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OLR Research Report

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ZONING VARIANCES

By: Kevin E. McCarthy, Principal Analyst

You asked for a discussion of the grounds for granting zoning variances and whether the legislature could require that variances be granted when a house must be modified in order for the family owning the home to adopt a child or other specified circumstances.

SUMMARY

CGS § 8-6 allows zoning boards of appeals (ZBAs) to grant variances from zoning laws when conditions affecting a particular parcel would create an "exceptional difficulty or unusual hardship" in the absence of a variance. The courts have construed this provision narrowly and stated that ZBAs should grant variances sparingly. They have held that in order for a ZBA to grant a variance, the applicant must show not only that he cannot use the property the way he desires, but that he is being completely or almost completely deprived of the land's value. Financial losses generally do not constitute a legal hardship that would warrant a variance. Moreover, the hardship must be imposed by conditions outside the property owner's control. As a result, it appears that a ZBA could not grant a variance to modify a home solely to accommodate a family that was seeking to adopt a child.

Since the variance provisions are statutory rather than constitutional law, the legislature could broaden the circumstances when ZBAs could grant variances or require that they grant variances under specific circumstances. While the legislature has generally given municipalities broad discretion in establishing zoning laws, it has imposed several specific requirements, and could do likewise with regard to variances.

GROUNDS FOR GRANTING A VARIANCE

CGS § 8-6 allows ZBAs to grant variances from zoning bylaws, ordinances, or regulations with respect to a parcel of land when "owing to conditions especially affecting such parcel but not affecting generally the [zoning] district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship..." In making its decision, the ZBA must consider public health, safety, convenience, welfare, and property values. The applicant must show that the variance will

not substantially affect the municipality's comprehensive zoning plan. *Dupont v. Zoning Board of Appeals of Town of Manchester*, 80 Conn. App. 327 (2003), *Stancuna v. Zoning Bd. of Appeals of Town of Wallingford*, 66 Conn. App. 565 (2001), *Smith v. Zoning Bd. of Appeals of Town of Norwalk*, 174 Conn. 323 (1978).

The statutes do not define "exceptional difficulty or unusual hardship," but these terms have been construed in an extensive body of case law. In *Dupont* and several earlier cases, the courts held that a hardship must be different in kind from that affecting properties in the same zoning district in order for the ZBA to grant a variance. Similarly, the Supreme Court has held that when a ZBA grants a variance on grounds that apply to many other properties in a given area, it effectively establishes a new zoning ordinance applicable to that area, which exceeds the ZBA's authority. *Ward v. Zoning Board of Appeals of Town of Hartford*, 153 Conn. 141 (1965).

In addition, the hardship must be imposed by conditions outside the property owner's control. *Hoffer v. Zoning Bd. of Appeals of Town of Oxford,* 64 Conn. App. 39 (2001). When an applicant who seeks a variance created a nonconformity with the zoning laws, the ZBA cannot grant a variance *Osborne v. Zoning Bd. of Appeals of Town of Guildford*, 41 Conn. App. 351, on remand (1996). As a result, it appears that a ZBA could not grant a variance solely to accommodate a family that needed to modify its home in order to adopt a child, since the hardship would not have occurred had the family not chosen to adopt.

Financial considerations, unless they greatly decrease or destroy the property's value, do not constitute a legal hardship that would warrant a variance. *Horace v. Zoning Board of Appeals,* 85 Conn. App. 162 (2004). To establish a hardship sufficient to support a variance, the applicant must show not only that he cannot use the property the way he desires, but that he is being completely or almost completely deprived of the land's value. *Jaser v. Zoning Bd. of Appeals of City of Milford* 42 Conn. App. 545 (1996).

In *Stancuna* the court found that these conditions had been met when a zoning ordinance required a 20-foot setback for commercial properties, this requirement created a hardship justifying a variance when applied to a 50-foot deep lot, because it would have required the owner to build a structure that was only ten feet wide. More generally, when application of a zoning ordinance renders a property practically worthless, its confiscatory impact warrants a grant of a variance. *Norwood v. Zoning Board of Appeals of the Town of Branford*, 62 Conn. App. 528 (2001). A hardship may arise from, among other things, the shape, size, or topography of a lot that makes it difficult to use for the use permitted in the zone. *Fiorilla v. Zoning Bd. of Appeals of City of Norwalk*, 144 Conn. 275 (1957).

Variances must be granted on a case-by-case basis. In *Hoffer*, the Appellate Court held that the fact that the town had granted other variances in the subdivision where the plaintiff lived had no bearing on whether the plaintiff should be granted a variance when he claimed that the size and configuration of his property prevented his compliance with zoning regulations.

The courts have consistently held that ZBAs should use their power to grant variances sparingly (see, for example, *Horace, Jaser*, and *Buccante v. Zoning Board of Appeals of City of Bridgeport*, 153 Conn. 44 (1965)).

MODIFYING VARIANCE LAW

Since the variance provisions described above are a matter of statute rather than constitutional law, the legislature could broaden the circumstances when ZBAs could grant variances (in practice, it appears that ZBAs routinely grant variances in the absence of a hardship). It could require that ZBAs grant variances under specific circumstances, for example if a house needs to be modified in order to accommodate a person who has become disabled or in order to facilitate an adoption. Alternatively, the legislature could establish a rebuttable presumption that such circumstances constitute a hardship, placing the burden of proof on the municipality to show that the variance is not needed. It is possible that making it easier to get a variance in one set of circumstances could serve as precedent for a more general liberalization of the laws governing variances, which could reduce the effectiveness of zoning laws. Moreover, such measures could reduce local autonomy.

While the legislature has generally given municipalities broad discretion in establishing zoning laws, it has imposed several specific requirements and prohibitions. For example, CGS § 8-2 requires zoning laws to treat manufactured homes that meet certain specifications the same way as they treat traditionally-constructed housing. It also bars municipalities from prohibiting day care centers in residential zones. Similarly, CGS § 8-3e through 8-3g limit local zoning autonomy regarding community residences and UConn 2000 projects.

KM:ts

April 1, 2024

TO: East Hampton Connecticut Planning and Zoning Commission

FROM: Melissa and David Baribault, 33 High Point Drive, Middle Haddam

There are two purposes of this letter I am sending in advance of the April 6th Commission Meeting. First, to provide an update on our work with The Inland Wetlands/Watercourse Agency and second, to respond to concerns raised at our March meeting about Legal precedence.

On Monday March 25, 2024, members of the Inland Wetlands Commission, Commissioners Rux and Zatorski from Planning and Zoning and Mr. Robert Russo of CLA Engineers (at our invitation) conducted a site visit of the conservation easement and adjoining areas of our river front at 33 High Point. The purpose of the site visit was to help the IWC in its work in aiding the design of a replanting plan within the conservation easement. A question surfaced during the visit about whether the landing of the stairs was within the coastal/tidal line and if it is, would DEEP handle the review and approval of the stairs to the river. That question is now with the East Hampton Attorney for determination. We were instructed not to submit an application to IWC until this question is answered. This was confirmed, and I anticipate, are reflected in the site visit special meeting minutes and the March 27, 2024, IWC meeting minutes for which we were in attendance.

I am a Compliance Officer in Insurance. I am not a trained J.D. but am experienced in regulatory and court procedures. In our March meeting a commissioner raised their concern that approving our requests would form a legal precedent. By definition, a legal precedent means that a decision on a certain principle or question of law has already been made. Where there is no law, as in this case, there is no legal precedent. For the Commission's reference I have attached a summary article by Kevin E. McCarthy regarding zoning variances. The article points out that "variances must be granted on a case-by-case basis. In Hoffer, the Appellate Court held that the fact that the town had granted other variances.....had no bearing on whether the plaintiff should be granted a variance."

Perhaps then the concern becomes one of behavioral precedent for other misdeeds in conservation easements. Since no two conservation easements are alike, it would be difficult to create a precise precedent. Furthermore, I argue that misbehavior in conservation easements is more widespread than is acknowledged. What is not as widespread is neighbor to neighbor conflict. The reason we are here as the first case for the commission, for not following the conservation easement requirements for advance commission approval and are now asking for forgiveness, is not because we are the first case of noncompliance. But rather, we have a neighbor who passionately dislikes everything about us. We are now going into our ninth month of responding to and requesting forgiveness for what we did in our conservation easement without the Commission's permission. Our communications and efforts are safely stored in Town records and available to the public. If we have created a precedence, it is one where future request for forgiveness of conservation easement violations will not be taken lightly by this commission.

The question that is still is whether the Commission agrees it is our right to access and use the Connecticut River and it is also our right to protect our property used in conjunction with river activities. In accessing those rights, we will incur great hardship and cause river damage without the gradual path, stairs and property stored in the locked shed. If the Commission does not agree that these are our rights as riverfront property owners and denies permission to retain the path, stairs and shed, what is the Town of East Hampton willing to do to restore us financially in the event of a future theft? The commission has the authority to grant us the exceptions to the easement.

We appreciate your careful consideration of our application.

Sincerely, Melissa Baribault