



## MEMORANDUM

DATE: APRIL 15, 2024

TO: WILTON ZONING BOARD OF APPEALS

FROM: IRA W. BLOOM, ESQ., PETER GELDERMAN, ESQ.

RE: E AND F ASSOCIATES, LLC V. ZONING BOARD OF APPEALS OF THE TOWN OF FAIRFIELD ET AL, (2015)

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As part of our discussion, we wish to highlight this important case. This case has serious implications for Zoning Boards of Appeal and the granting of variances.

In the above case, the applicant owned a legally non-conforming building at the corner of the Post Road and Sanford Road in Fairfield (1460 Post Road). The applicant sought to add a second story to the building. The existing building already was inconsistent with respect to various setback requirements but, as noted, it was legally non-conforming. The second story was requested so that the applicant could lease the building to a "quality restaurant." The applicant represented that it had received "numerous offers" to lease the building from other entities, including a "major coffee/donut shop and several national fast-food retailers and other high turnover food establishments." However, the applicant said that it did not wish to lease the existing building to any of those entities. Rather, the applicant wanted to add a second story to lease to the "quality restaurant." The ZBA granted the application. The trial court upheld the variance relying on the Appellate Court's decision in Stillman v. Zoning Board of Appeals, 25 Conn. App. 631 (1991).

An appeal was taken by the plaintiff, the owner of the abutting property on the Post Road. The Supreme Court reversed the trial court and ordered the case remanded to the trial court with a direction to sustain the plaintiff's appeal and to remand the case to the ZBA with a direction to deny the application. In rendering a decision, the Supreme Court had to search the record, since the ZBA stated no reason for granting the variance. The Supreme Court concluded that there was no basis under established legal standards for the ZBA's decision granting the variance. The Supreme Court noted that there was no evidence in the record that the strict application of the zoning regulations would have a confiscatory effect. They also cited the applicant's testimony that it had received "numerous offers" from a variety of sources to lease the existing building. The Supreme Court concluded, based on their previous holdings, that proof that a property has a peculiar characteristic that makes it difficult for a particular use to comply with the zoning regulations does not



justify the granting of the variance when the owner has made no showing that the property could not reasonably be developed for some other use permitted in that zone or that the effect of limiting the parcel to the permitted uses only would be confiscatory or arbitrary. The Supreme Court expressly overruled the Stillman case, which was an Appellate Court decision stating that the economic hardship test is a valid means of establishing a hardship, but it is not the *exclusive means*. The Stillman case stated that even in the absence of a showing that the denial of the variance will cause economic hardship, a variance may still be granted if the literal enforcement of a regulation causes exceptional difficulty or hardship because of some unusual characteristic of the property. The Supreme Court said that the Stillman decision is inconsistent with Supreme Court cases, holding that when a property would have *economic value* even if the zoning regulations were strictly enforced, the fact that a peculiar characteristic would make compliance with the regulations exceptionally difficult does not constitute a ground for a variance. The Supreme Court repeated once again that the power to grant variances “must be exercised sparingly.”

Here is the bottom line: The Supreme Court in this case made it clear that if a property has “economic value,” a showing that the property has a peculiar characteristic so as to make compliance with the regulations exceptionally difficult is *not sufficient to justify the granting of a variance*. It is clear from this case that the “economic value” of the property must be an element for consideration by the ZBA. It also seems clear to me that in a “typical” case of a property owner with a three-bedroom home who seeks an addition within the setback because there are wetlands on the opposite side, no variance can be granted since the three bedroom home still has “economic value” as is. Our office will continue to be available to discuss this case further.