



MEMORANDUM

To: Zoning Board of Appeals  
Re: Proposed Changes for Section 8.2 of the Zoning Regulations: Non-Conforming Lots in the R-1 Zone  
Date: May 4, 2023

The Planning and Zoning Commission is currently contemplating a change in the language related to undersized non-conforming lots within the R-1 Zone to deal with minimum setback requirements. The Commission is seeking your input before moving forward on the proposal. Some background:

The R-1 Zone (Lakeside and Village Residential) was created in 1990, when it replaced the RA-1 Zone (Single Family and Conversions) and RA-2 Zone (Lake Residence). The current zone paints with a broad brush, and includes residential properties surrounding Lake Pocotopaug, the Village Center, to the west of the Village along Barton Hill and to the east roughly between Summit Street and Watrous Street. The R-1 area and dimensional requirements are in the table below.

	<b>With Sewer</b>	<b>Without Sewer</b>
Minimum Lot Area (square feet)	20,000	60,000
Minimum Lot Width (feet)	125	150
Minimum Lot Depth (feet)	125	200
Minimum Lot Frontage (feet)	100	100
Maximum Lot Coverage (percent)	20%	10%
Minimum Front Setback (feet)	25	50
Minimum Side Setback (feet)	15	25
Minimum Rear Setback (feet)	25	50
Maximum Building Height (feet)	30	30

The zone encompasses much of the older housing stock in Town, and incorporates many neighborhoods which were created long before the modern zoning regulations were adopted in 1958. The vast majority of the lots in neighborhoods which surround Lake Pocotopaug are far smaller in lot size than the minimum size required in the zoning regulation and are legally non-conforming. As such they can be developed and redeveloped in a manner consistent with the zoning regulations in accordance with Section 8.2.

A breakdown of the non-conforming conditions is below, but in short, 65% of the zone consists of non-conforming lots with regard to lot size alone. Taking into account other bulk requirements such as lot width, depth, and frontage, the number of non-conforming lots increases. A map of the zone showing these non-conforming parcels is attached to this memo as Exhibit A.

R-1 Zone Statistics

6,236 Parcels in Town

1,434 Parcels in R-1 Zone (23%)

965 Non-Conforming Lot Size (65%)  
 26 Lots conform to Lot Size, but not to frontage requirement.

Following the completion of the centralized sewer system in the 1980's, the vast majority of what were once seasonal cottages began to be converted to year round homes. Many properties were redeveloped with additions and reconstructions. The existing condition of so many undersized lots has led to a large number of variance requests over the years. In an effort to appease landowners and allow conversions and reconstructions, the Zoning Board of Appeals has been put in a position to approve variances where often, a hardship, as defined by CT General Statutes section 8-6, may be difficult to prove.

For reference, a hardship must be present to issue a variance. Per Connecticut State Statute, the Board of Appeals may issue a variance *"...solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured..."* Simply stating a lot is undersized, where an entire neighborhood is made up of undersized lots, is not enough to prove a hardship and case law suggests that doing so will lose in a court appeal.

Considering that well over half of the parcels in the zone are undersized, the reality is that we have a zoning problem. The regulation cannot force properties to merge once they have been developed, and cannot force homeowners to purchase more than one lot to create conforming conditions. Below is a summary of 5.5 years of variance applications received by the Zoning Board of Appeals.

#### ZBA Statistics - July 1 2016 – December 31, 2022

87 Variance Applications

75 Approved

8 Denied

4 Withdrawn

44 Applications in R-1 Zone (52% of total)

39 for Setback Variances (88% of those in the R-1 Zone)

33 Approved

6 Denied (2 due to neighbor opposition, 4 due to lack of hardship finding)

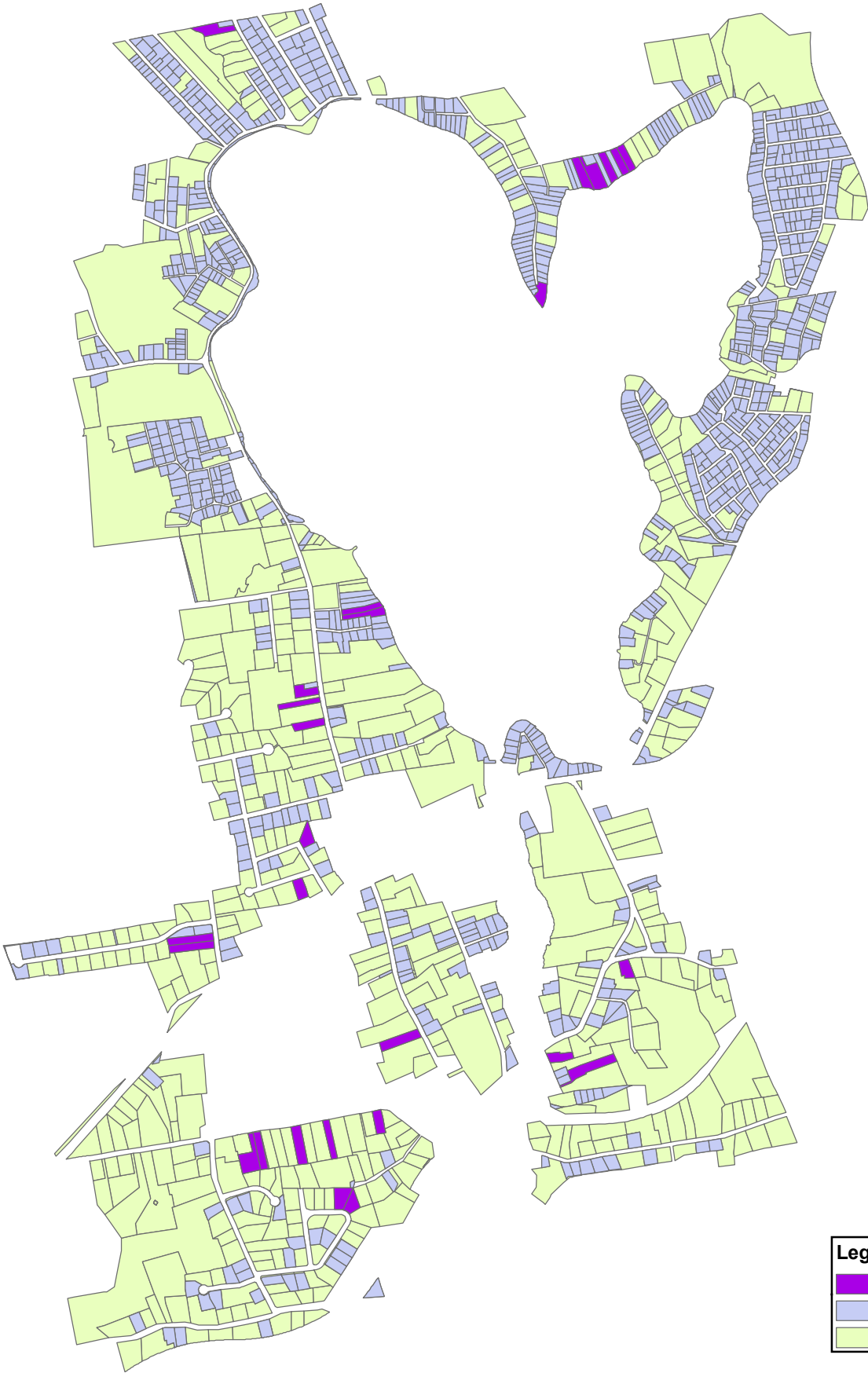
*Forty-five percent* (39 out of 87) of all variance applications over a 5.5 year period involved requests for setback variances in the R-1 Zone which only encompasses 23% of the total number of lots in Town. This indicates that the current zoning requirements for the zone do not align with the reality of the lot configurations within the zone. As evidenced by the map, the majority of the non-conforming lots surround Lake Pocotopaug. In searching the variance requests, it is evident that the majority of the setback variance requests occur in the historic lake neighborhoods, which are mostly made up of small, non-conforming lots.

Staff considered several options for resolving this issue to lessen the burden on the Zoning Board of Appeals, and reduce the number of variances being requested. Those options included:

1. Reduce bulk and setback requirements for R-1 Zone – The thinking was that for a large part of the zone, the setbacks are simply too large for the lot size, and the minimum lot size. This was ultimately ruled out because the R-1 zone does have significant areas that do meet the requirements and are not subject to as many variances.
2. Create a new zone surrounding the lake and encompassing most of the small lots – This was not preferred simply due to the complexity of the process. There are too many questions to try to answer, where do you draw the zone lines, how do you make that determination, and are there unfair disadvantages to any particular neighborhoods.
3. Address setback concerns in Section 8.2 – Non-Conforming Lots of Record, similar to the way maximum house size is impacted by lot size in the R-1 Zone. – This approach seems to be the most straightforward. There are no impacts to lots that meet the zoning requirement, and the other requirements remain intact, such as maximum coverage, allowed uses, etc.

The proposal included with this memo is an attempt to create a setback regulation which acknowledges the large number of undersized and narrow lots within the zone, while keeping minimum setbacks consistent with the Building Code and allowing houses of a minimum of 25 feet in width to be constructed. Rather than a strict broad brush setback requirement, the proposal scales the minimum setback down relative to the size of the lot, and includes an aggregate minimum so as to avoid clustering of structures. I have included a diagram with this Memo as Exhibit B in order to demonstrate minimum and aggregate setbacks. It is important to note that no other underlying requirements change. For example, the lot coverage would remain at 20% and could only be varied by the ZBA.

# Exhibit A R-1 Zone Parcels



**Legend**

- Non-Conforming Frontage
- Non-Conforming Parcels
- R-1 Parcels



*This map is for planning purposes only.*

Drawn By: JDD  
Date: 2.15.2023

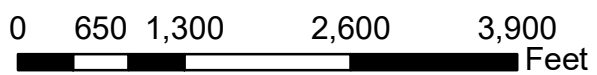
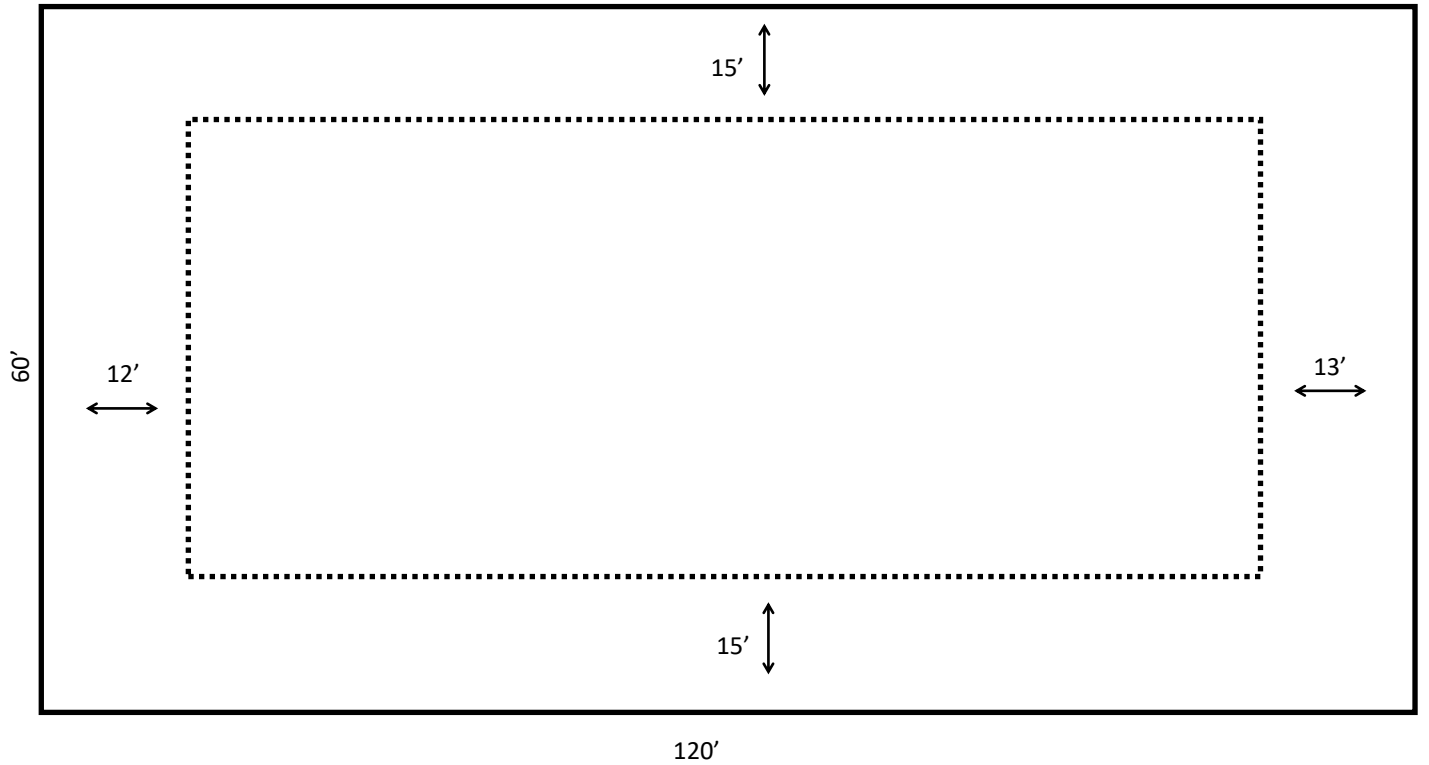
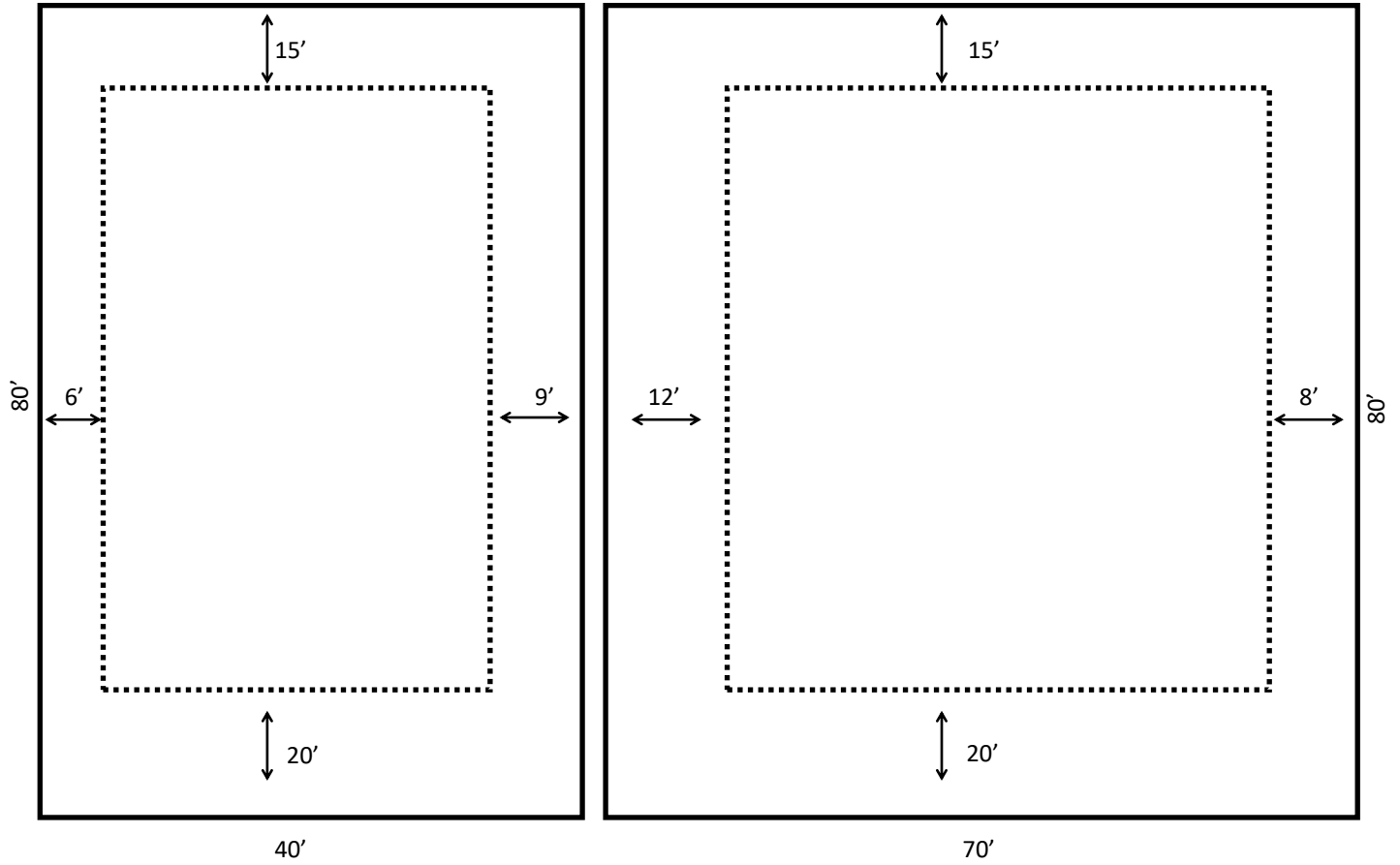


Exhibit B

Examples of Non-Conforming Lots and Proposed Setback Requirements



3. **VARIANCES:**

**“[T]o determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed”**

- a. **The ZBA is the only municipal agency that can vary the application of the zoning regulations in particular cases.** Mackenzie v. Planning & Zoning Commission of Town of Monroe, 146 Conn. App. 406, 426-428 (2013). Applications for variances have more often than not been granted, at least up until the decision in Verrillo v. Zoning Board of Appeals of Town of Branford, 155 Conn. App. 657 (2015). That 75 page decision sustaining the appeal of the ZBA grant of 8 variances to expand a nonconforming structure is a comprehensive treatise on variance law, the application of which is a reminder that there is no legal basis for the grant of most variances.
- b. **The power to grant a variance emanates directly from C.G.S. §8-6 and allows the ZBA to permit something to be done which violates the zoning regulations.** Bloom v. Zoning Board of Appeals of City of Norwalk, 233 Conn. 198; 206 (1995). The essential purpose of the ZBA’s variance power is to “furnish elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory, and consequently unconstitutional, manner.” Verrillo v. Zoning Board of Appeals of Town of Branford, 155 Conn. App 657, 679 (2015).
- c. **The variance power should be exercised sparingly and only under exceptional circumstances.** See Lindy’s Restaurant, Inc. v. Zoning Board of Appeals of City of Hartford, 143 Conn. 620, 623 (1956). ZBA “must adhere to the cardinal principle that the variance power should be carefully exercised in limited fashion.” Verrillo v. Zoning Board of Appeals of Town of Branford, 155 Conn. App. 657, 679 (2015). And see Pleasant View Farms Development, Inc. v. Zoning Board of Appeals of Town of Waterford, 218 Conn. 265, 270-1 (1991). The power to grant variances from the strict application of zoning ordinances should be carefully and sparingly exercised, because unless great caution is used and variances are granted only in proper cases, the whole fabric of town-wide and city-wide zoning will be worn through in spots and raveled at the edges until its purpose in protecting the property values and securing the orderly development of the community is completely thwarted.
- d. **C.G.S. §8-6 states that a variance should be granted only when the varied application of the regulation is “in harmony” with the regulation’s “general purpose and intent.”** The statute does not allow a variance to be granted where it would be inconsistent with a general purpose and intent of the zoning ordinance or would adversely affect public

health, safety and welfare, or property values in the district. See Fuller § 9.1, Land Use Law and Practice, 4<sup>th</sup> Edition.

- e. **One seeking a variance from must satisfy two basic requirements:** 1) the variance must be shown not to affect substantially the comprehensive zoning plan; and 2) adherence to the strict letter of the zoning ordinances must be shown to cause unusual hardship, unnecessary to the carrying out of the general purposes of the zoning plan. Schulhof v. Zoning Board of Appeals of City of Norwalk, 144 Conn. App. 446, 456 (2013) (If the setbacks on the island were strictly applied, no permitted structure could be built, so variance was proper).

"The first part of the test .... is usually met when the use to be allowed by the variance is consistent with other uses in the area." Amendola v. Zoning Board of Appeals of City of West Haven, 161 Conn. App. 726, 738 (2015).

Proof of exceptional difficulty or unusual hardship because of some peculiar characteristic of the parcel of land is a condition precedent to the granting of a zoning variance. Reid v. Zoning Board of Appeals of Town of Lebanon, 235 Conn. 850, 857 (1966).

- f. **C.G.S. §8-6 permits the ZBA to vary the zoning regulations where a "literal enforcement" of such regulations "would result in exceptional difficulty or unusual hardship."**

Although the "exceptional difficulty" standard is provided as an alternative to "unusual hardship" under C.G.S. §8-6, this standard has not been recognized by the courts as acceptable grounds for granting a variance. The Connecticut Supreme Court held that the phrase "practical difficulties" used in a local zoning ordinance as grounds for granting a variance was "too lacking in precision of meaning to afford a standard sufficient to sustain the delegation of power to the board..." Devaney v. Board of Zoning Appeals of City of New Haven, 132 Conn. 537, 541 (1946).

Therefore, the standard employed by the ZBA for granting variances is that of "unusual hardship". To constitute "unusual hardship", the hardship must be unique. As the Court pointed out in the case of Smith v. Zoning Board of Appeals of Town of Norwalk, 174 Conn. 323, 327 (1978), "the hardship must be different in kind from that generally affecting properties in the same zoning district..." "One seeking a variance must show that his property is particularly disadvantaged by the operation of the zoning ordinance and not merely that a general hardship, equally applicable to other properties in the neighborhood, results from a strict enforcement of the code." Ward v. Zoning Board of Appeals of Town of Hartford, 153 Conn. 141, 143 (1965). If the ZBA grants a variance "on grounds which apply equally to a large number of properties in a given area, it in effect establishes a new zoning regulation applicable to that area.... Arguments concerning the general unsuitability of a neighborhood to the zoning classification in which it has been placed are properly addressed to the" PZC, not to the ZBA. Id., at 145. When many lots are similarly affected (such as undersized lots in shoreline communities), then hardship likely would not be deemed unique. See Sudikoff v. Zoning Board of Appeals, 2021 WL 5013824 (Sept. 30, 2021).

## ARTICLE 8 - SPECIAL REGULATIONS

---

### Section 8.1. Prohibited Uses

1. Any use not specifically permitted by the East Hampton Zoning Regulations.
2. Junk yards, including, but not limited to motor vehicles. (More than one unregistered motor vehicle or parts thereof shall constitute a violation of this regulation.)
3. Solid waste disposal sites, not including municipal transfer stations.
4. Uses or activities which constitute or involve the treatment storage, or disposal of hazardous waste, hazardous materials, hazardous substances or toxic waste as the above terms are defined in the Federal and State Resource Conservation Recovery Act, Comprehensive Environmental Response Compensation Liability Act or Toxic Substance Control Act, or other relevant Acts or Documents. This provision shall in no way be construed to permit or allow by Special Permit other uses or activities not otherwise provided for in this Regulation or Section.

### Section 8.2. Non-Conforming Conditions

Any non-conforming use or building, lawfully existing at the time of adoption of these Regulations or of any amendments thereto, may be continued, and any building so existing, housing such non-conforming use, may be reconstructed in accordance with this Section.

#### A. Interpretation

Nothing in these Regulations shall be construed as authorizing or approving the continuance of the use of a structure or premise in violation of the Zoning Regulations in effect at the time of the adoption of these Regulations. The burden to prove valid non-conforming status shall rest on the owner of the premise in question.

#### B. Rendering to Safe Condition

Nothing in these Regulations shall be construed to relieve a property owner from the responsibility of maintaining or rendering a building, structure or premise to a condition deemed safe and healthful by proper authorities.

#### C. Alteration, Repair and Reconstruction

Any legal existing non-conforming building or structure may be:

1. Reconstructed, repaired or rebuilt, only to its previous floor area, when damaged or destroyed by fire, flood, collapse or other such accidental event.
2. Repaired or reconstructed as made necessary by normal wear and tear. (Effective January 1, 2008)



#### D. Change in Use

No non-conforming use may be changed except to a conforming use or, with the approval by the Planning and Zoning Commission of an application for a Special Permit, in accordance with Section 9.2 to another non-conforming use, not more objectionable, and deemed to be more conforming, provided any aspect of the use is not extended or enlarged (revision effective July 8, 2006).

#### E. Reversion

No part of a conforming lot, use or building may return to non-conformity once such non-conformity is abandoned or extinguished.

#### F. Non-Conforming Lots of Record

1. Lots made non-conforming by changes made to Zoning Regulations may be developed in conformance to these Regulations. Such lots must be legally existing at the time of any such changes in the Regulations, and the burden to prove such non-conforming status shall be on the applicant for such development.
2. Subject to the provisions of Section 8-26a(b) of the Connecticut General Statutes, contiguous, non-conforming lots created prior to adoption of Subdivision Regulations (5/1/49), or existing as the result of divisions not requiring subdivision, shall be considered one non-conforming lot when such lots are of the same ownership and have contiguous frontage.

#### G. Maximum House Size Allowed on Non-Conforming Lots of Record in the R-1 Zone

For the purposes of preventing overdevelopment of undersized lots, promote public safety, and allow for the orderly development of neighborhoods; the following shall be the maximum house sizes permitted on non-conforming lots of record in the R-1 Zone:

Lot Size	Maximum House Size (Habitable space)	Maximum First Floor Area
less than 5,000 sq. ft.	1500 sq. ft.	750 sq. ft.
5,000 - 10,000 sq. ft.	1800 sq. ft.	900 sq. ft.
10,001 - 19,999 sq. ft.	2200 sq. ft.	1100 sq. ft.

#### H. Minimum Required Setback on Non-Conforming Lots of Record in the R-1 Zone

For the purposes of allowing development of undersized lots, promoting public safety, and facilitating the orderly development of neighborhoods; the following shall be the minimum setback requirements on non-conforming lots of record in the R-1 Zone when the lot contains less than the minimum required number of square feet:

<u>Lot Width</u>	<u>Minimum Side Yard Setback</u>	<u>Minimum Aggregate Setback</u>
<u>less than 50 feet</u>	<u>6</u>	<u>15</u>
<u>50 to 75 feet</u>	<u>8</u>	<u>20</u>
<u>76 to 100 feet</u>	<u>10</u>	<u>20</u>
<u>101 to 124 feet</u>	<u>12</u>	<u>25</u>

Updated May 3, 2023

Proposed Changes in Red and Underlined

<u>Lot Depth</u>	<u>Minimum Front Setback</u>	<u>Minimum Rear Setback</u>
<u>less than 75 feet</u>	<u>15</u>	<u>15</u>
<u>75 to 100 feet</u>	<u>20</u>	<u>15</u>
<u>100 to 124 feet</u>	<u>25</u>	<u>20</u>

#### **H.I. Enlargement of a Permitted use on Non-Conforming Lots**

Buildings containing a permitted use, but which does not conform to the requirements of the Regulations regarding height, floor area, percentage of lot coverage, setbacks or parking facilities, may be enlarged or altered provided:

1. Such enlargement contains no more dwelling units than now exist.

Additions are constructed in accordance with the applicable yard and height requirements, or with the approval of the Zoning Board of Appeals, are not closer to the lot lines than the existing building or structure (revision effective July 8, 2006).