⁰ If other hardship factors are offered into evidence, the court will determine if the property can productively be used under the zoning ordinance. If so, the hardships must be self-inflicted, and will not be the basis for a variance. The effect of this second step is to balance the granting of variances against the general public welfare. The application of the second step includes the consideration of other factors which will tend to limit the granting of variances thereby promoting the exceptional circumstance policy. The ultimate result of the application of this rule is to balance the competing policies underlying variance statutes so that neither the "safety valve" nor exceptional circumstance policy totally prevail.

The Pennsylvania rule, which deemphasizes the knowledge test in the self-inflicted hardship analysis, is consistent with other jurisdictions

187. For a discussion of the policy underlying the variance statute, see notes 8-24 and accompanying text *supra*.

188. For a discussion of *McClure*, *Gro*, and *Poster*, see notes 91-106 and accompanying text *supra*.

189. See notes 16-20 and accompanying text *supra*.

190. For a discussion of the effect of *Poster* on a unified analysis, see notes 102-04 and accompanying text *supra*.

such as New Jersey.¹⁹¹ The New Jersey Supreme Court, in rejecting the idea that a purchaser with knowledge of the restriction may not assert a claim of hardship, stated:

We wish to make it clear that if a prior owner would be entitled to such relief, that right is not lost to the purchaser simply because he bought with knowledge of the zoning regulation involved. This situation is not within the realm of the self-created hardship which will generally bar relief.¹⁹²

New Jersey courts have subsequently interpreted this language to mean that where an original owner would be entitled to a variance under a specific set of circumstances, any successor in title may also be entitled to such a variance, provided that no owner in the chain of title since the adoption of the zoning restriction has done anything to create the condition from which relief is sought.¹⁹³ To deny a variance because of the knowledge of the purchaser would be inconsistent with the purpose of allowing land to be utilized which had no practical use under the zoning law.

In applying the two step test, the variance applicant could stand in the shoes of the original owner without the hardship being termed self-inflicted, so long as no owner in the chain of title had done anything to intentionally create the hardship for which relief is being sought.¹⁹⁴ The analysis for determining if the hardship was self-inflicted would focus primarily on the characteristics of the land and the purchase itself, rather than on the knowledge of the buyer and the specific purchase price paid. Such an analysis would be sensitive to *any* hardships arising out of the purchase, and not just those arising from an inflated purchase price.

Although this suggested approach is only a restatement of what is suggested to be the true Pennsylvania rule, it will make some variances more difficult to get, because now the courts will consider *all* hardships arising out of the purchase itself as being self-inflicted.¹⁹⁵ Such a change, however, would better balance the conflicting policies underlying the variance procedures. The biggest advantage to the adoption of the suggested test, would be to establish a concisely stated rule, and put to rest any belief that three distinct approaches govern the determination of whether a hardship is self-inflicted.¹⁹⁶

191. A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, § 39.02 at 39-15 & 16 (1979).

192. *Wilson v. Borough of Mountainside*, 42 N.J. 426, 452, 201 A.2d 540, 554 (1964).

193. *See Griffin Construction Corp. v. Board of Adjustment*, 85 N.J. Super. 472, 473, 205 A.2d 313, 315-16 (1964).

194. For a discussion of the ability of a purchaser with knowledge of the restriction to assert the seller's rights, *see* notes 102-04 and accompanying text *supra*.

195. *See* notes 105-06 and accompanying text *supra*.

196. *See* notes 112-14 and accompanying text *supra*.

VI. CONCLUSION

The analysis presented has shown that the various Pennsylvania Supreme Court decisions concerning self-inflicted hardship can be reconciled into one rule.¹⁹⁷ The commonwealth court, in interpreting and applying these supreme court decisions, has failed to undertake this analysis.¹⁹⁸ To correct this situation, it is time for the Pennsylvania Supreme Court to decide a self-inflicted hardship case, and enunciate a clear, concise statement of the law. It is proposed that in stating the Pennsylvania rule, the supreme court adopt the suggested refinements to its earlier decisions. It is submitted that such a decision would eliminate the confusion surrounding the Pennsylvania self-inflicted hardship rule, and give the commonwealth court the necessary guidance with which to properly decide variance cases.

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197. See notes 91-106 and accompanying text *supra*.

198. See notes 170-84 and accompanying text *supra*.

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