# CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES
# QUARTERLY NEWSLETTER

Winter 2022 Volume XXVI, Issue 1

## COURT RULES VARIANCE CAN NOT BE CHALLENGED AS PART OF SPECIAL EXCEPTION APPROVAL

When a special permit application was approved to locate a liquor store on the applicant's property, an owner of another liquor store appealed the decision to court. The basis for the appeal was that the planning and zoning commission's decision would allow a liquor store in violation of a zoning regulation that imposed a separation distance between such stores. The commission approved the application based in part on the fact that the applicant had applied for a variance from this regulation and the variance had been approved by the zoning board of appeals.

In its appeal of the special exception approval, the plaintiff argued that the variance was void and was thus an improper basis upon which to approve the special exception application. The court found this argument to be a collateral attack upon the variance approval and thus dismissed the appeal. In reaching this decision, the court found that any argument about the validity of the variance approval should have been made by appealing that board's decision. This the plaintiff did not do. Since the appeal period had passed for appealing the variance approval, the plaintiff could not collaterally attack this decision by challenging it now. Once the appeal period passed, the zoning board of appeal's decision to approve the variance became final and could not be disturbed at this later date. *See Boyajian v. Zoning Commission, 206 Conn. App. 118 (2021).*

## CERTIFICATE OF LOCATION FOUND TO BE LIKE A SPECIAL PERMIT

A Superior Court ruled that in deciding an appeal of a decision by a planning and zoning commission to approve a certificate of location for a liquor store, it would consider it under the same standard of review as for an appeal of a special permit approval. Basically, the role of the commission is to determine whether the application satisfies the standards contained in the zoning regulations. *Brookside Package LLC v. Planning & Zoning Commission, 70 Conn. L. Rptr. 402 (2020)*

## SAVE THE DATE – THE CONFERENCE IS BACK!

The Federation will hold its Annual Conference on March 24, 2022 at the Aqua Turf Country Club in Plantsville CT. The event starts at 5:00 p.m. The program for the Conference will include a presentation on How to Comply with the 2021 Legislation that Applies to Planning and Zoning as well as the 2022 Legislative Agenda. Flyers announcing the event will be sent to all members later this month.

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### RESCHEDULED COURT HEARING WITHOUT PROPER NOTICE RESULTS IN DUE PROCESS VIOLATION

A long-standing settlement agreement which governed the use of a sand and gravel mine was the subject of a motion to modify. The motion to modify was filed by both parties to the appeal in order to allow for more for the sand and gravel mine to be open for more hours during the evening. Shortly after the motion to modify was filed, a hearing date was set by the court and published on the state judicial website. The parties to the motion subsequently filed a request with the court asking that the hearing be moved up one week. The court granted this motion and duly held the hearing one week prior to the advertised hearing date wherein it approved the motion to modify.

On the scheduled date for the hearing, a neighbor of the sand and gravel mine appeared and filed a motion to intervene pursuant to Connecticut General Statutes Sec. 22a-19. This state statute allows anyone to intervene in a judicial proceeding solely on the issue of protecting the public trust in the air, water or other natural resources of the State from being unreasonably polluted. Since the court had approved the motion to modify one week prior, it dismissed the intervenor's motion to intervene as being untimely.

An appeal of this decision found its way to the state supreme court which held that the lower court was wrong to deny the motion to intervene. By agreeing to advance the hearing date on the motion to modify the settlement agreement one week prior to the published hearing date, the court had deprived the intervenor of a fair and accurate notice which deprived him of due process. *Griswold v. Camputaro, 331 Conn. 701 (2019).*

### COMPLIANCE WITH FEMA AND REDUCTION OF NONCONFORMITY ALLOW FOR VARIANCE

The owner of a parcel of property bordering Long Island Sound applied for a building height variance. The variance was needed in order for the owner to qualify for a State grant program which provided financial assistance to homeowners complying with FEMA regulations. In this case, the building height variance was needed so that the dwelling on the parcel could be raised and comply with the new FEMA flood zone requirements.

The application was granted by the zoning board of appeals over the objections of an abutting neighbor. An appeal to court followed.

The court found that a traditional hardship did not exist but recognized that compliance with mandatory FEMA flood regulations can be the basis for a variance. The court did not decide the

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appeal on this basis as compliance in this case was voluntary as an existing home does not need to comply with the new flood regulation requirements.

Instead, the court upheld the Board's decision because the record demonstrated that the overall nonconforming nature of the property would be reduced. The property owner's application, while creating a nonconformity as to building height, would eliminate a lot coverage nonconformity as well as reduce several others. *Fedus v. Zoning Board of Appeals, 66 Conn. L. Rptr. 183 (2018).*

## SHORT-TERM RENTALS NOT PERMITED AS A USE OF A SINGLE-FAMILY DWELLING

The Massachusetts Supreme Court addressed an issue that has the attention of many Connecticut land use agencies. The issue is whether short term rentals of single-family dwellings would be permitted as an additional or accessory use of the property. The court found short-terms rentals do not as they conflict with the intended purpose of a single-family zoned district which is to have an area free of commercial, transient uses and instead provide stability and permanence which furthers a sense of community.

The court also found that the short-term rental of a single-family home is not the same as a lodging house or tourist home as both of these envision that the owner of the property is present to supervise his lodgers whereas with a short-term rental, the owner is absent.

It should be noted that a short-term rental is defined as renting a dwelling for fewer than 30 days. *Styller v. Zoning Board of Appeals, 487 Mass. 588 (2021).*

## ANNOUNCEMENTS

**Lifetime Achievement Award and Length of Service Award**

Nomination forms will be sent out later this month for these awards which will be presented to recipients at the Federation's annual conference. You should begin your process of finding worthy nominees now.

**Workshops**

At the price of $180.00 per session for each agency attending, our workshops are an affordable way for your board to 'stay legal'. Each workshop attendee will receive a booklet which setsforth the 'basics' as well as a booklet on good governance which covers conflict of interest as well as how to run a meeting and a public hearing.

### *ABOUT THE EDITOR*

*Steven Byrne is an attorney with an office in Farmington, Connecticut. A principal in the law firm of Byrne & Byrne LLC, he maintains a strong focus in the area of land use law and is available for consultation and representation in all land use matters both at the administrative and court levels.*

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