



MEMORANDUM

To: Town of Wilton Zoning Board of Appeals
From: Ira W. Bloom, Esq.; Peter V. Gelderman, Esq.
Date: October 9, 2020
Re: Wilton ZBA - Case Law Update

A. Requirements for granting variances

Under C.G.S. § 8-6(a)(3), a zoning board of appeals is authorized to grant a variance if the following two requirements are met:¹

1. The variance will not substantially affect the comprehensive zoning plan:
 - a. The comprehensive plan is found in the zoning regulations themselves.²
 - b. Variances cannot be inconsistent with the general purpose and intent of the zoning regulations.³
 - c. Variances cannot allow a use that is not permitted anywhere else in town under the zoning regulations.⁴
2. Application of the zoning regulations will cause unusual hardship to the applicant:
 - a. The hardship must be different in kind from that generally affecting properties in the same zoning district; it must be unique or unusual.⁵
 - b. Disappointment in the use of property, namely, the inability to build a larger structure, does not constitute unusual hardship.⁶
 - c. Where a hardship is self-created, the zoning board of appeals cannot grant a variance.⁷
 - 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.⁸
 - 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.⁹

¹ *Caruso v. Zoning Bd. of Appeals of City of Meriden*, 320 Conn. 315, 321 (2016).

² *Pike v. Zoning Bd. of Appeals of Town of Hampton*, 31 Conn.App. 270, 277 (1993).

³ *Krejpcio v. Zoning Bd. of Appeal of City of Hartford*, 152 Conn. 657, 662 (1965).

⁴ *Bradley v. Zoning Bd. of Appeals of Town of Westport*, 165 Conn. 389, 395-396 (1973).

⁵ *Caruso* at 322.

⁶ *Michler v. Planning & Zoning Bd. of Appeals of Town of Greenwich*, 123 Conn. App. 182, 186 (2010).

⁷ *Pollard v. Zoning Bd. of Appeals of City of Norwalk*, 186 Conn. 32, 39, 40 (1982).

⁸ *Highland Park, Inc. v. Zoning Bd. of Appeals of North Haven*, 155 Conn. 40 (1967).

⁹ *Verrillo v. Zoning Bd. of Appeals of Town of Branford*, 155 Conn. App. 657 (2015).

- 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.¹⁰
- g. When a reasonable use of the property exists, there can be no practical confiscation.¹¹

B. *Verrillo v. Branford ZBA*

In 2015, the Appellate Court in *Verrillo* exhaustively detailed the test for granting variances. Significantly:

1. “An applicant's disappointment in the use of the subject property, namely, the inability to build a larger structure, is personal in nature and not a proper basis for a finding of hardship.”¹²
2. “Neither the applicants' personal desire to expand their existing nonconforming structure to obtain additional, more comfortable space nor their desire to modernize that structure constitute legal hardship under our law.”¹³
3. The power to grant variances must be exercised sparingly and only where the requirements for granting variances have been met.
4. For the first time, the Court explicitly set forth an alternative to the requirement that an applicant show an unusual hardship: situations where the requested variance will reduce an existing nonconformity. This alternative is detailed in Section D. below.

C. *E & F v. Fairfield ZBA*¹⁴

In 2015, the Supreme Court issued a decision in *E & F* 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.

1. The applicant sought to add a second story onto an existing non-conforming building so that it could lease the building to a “quality restaurant”, instead of “a major coffee/donut shop and several national fast food retailers and other high turnover food establishments” that had offered to lease the existing building.¹⁵

¹⁰ *Id.*

¹¹ *Id.* at 323.

¹² *Id.* at 692.

¹³ *Id.* at 695.

¹⁴ *E & F Assocs., LLC v. Zoning Bd. of Appeals of Town of Fairfield*, 320 Conn. 9 (2015)

¹⁵ *Id.* at 12.

2. The ZBA granted the variances and the trial court upheld the ZBA decision.¹⁶
3. However, the Supreme Court overturned the trial court, concluding that the ZBA had no basis for granting the variance.¹⁷
4. The Court pointed out that there was no evidence that applying the zoning regulations would result in no economic value to the property, citing the “numerous offers” to lease the existing building.¹⁸
5. The Court ultimately held that unusual or peculiar circumstances affecting a property do not alone justify granting a variance where the property continues to have “economic value” in absence of the variance.¹⁹
6. 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....”

D. Alternative to showing of unusual hardship

A fundamental principle in Connecticut is that “nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit—[i]n no case should they be allowed to increase.”²⁰

Furthering this principal, the *Verrillo* court cited the following cases supporting an alternative to the hardship requirement for granting variances: if a requested variance will reduce or eliminate an existing nonconformity, proof of unusual hardship is not required. These cases are still the leading cases on the hardship alternative and have not been disturbed by more recent case law.

1. *Adolphson v. Fairfield ZBA* (1988 Supreme Court case that originally outlined the hardship alternative)
 - a. The applicants owned a metal foundry located in an industrial zone that constituted a nonconforming use.²¹ They sought variances to use the property as an automobile repair shop, another use prohibited in the industrial zone, and the ZBA granted the variances.²²
 - b. The trial court upheld the ZBA decision, concluding that “the proposed use for the subject property... would be far less offensive to the surrounding residents than a foundry.”²³

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 17-18.

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 18.

²⁰ *Verrillo* at 687.

²¹ *Adolphson v. Zoning Bd. of Appeals of Town of Fairfield*, 205 Conn. 703, 705 (1988)

²² *Id.* at 706.

²³ *Id.*

- c. The Supreme Court affirmed the trial court, emphasizing that the applicants were seeking “to change an established nonconforming use to a less offensive nonconforming use.”²⁴ Significantly, the Court held that a variance eliminating a nonconforming use “constitutes independent grounds for sustaining the granting of a variance.”²⁵
- 2. *Stancuna v. Wallingford ZBA* (1991 Appellate Court case also applying the hardship alternative).
 - a. The applicant owned a single-family residence in a commercial district, a nonconforming use, and sought a variance to construct a new commercial building.²⁶
 - b. The ZBA granted the variance, and the trial court upheld the ZBA decision.²⁷
 - c. The Appellate Court, citing *Adolphson*, held that because “the variance eliminates the nonconforming residential use of the property and allows a commercial use in a commercial zone,” the variance was properly granted.²⁸
- 3. *Vine v. North Branford ZBA* (The most recent 2007 Supreme Court case applying the hardship alternative).
 - a. The applicant proposed converting three nonconforming (undersized) lots into two lots after a public utility easement reduced the buildable area, and also sought a variance of the minimum lot area and shape requirements in order to build on one of the two proposed lots.²⁹
 - b. The ZBA granted the variance, noting the minimal impact of the variance and a lower housing density resulting from the circumstances.³⁰
 - c. The trial court upheld the ZBA decision, concluding that the public utility easement created an unusual hardship justifying the variance.³¹
 - d. The Supreme Court ultimately concluded that the ZBA’s “decision to grant the variance was proper because it reduced the preexisting nonconforming use of the property to a less offensive use.”³²

²⁴ *Id.* at 712.

²⁵ *Id.* at 710.

²⁶ *Stancuna v. Zoning Bd. of Appeals of Town of Wallingford*, 66 Conn. App. 565, 567-571 (2001).

²⁷ *Id.* at 567.

²⁸ *Id.* at 573.

²⁹ *Vine v. Zoning Bd. of Appeals of Town of N. Branford*, 281 Conn. 553, 556-557 (2007).

³⁰ *Id.* at 557-558.

³¹ *Id.* at 558.

³² *Id.* at 563.

E. Bottom Lines

Three key takeaways emerged from these cases and remain today. First, as the Supreme Court has repeatedly and explicitly stated, the power to grant variances must be exercised sparingly. Second, unusual or peculiar circumstances affecting a property do not alone justify granting a variance where the property continues to have "economic value" in absence of the variance. Third, a variance may be granted despite the lack of an unusual hardship if the requested variance reduces or eliminates an existing nonconformity.