BERCHEM MOSES PC

MEMORANDUM

Wilton ZBA Orientation: Powers, Duties and Procedures

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I. Powers of ZBAs: C.G.S. § 8-6 – Variances and Appeals

A. VARIANCES: To determine and vary the application of these 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 the parcel, but not affecting generally the district in which it is situated, a literal enforcement of these regulations **would result in exceptional difficulty or unusual hardship**, so that substantial justice will be done and the public safety and welfare secured. (also Regs 71.2.3)

1. Variances are most common. ZBA is the only municipal agency that can vary the application of the zoning regulations in particular cases = allows ZBA to permit something that the Regs do not (besides allowing a use not allowed anywhere in Town).

2. However, the standard to grant a variance is a very high one.

3. The key requirement comes right out of C.G.S. § 8-6: application of the zoning regulations **must cause "unusual hardship" to the applicant**. But what does unusual hardship actually mean? What must be shown in the record before the ZBA in order for it to grant a variance?

a) The hardship must be different in kind from that generally affecting properties in the same zoning district; it must be unique or unusual.[1]

b) Disappointment in the use of property, namely, the inability to build a larger structure, does not constitute unusual hardship.[2]

c) Where a hardship is self-created, the zoning board of appeals cannot grant a variance.[3]

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[1] *Caruso* at 322.
[2] *Michler v. Planning & Zoning Bd. of Appeals of Town of Greenwich*, 123 Conn. App. 182, 186 (2010).
[3] *Pollard v. Zoning Bd. of Appeals of City of Norwalk*, 186 Conn. 32, 39, 40 (1982).

d) If a problem for which a variance is requested was created by someone hired by the property owner to do the work, this is a self-created hardship.[4]

e) The fact that a requested variance might be very minor in scope does not make it a hardship sufficient for the granting of the variance.[5]

f) Unusual hardship may be shown by demonstrating that the zoning regulation has deprived the property of all reasonable use and value, thereby practically confiscating the property.[6]

g) When a reasonable use of the property exists, there can be no practical confiscation.[7]

h) Much of these rules were examined and laid out in the 2015 Appellate Court decision *Verillo v. Branford ZBA*.

i) Then later in 2015, the Supreme Court issued a decision in *E & F v. Fairfield ZBA* that overturned a number of prior cases and definitively established that unique characteristics of a property that make it difficult to comply with zoning regulations do not constitute a hardship unless the property would have no economic value if the regulations were applied.

j) Like the Appellate Court in Verrillo, the Supreme Court in E & F also made a point to highlight that "this court has many times held that the power to grant variances must be exercised sparingly...."

4. However, there is one narrow exception to the "unusual hardship" requirement – in other words, one exception to the requirement that a variance can only be granted if there would be no economic value to the property. That exception is when the requested variance would eliminate or reduce an existing nonconformity, proof of hardship is not required. (Verillo point to SC cases applying exception).

5. Other potential Federal exemption – rare but variance may be required if requested as reasonable accommodation under the FHA or ADA. Very case by case.

B. APPEALS: To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the Enforcement Officer; (also Regs 71.2.1)

1. Not many of these, but Board must hear if properly brought.

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[4] *Highland Park, Inc. v. Zoning Bd. of Appeals of North Haven*, 155 Conn. 40 (1967).
[5] *Verrillo v. Zoning Bd. of Appeals of Town of Branford*, 155 Conn. App. 657 (2015).
[6] *Id.*
[7] *Id.* at 323.

2. Broad discretion of the Board to consider ZEO action "de novo" without deference and determine the applicability of zoning regulations to the facts – acts quasi-judicial. Full reconsideration of ZEO action.

3. No power to hear appeal based on ZEO failure to act. Would need to bring separate mandamus lawsuit.

4. Court review of Board decision will focus on whether there was substantial evidence in the ZBA appeal record to support the ZEO action or not.

II. ZBA Procedures

A. A quorum – a majority (3) of all members (5) – must be present to open a meeting. However, need 4 concurring votes to grant a variance or reverse a ZEO after appeal. So need at least 4 present and voting in order to attempt those actions. Recommend offering applicant opportunity to come back when 5 members present.

B. When acting upon a variance or appeal, the Board must "state upon the record the reason for its decision and the zoning regulation which is varied and , when a variance is granted, describe specifically the exceptional difficulty or unusual hardship on which its decision is based.

C. Variances because effective upon the filing of a copy with the Town Clerk and recording in the land records (C.G.S. § 8-3d).

D. Site Visits: Evidence acquired by personal observations during site visits can be considered as part of your deliberations. During such site visits, it is best to avoid discussion at the site, saving such discussion for the public hearing. It is usually best to be accompanied by a member of the P&Z staff. It is often best to discourage attendance by the applicant or the applicant's representative.

E. The Record

1. All written reports and comments received by the Commission at or prior to a hearing should be included in the official record, including all correspondence and testimony from municipal personnel and officials.

2. If a Board member intends to use his or her own expertise or personal knowledge of a site as basis for a decision, he or she should disclose that expertise or knowledge at the public hearing. The disclosure helps protect the record and apprises those concerned with the application of the factual basis for the decision. Interested parties therefore have a chance to respond or rebut or provide their own expert.

3. Information received after the close of the public hearing should not be permitted in the official record. If further information is needed, the better approach is to keep the hearing

open for the further information and then give all parties the opportunity to review the information and comment on it when it is available.

F. Public hearing conduct - Largely informed by case law. General concepts:

1. At hearing, "any person or persons may appear and be heard," so in most situations, time limits on testimony is improper. C.G.S. § 8-7d(a).

2. Speakers may be represented by an agent or attorney. C.G.S. § 8-7d(a).

3. Required by statute to have a stenographer take the evidence or to use a sound-recording device. C.G.S. § 8-7a.

4. Concepts of procedural due process and fundamental fairness apply to agency hearings, and provide the applicant with the right to a fair hearing, to present evidence, and to have reasonable opportunity to know and rebut the claims of any opposing party.

5. Not bound by strict rules of evidence. Board has discretion to give weight to certain evidence.

6. Once the public hearing is closed, no further evidence or testimony may be entered into the record or considered by the agency.

G. Conflicts/recusals:

1. When a board reviews an application, each member must determine whether he or she has a conflict of interest which might disqualify them from participating in consideration of the application. There are statutes which prohibit participation if a member has a personal or financial interest in the issue (Conn. Gen. Stat. §8-11 and §8-21).

2. A Board member should not appear for or represent any person, corporation or entity (including a neighborhood association of which they are a member) in any matter pending before the ZBA or PZC (C.G.S. § 7-148t). This applies whether or not the member is paid for the representation.

3. If a member decides to recuse himself or herself, that fact should be noted on the record.

4. Often it is not the actual conflict, but the appearance of conflict. The cases say that is enough to undermine public confidence. It is up to the individual to decide when he/she has a conflict. It is not up to the Town Attorney, the Planning Director or the Board.

5. But remember that the decision you make can impact or jeopardize the Board decision. A court finding of prejudice or bias could cause reversal of the Board's action.

H. Bias/predetermination

1. Predetermination is a finding that a member (or the entire Board) has made up its mind and essentially decided the application before the public hearing.

2. A member should not take a public position on a matter which is about to come before the Board. Similarly, it is prudent to avoid comment on a matter which you reasonably suspect may come before your board. This means avoiding letters to the editor and other public comments.

3. This does not mean that you are expected to have no opinions on anything. However, it is important to avoid comments which suggest that you have made up your mind before the conclusion of a particular application.

4. Watch out for social media and other communications.

5. Similarly, ZBA members should not discuss a pending application except at a public hearing where all parties have an opportunity to participate. Discussions with interested parties held outside the public hearing are known as ex parte communications and are regarded suspiciously by the courts. Caution should be exercised during any "breaks" in hearings.

I. FOIA

1. ZBAs are "Public Agencies" subject to the Freedom of Information Act (C.G.S. §§ 1-200 through 1-259).

2. Under FOIA, public agencies must hold meetings in public.

3. Meeting broadly defined as "any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power.

a) "Meeting" does not include: Any meeting of a personnel search committee for executive level employment candidates; any chance meeting, or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business; strategy or negotiations with respect to collective bargaining; a caucus of members of a single political party notwithstanding that such members also constitute a quorum of a public agency; an administrative or staff meeting of a single-member public agency; and communication limited to notice of meetings of any public agency or the agendas thereof. A quorum of the members of a public agency who are present at any event which has been noticed and conducted as a meeting of another public agency under the provisions of the Freedom of Information Act1 shall not be deemed to be holding a meeting of the public agency of which they are members as a result of their presence at such event.

4. So, emails amongst the ZBA members about an incoming or pending application constitute an illegal meeting under FOIA and any subsequent action can be voided. I mentioned these earlier because they could be seen as bios or predetermination, but they also clearly violate FOIA.

5. FOIA also allows members of the public to request and review public records, which would include any email communications, text messages and voicemails related to your town business. And that includes not just town issued email or phone accounts – that also applies to any personal accounts or devices that you use for town business.

6. A site visit by 3 or more members of the Board would also be considered a meeting that must be publicly noticed. Evidence acquired by personal observations can be considered as part of your deliberations. During such site visits, it is best to avoid discussion at the site, saving such discussion for the public hearing. It is usually best to be accompanied by a member of the P&Z staff. It is often best to discourage attendance by the applicant or the applicant's representative.

J. Statutory Training (C.G.S. § 8-4c):

1. Effective January 1, 2023, each member shall complete at least four hours of training. Exceptions: members who are (1) a licensed attorney-at-law of this state with four or more years of experience on any such commission or board, or (2) a land use enforcement officer.

2. Members serving as of January 1, 2023, shall complete the 4 hours training by January 1, 2024, and

3. Members joining after January 1, 2023, shall complete such initial training not later than 1 year after such member's election.

4. Members shall complete any subsequent training once every 4 years thereafter or once every term for which such member is elected or appointed if such term is longer than 4 years.

5. Such training shall include at least one hour concerning affordable and fair housing policies and may also consist of (1) process and procedural matters, including the conduct of effective meetings and public hearings and the Freedom of Information Act, as defined in section 1-200, (2) the interpretation of site plans, surveys, maps and architectural conventions, and (3) the impact of zoning on the environment, agriculture and historic resources.

6. Not later than March 1, 2024, and annually thereafter, the ZBA shall submit a statement to BOS, affirming compliance for each member required to complete such training in the calendar year ending the preceding December thirty-first.