

Chapter 9

Variances

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§ 9:1 Policy behind variances and limitations on granting them

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ¶484 to 487
C.J.S., Zoning and Land Planning §§ 234 to 237

While some municipalities have a zoning board of appeals established by special act, the authority of the zoning board of appeals to grant variances in most municipalities is governed by section 8-6(a)(3) of the General Statutes. These acts have comparable provisions. Section 8-6(a)(3) allows the board to vary the application of the zoning ordinance or regulations, consistent "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."

The existence of the variance power recognizes that zoning regulations which permit some uses of land and limit or prohibit

others will adversely affect individual property rights in some cases, and variances furnish elasticity in the application of the regulations so they do not operate in an arbitrary or confiscatory and therefore, unconstitutional manner.¹ Without authorization to a board of appeals or some similar agency to grant variances, it would be difficult, if not impossible, to keep the law "running on an even keel" and to prevent attacks upon the constitutionality of the zoning ordinance.² "A board of appeals is indispensable to the zoning process both from the constitutional and the practical standpoint."³ The variance power, however, should be sparingly exercised⁴, and variances can be granted only where a situation falls fully within the specified conditions in the statute.⁵ Otherwise the variance power would be used to confer benefits on property owners not granted to others under similar circumstances. However, a variance for specific property prevents unreasonable restrictions on its use and a taking of it, by providing relief from the comprehensive plan and the uniformity requirement in a proper case.

A variance is granted for a particular piece of property and can be used by all subsequent owners; it is a legal status granted to property, and for that reason the financial loss or potential of financial advantage to the property owner is not a proper consideration for the zoning board of appeals when deciding a variance.⁶

Variances go with the land and apply to the use of the land, not the user of the land.⁷

Accordingly, variances can be granted by the board only when

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¹Reid v. Zoning Board of Appeals of Town of Lebanon, 235 Conn. 850, 855, 670 A.2d 1271, 1274 (1996), quoting this text. Florentine v. Town of Darien, 142 Conn. 415, 425, 115 A.2d 328, 332 (1955).

²Id. at 855, 670 A.2d at 1274. Service Realty Corporation v. Planning and Zoning Board of Appeals of Town of Greenwich, 141 Conn. 632, 635, 109 A.2d 256, 258 (1954); St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 139, 154 A. 343, 345 (1932).

³Florentine v. Town of Darien, 142 Conn. at 425, 115 A.2d at 332.

⁴Pleasant View Farms Development, Inc. v. Zoning Board of Appeals of Town of Wallingford, 218 Conn. 265, 270, 588 A.2d 1372, 1375 (1991);

Lindy's Restaurant, Inc. v. Zoning Board of Appeals of City of Hartford, 143 Conn. 620, 623, 124 A.2d 918, 920 (1956).

⁵Devaney v. Board of Zoning Appeals of City of New Haven, 132 Conn. 537, 540, 45 A.2d 828, 829 (1946); Thayer v. Board of Appeals of City of Hartford, 114 Conn. 15, 23, 157 A. 273, 276 (1931); Piccirillo v. Board of Appeals of City of Bridgeport, 139 Conn. 116, 120, 90 A.2d 647, 648 (1952).

⁶Garibaldi v. Zoning Board of Appeals of City of Norwalk, 163 Conn. 235, 239, 303 A.2d 743, 745 (1972).

⁷Gangemi v. Zoning Board of Appeals of Town of Fairfield, 54 Conn.App. 559, 736 A.2d 167 (1999), rev'd on other grounds 255 Conn. 143, 763 A.2d 1011 (2001).

"exceptional difficulty or unusual hardship" is shown by applying the zoning ordinance to a specific parcel of land. This requires the hardship to be unique, which means that it must be more than and different from the restriction imposed by the zoning regulations on other properties in the area. 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. The requirement that a variance must be consistent with a general purpose and intent of the zoning ordinance is highly important.⁸ These concepts have gradually evolved and been compressed into a requirement that the variance cannot substantially be inconsistent with and effect the comprehensive zoning plan.⁹ This ties in directly with the policy reason behind limited use of the variance power, namely "that unless great caution is used and variations are granted on in proper cases, the whole fabric of town and city-wide zoning will be worn through in spots and raveled at the edges until its purpose in protecting property and securing an orderly development of the community is completely thwarted."¹⁰

Variances result in authorizing a use not otherwise permitted under the zoning ordinance and should not be used to accomplish what amounts to a substantial change in the uses permitted in a specific zone because that encroaches upon the legislative function of the zoning commission in establishment and changes in the zoning regulations.¹¹

A small percentage of the cases have upheld the granting of a variance because the hardship requirement is objectively difficult to prove. The board grants the variance either because no one strenuously objects, or the agency is sympathetic with the applicant and, after considering the effect of it, concludes that it should be granted for essentially equitable reasons. While the zoning board of appeals is the court of equity of the zoning process, fairness to the applicant and lack of significant adverse effect upon surrounding property values, the considerations often

⁸Devaney v. Board of Zoning Appeals of City of New Haven, 132 Conn. at 541, 45 A.2d at 829.

⁹Grillo v. Zoning Board of Appeals of City of West Haven, 206 Conn. 362, 368, 537 A.2d 1030, 1033 (1988) and cases cited therein.

¹⁰Gregorio v. Zoning Board of Appeals of Town of Windsor, 155 Conn. 422, 427, 232 A.2d 330, 333 (1967); Heady v. Zoning Board of Appeals for Town of Milford, 139 Conn. 463, 467,

94 A.2d 789, 790 (1953). Pleasant View Farms Development, Inc. v. Zoning Board of Appeals of Town of Wallingford, 218 Conn. at 270, 271, 588 A.2d at 1375.

¹¹Bradley v. Zoning Board of Appeals of Town of Westport, 165 Conn. 389, 395, 334 A.2d 914, 916 (1973) (holding that the zoning board of appeals abused its discretion in allowing a use not permitted anywhere in the municipality).

applied by zoning boards of appeals, do not meet the legal test for variances as defined in the court decisions interpreting the statute. As a result, almost all appeals from the granting of variances will be sustained by the Superior Court, and appeals from the denial of variances will inevitably be dismissed except in those rare instances of unusual or unique hardships or where denial of a variance results in confiscation.¹²

§ 9:2 Test for variances

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ⇨483, 488
C.J.S., Zoning and Land Planning §§ 191, 229, 235 to 237

A variance is authority granted to a property owner to use his property in a manner forbidden by the zoning regulations.¹ A variance is granted for the particular piece of property, and benefits the present owner and all subsequent owners.² Consistent with prior case law, a statute now states that a variance runs with the land, is not personal to the person who applied for and received it, and does not expire when there is a transfer of title to the property.³ A variance differs from a special permit in that it allows the owner to use his property in a manner not allowed by the zoning ordinance while a special permit allows him to put the property to a use which the ordinance permits under conditions specified in the ordinance.⁴ A list of all the cases through 1953 involving variance applications and appeals, some of which involved special permits or special exceptions, can be

¹²Smith v. Zoning Board of Appeals of Town of Norwalk, 174 Conn. 323, 387 A.2d 542 (1978). See also Willard v. Zoning Board of Appeals of City of Hartford, 152 Conn. 247, 249, 206 A.2d 110, 112 (1964) (where there was nothing in the record for denial of a variance, hardship was clear, no one was injured by the variance and it was consistent with the comprehensive plan after considering the uses of neighboring property).

[Section 9:2]

¹Bloom v. Zoning Board of Appeals of City of Norwalk, 233 Conn. 198, 206, 658 A.2d 559, 563 (1995). Grillo v. Zoning Board of Appeals of City of West Haven, 206 Conn. 362, 372, 537 A.2d 1030, 1035 (1988); Carlson v. Zoning Board of Appeals of

Town of Berlin, 158 Conn. 86, 90, 255 A.2d 841, 844 (1969).

²Garibaldi v. Zoning Board of Appeals of City of Norwalk, 163 Conn. 235, 239, 303 A.2d 743, 745 (1972).

³C.G.S.A. § 8-6(b), as amended by Public Act 93-385, § 1. Reid v. Zoning Board of Appeals of Town of Lebanon, 235 Conn. 850, 859, 670 A.2d 1271, 1276 (1996), quoting this text.

⁴Town of Burlington v. Jencik, 168 Conn. 506, 509, 362 A.2d 1338, 1339 (1975); Lurie v. Planning and Zoning Commission of Town of Westport, 160 Conn. 295, 304, 278 A.2d 799, 804 (1971). Mitchell Land Co. v. Planning and Zoning Board of Appeals of Town of Greenwich, 140 Conn. 527, 532, 102 A.2d 316, 319 (1953).

found in *Mitchell Land Co. v. Planning and Zoning Board of Appeals of Town of Greenwich*.⁵

In order for a zoning board of appeals to grant a variance under § 8-6(a)(3) of the General Statutes, two conditions must be met: (1) the variance must be shown not to substantially affect the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan.⁶

A variance cannot be granted to allow a use which is not otherwise permitted in the municipality.⁷ Variances should not be used to accomplish what is, in effect, a substantial change in the uses permitted in a specified zone.⁸ Where the zoning regulations specify that a use is not allowed in the zone, as allowed by § 8-6(3) of the General Statutes, the board cannot grant a use variance allowing that use or extending a nonconforming use.⁹ This reflects a statement in earlier cases that there must be a balancing of hardship to the property owner and the public interest¹⁰ and that the variance cannot adversely affect the comprehensive plan. See also discussion in sections 22:8, 52:2 and 52:3 on limitations in the zoning regulations for use variances.

A zoning board of appeals cannot grant a variance for a use which is inconsistent with the general purpose and intent of the zoning ordinance or which impairs the integrity of the comprehensive plan.¹¹ However, a use variance may be granted if the use is not prohibited in the municipality, provided it is consistent with

⁵*Mitchell Land Co. v. Planning and Zoning Board of Appeals of Town of Greenwich*, 140 Conn. at 532, 102 A.2d at 319.

⁶*Grillo v. Zoning Board of Appeals of City of West Haven*, 206 Conn. 362, 368, 537 A.2d 1030, 1033 (1988); *Adolphson v. Zoning Board of Appeals of Town of Fairfield*, 205 Conn. 703, 709, 535 A.2d 799, 802 (1988); *Whittaker v. Zoning Board of Appeals of Town of Trumbull*, 179 Conn. 650, 655, 427 A.2d 1346, 1349 (1980); *Smith v. Zoning Board of Appeals of Town of Norwalk*, 174 Conn. 323, 326, 387 A.2d 542, 545 (1978); *Aitken v. Zoning Board of Appeals of Town of Branford*, 18 Conn.App. 195, 204, 557 A.2d 1265, 1269 (1989); *Dupont v. Zoning Board of Appeals of Town of Manchester*, 80 Conn.App. 327, 330, 834 A.2d 801, 803 (2003).

⁷*Bradley v. Zoning Board of Appeals of Town of Westport*, 165 Conn. 389, 395, 396, 334 A.2d 914, 916, 917 (1973).

⁸*Adolphson v. Zoning Board of Appeals of Town of Fairfield*, 205 Conn. 703, 707, 535 A.2d 799, 801 (1988).

⁹*Wells v. Zoning Board of Appeals of City of Shelton*, 180 Conn. 193, 198, 429 A.2d 467, 469 (1980).

¹⁰*Torello v. Board of Zoning Appeals of City of New Haven*, 127 Conn. 307, 311, 16 A.2d 591, 592 (1940).

¹¹*Whittaker v. Zoning Board of Appeals of Town of Trumbull*, 179 Conn. 650, 656, 427 A.2d 1346, 1350 (1980); *Miclon v. Zoning Board of Appeals of Town of Windsor Locks*, 173 Conn. 420, 423, 424, 378 A.2d 531, 532, 533 (1977); *Stavola v. Bulkeley*,

the comprehensive plan and hardship is shown.¹² If the use to be allowed by the variance is consistent with other uses in the area, the first part of the variance test is met, such as where houses in the area of the applicant's property were built on lots which were of the same size or smaller and with similar setbacks.¹³ It is difficult, however, to satisfy the second part of the test, "exceptional difficulty or unusual hardship."¹⁴ An interesting feature of the two part test for a variance is the situation of the undersized residential lot in a subdivision or neighborhood with similar undersized lots. The existence of similar lots may amount to compliance with the comprehensive plan, but make it difficult or impossible to prove unusual or unique hardship.¹⁵ The board can act based upon the observation of the site by board members.¹⁶

§ 9:3 Hardship requirement

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ⇨492

C.J.S., Zoning and Land Planning § 239

The hardship which justifies a zoning board of appeals to grant a variance must be one that originates in the zoning ordinance, and arises directly out of the application of the ordinance to circumstances or conditions beyond the control of the party involved.¹

While the statute and comparable special acts, which were

134 Conn. 186, 189, 56 A.2d 645, 646 (1947). *Piccirillo v. Board of Appeals on Zoning of City of Bridgeport*, 139 Conn. 116, 122, 90 A.2d 647, 649 (1952) (slaughterhouse should not have been allowed in zone by variance where residences on three sides of property).

¹²*Devaney v. Board of Zoning Appeals of City of New Haven*, 143 Conn. 322, 122 A.2d 303 (1956) (use variance for parking upheld).

¹³*Eagan v. Zoning Board of Appeals of Old Lyme*, 20 Conn.App. 561, 564, 568 A.2d 811, 813 (1990) (area and setback variances upheld).

¹⁴C.G.S.A. § 8-6(a)(3).

¹⁵*Francini v. Zoning Board of Appeals of Town of Old Lyme*, 228 Conn. 785, 791, 639 A.2d 519, 522 (1994).

¹⁶*Mrowka v. Board of Zoning Appeals of Town of Plainville*, 134 Conn.

149, 154, 55 A.2d 909, 912 (1947); *Dubiel v. Zoning Board of Appeals of Town of East Hartford*, 147 Conn. 517, 522, 162 A.2d 711, 714 (1960); *Hiavati v. Board of Adjustment of City of New Britain*, 142 Conn. 659, 666, 116 A.2d 504, 507 (1955).

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¹*Archambault v. Wadlow*, 25 Conn.App. 375, 381, 382, 594 A.2d 1015, 1019 (1991) (nonconforming undersized lot arose with enactment of zoning regulations, and requesting a variance was not a self-created hardship); *Mandanici v. Zoning Board of Appeals of City of Shelton*, 50 Conn.App. 308, 311, 717 A.2d 287, 288 (1998); *Whittaker v. Zoning Board of Appeals of Town of Trumbull*, 179 Conn. 650, 658, 427 A.2d 1346, 1350 (1980); *Pollard v. Zoning Board of Appeals of City of Norwalk*, 186 Conn. 32, 40, 438 A.2d 1186, 1190 (1982);

derived initially from provisions in statutes of other states, refer to "exceptional difficulty or unusual hardship," the Supreme Court indicated in *Devaney v. Board of Zoning Appeals of City of New Haven*,² that no court has ever regarded the words "practical difficulties" as having any significance in themselves or that they amount to a separate standard for allowing variances, and the phrase must be construed as a whole. This concept remains unchanged in later cases.³ Connecticut does not follow other states which apply "unnecessary hardship" to use variances and "practical difficulties" to area variances.

Proof of the existence of practical difficulty or unusual hardship is a condition precedent to the granting of a variance.⁴ The applicant has the burden of proving hardship peculiarly affecting his land by the application of the zoning ordinance.⁵ The applicant must show that because of some peculiar characteristic of his property, the strict application of the zoning regulations results in an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone.⁶ Paying taxes on two abutting parcels but only being able to use one is not hardship.⁷ Having one of the highest tax bills because of the formula used by the town for assessing property is not a sufficient hardship to allow the division of one irregularly shaped parcel into two lots.⁸ Increased tax revenues for the municipality is not a ground for a variance.⁹ The hardship required for a vari-

Smith v. Zoning Board of Appeals of Town of Norwalk, 174 Conn. 323, 327, 387 A.2d 542, 545 (1978); *McMahon v. Board of Zoning Appeals of City of New Haven*, 140 Conn. 433, 442, 101 A.2d 284, 289 (1953).

²*Devaney v. Board of Zoning Appeals of City of New Haven*, 132 Conn. 537, 541, 45 A.2d 828, 829 (1946).

³See *Celentano, Inc. v. Board of Zoning Appeals of New Haven*, 149 Conn. 671, 673, 184 A.2d 49, 50 (1962); *Sonn v. Planning Commission of City of Bristol*, 172 Conn. 156, 160, 374 A.2d 159, 161 (1976).

⁴*Spencer v. Zoning Board of Appeals of Town of Stratford*, 15 Conn.App. 387, 389, 544 A.2d 676, 677 (1988); *Miclon v. Zoning Board of Appeals of Town of Windsor Locks*, 173 Conn. 420, 423, 378 A.2d 531, 532 (1977); *Nash v. Zoning Board of Appeals of Town of East Hartford*, 165 Conn. 576, 577, 345 A.2d 35, 35 (1973);

Ward v. Zoning Board of Appeals of Town of Hartford, 153 Conn. 141, 144, 215 A.2d 104, 106 (1965).

⁵*Bloom v. Zoning Board of Appeals of City of Norwalk*, 233 Conn. 198, 207, 208, 658 A.2d 559, 564, 564 (1995). *Scobie v. Idarola*, 155 Conn. 22, 23, 229 A.2d 361, 361 (1967); *Kelly v. Zoning Board of Appeals of Town of Hamden*, 21 Conn.App. 594, 599, 575 A.2d 249, 252 (1990).

⁶*Id.* at 207, 658 A.2d at 564; *Dolan v. Zoning Board of Appeals of Town of Fairfield*, 156 Conn. 426, 430, 242 A.2d 713, 714 (1968).

⁷*Spencer v. Zoning Board of Appeals of Town of Stratford*, 15 Conn.App. at 391, 544 A.2d at 678.

⁸*Bigley v. Board of Zoning Appeals of Stratford*, 1 Conn.Ops. 566, 1995 WL 263727 (1995).

⁹*Dixon v. Zoning Board of Appeals of Town of Milford*, 19 Conn.Sup. 349, 353, 113 A.2d 606, 608 (1955).

ance must be one that originates in the zoning ordinance.¹⁰ Where condemnation of a liquor business occurred, denial of a variance of the separation distance provision was not hardship caused by the ordinance.¹¹

A person is not entitled to a variance where the hardship claimed is not different in kind from that generally affecting property in the same zoning district, namely the hardship is not unique or unusual.¹² The failure of the municipality to enforce the zoning ordinance in the past is immaterial, since the board cannot consider estoppel or laches in deciding whether a variance should be granted, but is limited by the terms of the zoning ordinance and statutory requirements.¹³

The hardship that must exist for a variance is a hardship on the individual property owner, and the board cannot grant a variance for a hardship suffered by the town as a whole¹⁴ or by a general hardship to the neighborhood.¹⁵ The fact that the board granted a variance to another lot owner on the same street in a

¹⁰Pollard v. Zoning Board of Appeals of City of Norwalk, 186 Conn. 32, 39, 438 A.2d 1186, 1190 (1982); Scobie v. Idarola, 155 Conn. 22, 23, 229 A.2d 361, 361 (1967).

¹¹Maraczi v. Zoning Board of Appeals of City of Bridgeport, 155 Conn. 500, 234 A.2d 824 (1967).

¹²Chapman v. Zoning Board of Appeals of Old Lyme, 23 Conn.App. 441, 443, 581 A.2d 745, 746 (1990) (denial of variance where all the other lots in the area were also nonconforming); Green v. Zoning Board of Appeals of Town of Westport, 4 Conn.App. 500, 503, 495 A.2d 290, 291 (1985); Carini v. Zoning Board of Appeals of Town of West Hartford, 164 Conn. 169, 172, 319 A.2d 390, 392 (1972), cert. denied 414 U.S. 831, 94 S.Ct. 64, 38 L.Ed.2d 66 (1973), rehearing denied 414 U.S. 1087, 94 S.Ct. 610, 38 L.Ed.2d 494 (1973); Garibaldi v. Zoning Board of Appeals of City of Norwalk, 163 Conn. 235, 238, 303 A.2d 743, 744 (1972); B.I.B. Associates v. Zoning Board of Appeals of City of Stamford, 161 Conn. 596, 281 A.2d 823 (1971); Belknap v. Zoning Board of Appeals of Town of Easton, 155 Conn. 380, 383, 232 A.2d 922, 924 (1967); Ward v. Zoning Board of Appeals of Town of Hartford, 153

Conn. 141, 143, 146, 215 A.2d 104, 105, 107 (1965); Spencer v. Zoning Board of Appeals of Town of Stratford, 15 Conn.App. 387, 391, 544 A.2d 676, 678 (1988); Murphy, Inc. v. Board of Zoning Appeals of Town of Wilton, 147 Conn. 358, 360, 161 A.2d 185, 186 (1960); Makar v. Zoning Board of Appeals of Town of Fairfield, 150 Conn. 391, 396, 397, 190 A.2d 45, 47, 48 (1963); Bright v. Zoning Board of Appeals of Town of Fairfield, 149 Conn. 698, 706, 183 A.2d 603, 606 (1962); Vine v. Zoning Board of Appeals of Town of North Branford, 93 Conn.App. 1, 6, 887 A.2d 442 (2006), citing this text.

¹³Carini v. Zoning Board of Appeals of Town of West Hartford, 164 Conn. 169, 173, 319 A.2d 390, 392 (1972), cert. denied 414 U.S. 831, 94 S.Ct. 64, 38 L.Ed.2d 66 (1973), rehearing denied 414 U.S. 1087, 94 S.Ct. 610, 38 L.Ed.2d 494 (1973).

¹⁴Finch v. Montanari, 143 Conn. 542, 546, 124 A.2d 214, 215 (1956).

¹⁵Ward v. Zoning Board of Appeals of Town of Hartford, 153 Conn. at 146, 215 A.2d at 107; Kelly v. Zoning Board of Appeals of Town of Hamden, 21 Conn.App. 594, 598, 575 A.2d 249, 252 (1990).

virtually identical situation is not a valid basis for granting a variance.¹⁶

Absent a situation amounting to confiscation, financial loss or the potential of financial advantage to the applicant is not the proper basis for a variance, and does not constitute hardship.¹⁷ Loss of competitive advantage is not sufficient for a variance.¹⁸ A variance also should not be granted to allow the property owner to implement modern technology to expand a use to allow a business to remain competitive¹⁹ because the regulations did not impose an unusual or unique hardship. Financial considerations are relevant only in those exceptional situations where application of the zoning regulations to the property either destroys or drastically reduces its value for any of the uses to which it could reasonably be put and where the regulations as applied bear so little relationship to the purposes of zoning that application of the regulations to the property have a confiscatory or arbitrary effect.²⁰

Where the effect of applying the regulations to the property is so severe as to amount to practical confiscation, that is sufficient

¹⁶Haines v. Zoning Board of Appeals of Town of Oxford, 26 Conn.App. 187, 191, 599 A.2d 399, 401 (1991).

Hoffer v. Zoning Board of Appeals of Town of Oxford, 64 Conn.App. 39, 43, 779 A.2d 214, 217 (2001) (the prior granting of variances to others has no bearing on whether there was hardship for the particular variance requested).

¹⁷Garibaldi v. Zoning Board of Appeals of City of Norwalk, 163 Conn. 235, 239, 303 A.2d 743, 745 (1972); Carlson v. Zoning Board of Appeals of Town of Berlin, 158 Conn. 86, 89, 255 A.2d 841, 843 (1969); Berlani v. Zoning Board of Appeals of Town of Plainville, 160 Conn. 166, 171, 276 A.2d 780, 782 (1970); Laurel Beach Association v. Zoning Board of Appeals of City of Milford, 166 Conn. 385, 387, 349 A.2d 834, 835 (1974); Shell Oil Co. v. Zoning Board of Appeals of Town of Bloomfield, 156 Conn. 66, 70, 238 A.2d 426, 428 (1968); Makar v. Zoning Board of Appeals of Town of Fairfield, 150 Conn. 391, 396, 190 A.2d 45, 47 (1963); Spencer v. Zoning Board of Appeals of Town of Stratford, 15 Conn.App. at 392, 544 A.2d at 679; Benoit v. Zoning Board of Appeals of

Town of Enfield, 148 Conn. 443, 446, 172 A.2d 71, 73 (1961); Paul v. Board of Zoning Appeals of City of New Haven, 142 Conn. 40, 43, 110 A.2d 619, 620 (1955); Heady v. Zoning Board of Appeals of Town of Milford, 139 Conn. 463, 467, 94 A.2d 789, 791 (1953).

¹⁸Forbes v. Zoning Board of Appeals of Town of West Haven, 146 Conn. 547, 550, 153 A.2d 458, 459 (1959).

¹⁹Berlani v. Zoning Board of Appeals of Town of Plainville, 160 Conn. 166, 170, 171, 276 A.2d 780, 782 (1970).

²⁰Vine v. Zoning Board of Appeals of Town of North Branford, 93 Conn.App. 1, 6, 887 A.2d 442 (2006); Grillo v. Zoning Board of Appeals of City of West Haven, 206 Conn. 362, 369, 537 A.2d 1030, 1033 (1988); Berlani v. Zoning Board of Appeals of Town of Plainville, 160 Conn. 166, 171, 276 A.2d 780, 782 (1970); Carlson v. Zoning Board of Appeals of Town of Berlin, 158 Conn. 86, 89, 90, 255 A.2d 841, 843, 844 (1969); Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 144 Conn. 641, 645, 136 A.2d 789, 791 (1957).

hardship to allow and even require the zoning board of appeals to grant a variance.²¹ On the subject of confiscation from zoning ordinances, see section 54. Hardship for a variance can exist where there is proof that there is no market for the property without the requested variance, and the granting of a variance by a zoning board of appeals to allow a rooming house was upheld where the building was functionally obsolete and could not attract retail businesses and commercial offices which existed on other properties in the area and were permitted uses in the zone.²² This is particularly true when the owner's problem resulted from an act of public authorities, such as condemning of all or part of the property.²³ The state does not have to show hardship in an application when it condemns property and applies for a variance of the lot area requirements of the zoning regulations, but if a variance is not obtained prior to the condemnation the state must compensate the property owner pursuant to C.G.S.A. § 48-24 for any remaining contiguous property which does not meet the area regulations as a result of the condemnation.²⁴

When the state intends to condemn property and files for a zoning variance under C.G.S.A. § 48-24 it does not have to submit evidence of unusual hardship in the taking of the property.²⁵

The confiscation test is not the exclusive test for hardship; a

²¹Archambault v. Wadlow, 25 Conn.App. 375, 383, 594 A.2d 1015, 1019 (1991); Stankiewicz v. Zoning Board of Appeals of Town of Montville, 15 Conn.App. 729, 733-35, 546 A.2d 919, 921-22 (1988), affirmed 211 Conn. 76, 556 A.2d 1024 (1989); Smith v. Zoning Board of Appeals of Town of Norwalk, 174 Conn. 323, 387 A.2d 542 (1978); Chevron Oil Co. v. Zoning Board of Appeals of Town of Shelton, 170 Conn. 146, 152, 365 A.2d 387, 390 (1976); Culinary Institute of America v. Board of Zoning Appeals of City of New Haven, 143 Conn. 257, 261, 121 A.2d 637, 639 (1956); Malmstrom v. Zoning Board of Appeals of City of Hartford, 152 Conn. 385, 390, 207 A.2d 375, 377 (1965); Lessner v. Zoning Board of Appeals of Town of Manchester, 151 Conn. 165, 171, 195 A.2d 437, 439 (1963); Libby v. Board of Zoning Appeals of City of New Haven, 143 Conn. 46, 51, 118 A.2d 894, 896 (1955).

²²Collins Group, Inc. v. Board of Zoning Appeals of City of New Haven, 32 Conn.L.Rptr. 341, 2002 WL

1559087 (2002), aff'd 78 Conn.App. 561, 827 A.2d 764 (2003).

²³Smith v. Zoning Board of Appeals of Town of Norwalk; Nielsen v. Board of Appeals on Zoning of Bridgeport, 129 Conn. 285, 289, 27 A.2d 392, 393 (1942); Mabank Corporation v. Board of Zoning Appeals of City of Stamford, 143 Conn. 132, 136, 120 A.2d 149, 151 (1956) (overruled in part by, Garibaldi v. Zoning Bd. of Appeals of City of Norwalk, 163 Conn. 235, 303 A.2d 743 (1972)). But see Rogers v. Zoning Board of Appeals of Town of Orange, 154 Conn. 484, 488, 489, 227 A.2d 91, 93, 94 (1967).

Couture v. Bristol Zoning Board of Appeals, 34 Conn.L.Rptr. 351, 2003 WL 1874728 (2003).

²⁴Smith v. Zoning Board of Appeals of Town of Norwalk, 174 Conn. 323, 327, 328, 387 A.2d 542, 545, 546 (1978).

²⁵Smith v. Zoning Board of Appeals of Town of Norwalk, 174 Conn. at 327, 328, 387 A.2d at 545; Couture v. Bristol Zoning Board of Appeals, 34 Conn.L.Rptr. at 352.

variance may be granted if the literal enforcement of a regulation causes exceptional difficulty or hardship because of some unusual characteristic of the property.²⁶ There was a deprivation of reasonable use where the narrowness and topography of the property provided only a limited area for a commercial building, and the possibility of using a rundown house for residential purposes as a nonconforming use did not prevent a variance where the denial of one would deprive the owner of reasonable use of the property.²⁷ In a later case the Appellate Court stated that the concept of denial of reasonable use of the property was not a proper test to apply in a variance appeal, and interpreted the *Giarrantano* case on the more limited ground that under its facts the record showed unusual hardship which justified a variance.²⁸

Topographic conditions on the property involved in the application may be the basis for granting a variance, as long as other properties in the area do not have the same problem.²⁹ The location of the property may also create hardship.³⁰ Under some circumstances uncertainty as to the proper application of a zoning regulation may create an unnecessary hardship which would justify the granting of a variance.³¹ However, a later case states that uncertainty of the zoning ordinance does not support the finding of undue hardship needed for a variance, distinguishing *Leveille*, but not discussing *Shell Oil*.³² The arbitrariness of a decision of the zoning enforcement officer is not a hardship because

²⁶*Giarrantano v. Zoning Board of Appeals of City of Norwich*, 60 Conn.App. 446, 453, 760 A.2d 132, 136 (2000).

²⁷*Giarrantano v. Zoning Board of Appeals of City of Norwich*, 60 Conn.App. at 454, 760 A.2d at 136 (case remanded to determine if the comprehensive zoning plan would be substantially affected by a variance).

²⁸*Vine v. Zoning Board of Appeals of Town of North Branford*, 93 Conn.App. at 9.

²⁹*Stillman v. Zoning Board of Appeals of Town of Redding*, 25 Conn.App. 631, 637, 596 A.2d 1, 4 (1991); *Kelly v. Zoning Board of Appeals of Town of Hamden*, 21 Conn.App. 594, 599, 575 A.2d 249, 252 (1990); *Miclon v. Zoning Board of Appeals of Town of Windsor Locks*, 173 Conn. 420, 423, 424, 378 A.2d 531, 532 (1977); *Talmadge v. Board of Zoning Appeals of City of New Haven*, 141

Conn. 639, 643, 644, 109 A.2d 253, 255 (1954); *Plumb v. Board of Zoning Appeals of City of New Haven*, 141 Conn. 595, 601, 108 A.2d 899, 902 (1954); *Fiorilla v. Zoning Board of Appeals of City of Norwalk*, 144 Conn. 275, 280, 129 A.2d 619, 622 (1957).

³⁰*Plumb v. Board of Zoning Appeals of City of New Haven*, 141 Conn. 595, 601, 108 A.2d 899, 902 (1954).

³¹*Shell Oil Co. v. Zoning Board of Appeals of Town of Bloomfield*, 156 Conn. 66, 70, 238 A.2d 426, 428 (1968); *Leveille v. Zoning Board of Appeals of Town and City of Meriden*, 145 Conn. 468, 472, 144 A.2d 45, 47 (1958) (uncertainty as to zone boundary).

³²*Mezick v. Zoning Board of Appeals of Monroe*, 9 Conn.Super.Ct.Rpts. 927, 1994 WL 411327 (1994); *Wnuk v. Zoning Board of Appeals of City of New Britain*, 225 Conn. 691, 698-99, 626 A.2d 698, 701-02 (1993).

if the ordinance does not prohibit the proposed use, then the use is allowed and a variance is inappropriate.³³

A variance which will eliminate a nonconforming use is an independent ground for approving the variance.³⁴

The concept that the grounds for the variance must arise from circumstances beyond the applicant's control, is related to the concept that variances cannot be granted for a self-created hardship. Where a hardship is self-created, the zoning board of appeals cannot properly grant a variance.³⁵ It has been held that where the zoning board of appeals denies a variance application on grounds of self-created hardship, that even though the applicant has the burden of proof on the appeal that the board has the burden of proof on self-created hardship, which is analogous to a special defense.³⁶ These cases often concern location of structures or lot division lines. Connecticut does not recognize a good faith exception to the hardship rule for variances, which is allowed in some other states.³⁷ Whether a variance can or should be granted depends upon the facts of each case. The decisions referred to below are generally but not entirely consistent with each other.

Self-created hardship is not a sufficient reason for a variance because the hardship does not arise from the application of the zoning regulations per se, but from the zoning regulations coupled with an individual's personal needs, preferences and circumstances.³⁸ Self-created hardship exists when the problem is caused by someone hired by the property owner.³⁹ In one case it has been held that an honest error made by surveyor who was an indepen-

³³Id. at 697, 626 A.2d at 701.

³⁴*Stancuna v. Zoning Board of Appeals of Town of Wallingford*, 66 Conn.App. 565, 572, 785 A.2d 601, 607 (2001).

³⁵*Pollard v. Zoning Board of Appeals of City of Norwalk*, 186 Conn. 32, 39, 40, 438 A.2d 1186, 1189, 1190 (1982); *Abel v. Zoning Board of Appeals of City of Norwalk*, 172 Conn. 286, 289, 374 A.2d 227, 228 (1977); *M. & R. Enterprises, Inc. v. Zoning Board of Appeals of Town of Southington*, 155 Conn. 280, 282, 231 A.2d 272, 273 (1967); *Highland Park, Inc. v. Zoning Board of Appeals of Town of North Haven*, 155 Conn. 40, 43, 229 A.2d 356, 357 (1967); *Booe v. Zoning Board of Appeals of City of Shelton*, 151 Conn. 681, 683, 202 A.2d 245, 246 (1964); *Wil-Nor Corporation v. Zoning Board*

of Appeals of City of Norwalk, 146 Conn. 27, 31, 147 A.2d 197, 199 (1958); *Hadik v. Zoning Board of Appeals of Town of Norwalk*, 146 Conn. 737, 738, 150 A.2d 606, 606 (1959).

³⁶*Dupont v. Zoning Board of Appeals of Town of Manchester*, 33 Conn.L.Rptr. 209, 2002 WL 31415204 (2002), rev'd on other grounds 80 Conn.App. 327, 834 A.2d 801 (2003).

³⁷*Osborne v. Zoning Board of Appeals, Town of Guilford*, 9 Conn.Super.Ct.Rpts. 689, 690, 1994 WL 271858 (1994), reversed on other grounds, 41 Conn.App. 351, 675 A.2d 917 (1996).

³⁸*Garibaldi v. Zoning Board of Appeals of City of Norwalk*, 163 Conn. at 239, 303 A.2d at 745.

³⁹*Highland Park, Inc. v. Zoning Board of Appeals of Town of North Ha-*

dent contractor hired by property owner's architect was not a self-created hardship,⁴⁰ without referring to other cases which hold that an error made by someone hired by the property owner is imputed to the owner. This deviation is arguably an equitable exception from the harsh rule in the earlier cases, but the legal distinction is questionable. Where a building was constructed in violation of the zoning regulations but in good faith reliance on the erroneous issuance of a building permit, there was sufficient hardship to allow a variance since the building was built before the mistake was discovered, and the error was not a self-created hardship.⁴¹ The desire to subdivide property into 2 lots is a voluntary hardship created by the applicant requiring denial of a variance.⁴² A sale of part of a tract which leaves the remainder as a nonconforming lot is a self-created hardship.⁴³

The construction of a deck on a building in violation of the zoning setback is a self-created hardship which justifies the denial of a variance.⁴⁴

In one case where the property owner commenced construction while a variance allowing it was being appealed and the appeal was later sustained because of defective notice, the owner's reckless conduct in proceeding with construction was considered self-created hardship when the board denied the second variance application.⁴⁵ Where a building permit was issued for construction of a building and the zoning regulations were then amended to prohibit the use unless construction had begun prior to the effective date of the amendment and was completed within two years after it, failure to build within these time limits was a self-created hardship and a variance was not properly issued for an exten-

ven, 155 Conn. 40, 43, 229 A.2d 356, 357 (1967). Pollard v. Zoning Board of Appeals of City of Norwalk, 186 Conn. at 41, 42, 438 A.2d at 1190, 1191; Grogan v. Zoning Board of Appeals of Old Lyme, 8 Conn.Super.Ct.Rptr. 484, 1993 WL 126504 (1993).

⁴⁰Osborne v. Zoning Board of Appeals of Town of Guilford, 41 Conn.App. 351, 354, 355, 675 A.2d 917, 918, 919 (1996).

Philpot v. Zoning Board of Appeals of Town of Woodbridge, 9 Conn.Ops. 871, 2003 WL 21659693 (2003).

⁴¹Gallagher v. Wallingford Zoning Board of Appeals, 18 Conn.L.Rptr. 544, 1997 WL 32781 (1997).

⁴²Aitken v. Zoning Board of Appeals of Town of Branford, 18

Conn.App. 195, 206, 557 A.2d 1265, 1270 (1989); Rice v. Old Saybrook Zoning Board of Appeals, 38 Conn.L.Rptr. 842, 845 (2005).

Dupont v. Zoning Board of Appeals of Town of Manchester, 80 Conn.App. 327, 330, 331, 834 A.2d 801, 804 (2003), citing this text.

⁴³Booe v. Zoning Board of Appeals of City of Shelton; Mesick v. Zoning Board of Appeals of Guilford, 1 Conn.Super.Ct.Rpts. 78 (1986).

⁴⁴Just Bee, LLC v. Black Point Beach Club Zoning Board of Appeals, 9 Conn.Ops. 1084, 2003 WL 21675943 (2003).

⁴⁵McGavin v. Zoning Board of Appeals of Town of Westport, 26 Conn.Sup. 251, 255, 217 A.2d 229, 232 (1965).

sion.⁴⁶ Denial of a variance to allow maintaining of a swimming pool in violation of the setback regulations is proper and any hardship of the property owner in relocating it was self-created.⁴⁷

Where a variance was given because the owner relied on an improperly granted building permit and the removal of a dormer and porch were required, there was no hardship to support the variance because (1) the owners were not entitled to a variance before their improvements were made and (2) limitations imposed by the shape of the lot did not in and of themselves create a hardship.⁴⁸ There was no hardship for a variance of the maximum building coverage provision on a legal undersized lot, where the owner wanted more living space in a larger building.⁴⁹

Where the zoning regulations have a merger provision for adjacent lots, and the owner conveys one of them away, there is a self-imposed hardship which precludes a variance for the seller's remaining land and for a buyer of the lot who received a conveyance of one of the lots with knowledge of the zoning regulation.⁵⁰ However, where a lot was purchased with inadequate frontage based on prior opinion of town counsel that undersized lots which predated zoning could be built upon, there was no self-created hardship which precluded a variance.⁵¹ Self-created hardship should not be applied where the regulations create a hardship themselves and the other requirements for a variance are met, and the hardship is the same as if the applicant or his agent had not acted without a variance.

Personal hardship is not a ground for the granting of a variance.⁵² However, where a buyer of property does not purchase it with knowledge of the problem and the hardship arises as the result of a voluntary act by one other than the person whom the variance will benefit, the zoning board of appeals within its discretion may grant a variance, although it is not required to do

⁴⁶*Farrington v. Zoning Board of Appeals of Noank Fire District*, 177 Conn. 186, 189, 413 A.2d 817, 818 (1979).

⁴⁷*Hadik v. Zoning Board of Appeals of Town of Norwalk*, 146 Conn. 737, 738, 150 A.2d 606, 606 (1959).

⁴⁸*Bloom v. Zoning Board of Appeals of City of Norwalk*, 233 Conn. 198, 209, 210, 658 A.2d 559, 565, 565 (1995).

⁴⁹*McCarthy v. Zoning Board of Appeals of North Branford*, 2 Conn.Ops. 1032, 1996 WL 499173

(1996).

⁵⁰*Kores v. Canton Zoning Board of Appeals*, 5 Conn.Super.Ct.Rpts. 872, 873, 1990 WL 276648 (1990).

⁵¹*Lessner v. Zoning Board of Appeals of Town of Manchester*, 151 Conn. 165, 195 A.2d 437 (1963).

⁵²*Garibaldi v. Zoning Board of Appeals of City of Norwalk*, 163 Conn. 235, 239, 240, 303 A.2d 743, 745, 746 (1972); *Pollard v. Zoning Board of Appeals of City of Norwalk*, 186 Conn. at 44, 438 A.2d at 1192.

so.⁵³ Where the construction of deck on a house by the prior property owner which made the house nonconforming as to coverage was a zoning violation and a self-created hardship, and the board concluded that the subsequent purchaser had no knowledge of the violation and granted a variance which allowed the deck to remain, it was upheld on appeal.⁵⁴ A prior application to the zoning commission which resulted in a zone change is not considered a self-created hardship barring a variance of another zoning regulation.⁵⁵

The applicant for a variance must show that because of some peculiar or unique characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone.⁵⁶ In a proper case the location of the property, its unusual soil conditions, topography and drainage problems may make it unsuitable for residential use and allow a variance for a nonresidential use.⁵⁷ Where a lot was not suitable for residential use because the health department would not approve a septic system for it, the land could not be sold for a reasonable price to an adjacent landowner for use as a side yard, and there was no reasonable alternative use of the lot, there was an unusual hardship which required the board to grant a variance, with conditions, to allow a nonresidential use in the zone.⁵⁸ In addition, since the use was a permitted use in the zone, the court rejected a conclusion that a variance would be contrary to

⁵³*Belknap v. Zoning Board of Appeals of Town of Easton*, 155 Conn. 380, 384, 232 A.2d 922, 924 (1967) (undersized lot caused by defect in title created by a predecessor in title to the applicant); *Whittaker v. Zoning Board of Appeals of Town of Trumbull*, 179 Conn. 650, 657, 658, 427 A.2d 1346, 1350, 1351 (1980).

⁵⁴*Whitehead v. East Haven Zoning Board of Appeals*, 2004 WL 1462829 (Conn.Super.2004).

⁵⁵*Lawrence and Memorial Hospital, Inc. v. Zoning Board of Appeals of City of New London*, 22 Conn.App. 291, 300, 301, 577 A.2d 740, 744, 745 (1990).

⁵⁶*Berlani v. Zoning Board of Appeals of Town of Plainville*, 160 Conn. 166, 170, 276 A.2d 780, 782 (1970); *Belknap v. Zoning Board of Appeals of*

Town of Easton, 155 Conn. 380, 383, 232 A.2d 922, 924 (1967); *Garibaldi v. Zoning Board of Appeals of City of Norwalk*, 163 Conn. at 238, 239, 303 A.2d at 744, 745; *B.I.B. Associates v. Zoning Board of Appeals of City of Stamford*, 163 Conn. 615, 316 A.2d 414 (1972); *Dlugos v. Zoning Board of Appeals of Town of Trumbull*, 36 Conn.Sup. 217, 221, 416 A.2d 180, 182 (1980).

⁵⁷*Pike v. Zoning Board of Appeals of Town of Hampton*, 31 Conn.App. 270, 274, 624 A.2d 909, 911 (1993), citing this text. *Goldreyer v. Board of Zoning Appeals of City of Bridgeport*, 144 Conn. 641, 645, 136 A.2d 789, 791 (1957).

⁵⁸*Pike v. Zoning Board of Appeals of Town of Hampton*, 31 Conn.App. 270, 276, 624 A.2d 909, 912 (1993).

the comprehensive plan.⁵⁹ A variance granted by a zoning board of appeals has been upheld where no house could be built on an irregularly shaped lot even though a prior structure on the lot had been demolished, because a house was an appropriate use in a residential zone, and the demolition of the structure was not directly related to whether a variance should be granted, since the application would be the same if the old structure (a garage and summer apartment unit) had been in place, since the hardship was the shape of the lot; a claim of self created hardship was rejected because the demolition of the structure violated no zoning laws, and was not germane to the hardship for the type of variance requested.⁶⁰

In some cases the board within its discretion can find that the configuration of a lot and the location of the well and septic system is a hardship unique to the property.⁶¹ A setback variance was upheld based upon topographical conditions on a parcel of land where the shape of the property and the location of wetlands in the middle of it limited the area where structures could be located.⁶² Where a confiscation situation will occur a variance granted by the board will be upheld even if the hardship is not unique to the neighborhood where the buyer of a lot relied upon advice from zoning officials based upon advice of town counsel (that the frontage of the lot did not prevent issuance of permits even though it did not meet current zoning regulations).⁶³ Where the property is a valid nonconforming lot, and a building could not conform to the setback requirements, denial of a variance which prevented all use of the lot was a practical confiscation.⁶⁴ There was no hardship to justify a variance of a setback provision to build a house in one location on a lot because of tidal wetlands where a house could be located on the lot and still conform to the setbacks.⁶⁵

A variance granted by a zoning board of appeals for a vacant lot was upheld even though it was possible to build a house which was smaller than the proposed structure without a variance, where the size of the lot, a storm drainage easement, the fact

⁵⁹Id. at 277, 624 A.2d at 913.

⁶⁰O'Neill v. Madison Zoning Board of Appeals, 24 Conn.L.Rptr. 176, 5 Conn. Ops. 365, 1999 WL 185128 (1999).

⁶¹Stillman v. Zoning Board of Appeals of Town of Redding, 25 Conn.App. 631, 637, 596 A.2d 1, 4 (1991), certification denied 220 Conn. 923, 598 A.2d 365 (1991).

⁶²Fifteen North Plains Industrial Road, LLC v. Wallingford Zoning

Board of Appeals, 10 Conn.Ops. 1293, 2004 WL 2439734 (Conn.Super.2004).

⁶³Lessner v. Zoning Board of Appeals of Town of Manchester, 151 Conn. 165, 169, 195 A.2d 437, 438 (1963).

⁶⁴Archambault v. Wadlow, 25 Conn.App. at 383, 594 A.2d at 1020.

⁶⁵Jaser v. Zoning Board of Appeals of City of Milford, 43 Conn.App. 545, 548, 684 A.2d 735, 737 (1996).

that the lot abutted a river, and the setback lines were unique features of the lot which prevented construction of a house reasonably similar in size to the other houses in the area.⁶⁶ However, the zoning board of appeals failed to make the specific written findings required by a section of the zoning regulations, and the court remanded the variance to the board based on C.G.S.A. § 8-8(1) with instructions that it make the findings necessary under the zoning regulation.⁶⁷

Where a house could be located on a lot to comply with a 42 foot setback for the zone, there was no hardship for a variance approving a 20 foot setback.⁶⁸ Difficulty caused by the location of the septic system on the property and a restrictive covenant limiting areas where a structure would be built were not considered hardship caused by the zoning regulations sufficient to allow a variance in one case.⁶⁹ It has been held that a variance cannot be granted for aesthetic reasons because that is not a hardship where there were other remedies and options to construct a building on the lot.⁷⁰ A claim by a private school that it had to comply with a federal sex discrimination law and build a new gymnasium which outgrew its location was not considered an unusual hardship sufficient to justify a variance of the density and setback regulations.⁷¹ The fact that a zoning board of appeals may have granted somewhat similar variances on prior occasions to other applicants is not controlling⁷² unless the record clearly shows a pattern of unreasonable discrimination.⁷³

An applicant for modification of a condition attached to a variance must prove to show hardship, and evidence that a material

⁶⁶*Carberry v. Zoning Board of Appeals of City of Stamford*, 30 Conn.L.Rptr. 537, 2001 WL 1374753 (2001).

⁶⁷*Carberry v. Zoning Board of Appeals of City of Stamford*, 30 Conn.L.Rptr. at 542.

⁶⁸*Flaherty v. Zoning Board of Appeals of Branford*, 3 Conn.Ops. 521 (1997).

⁶⁹*Allen v. Zoning Board of Appeals of Town of Danbury*, 155 Conn. 506, 511, 235 A.2d 654, 656 (1967).

⁷⁰*Cooper v. Norwalk Zoning Board of Appeals*, 2 Conn.Ops. 1091, 1996 WL 526887 (1996).

⁷¹*Whitneyville Civic Association, Inc. v. Chorney*, 2 Conn.Ops. 1030, 1996 WL 502175 (1996).

⁷²*Aitken v. Zoning Board of Appeals of Town of Branford*, 18 Conn.App. 195, 205, 557 A.2d 1265, 1270 (1989); *Ward v. Zoning Board of Appeals of Town of Hartford*, 153 Conn. 141, 146, 215 A.2d 104, 107 (1965).

⁷³*Carini v. Zoning Board of Appeals of Town of West Hartford*, 164 Conn. 169, 172-74, 319 A.2d 390, 392-93 (1972), cert. denied 414 U.S. 831, 94 S.Ct. 64, 38 L.Ed.2d 66 (1973), rehearing denied 414 U.S. 1087, 94 S.Ct. 610, 38 L.Ed.2d 494 (1973).

change in circumstances has made the condition unreasonable is insufficient.⁷⁴

Several cases have discussed the difficulties of adding on to existing residences where the expansion is over the zoning setbacks, which physically restrict where the addition can be built, and there are problems of building without infringing on the setbacks. In one case, where a two car detached garage was approved, the zoning board of appeals initially gave no reason for the variance, but claimed on appeal that the location of the existing garage in a flood plain (a topographic problem) caused it to flood; on appeal the trial court found a self-created hardship because the property owner had converted the existing garage into a storage area.⁷⁵ A variance was upheld where the owner of a residential lot wanted to add a two car garage over the side yard setback in a neighborhood where most other properties had two car garages.⁷⁶ A variance from setbacks and lot coverage for a garage was overturned on appeal because there was no hardship where the owners had a garage on the lot which they wanted to convert into an apartment for an elderly parent, and the fact that the slope of the lot made it difficult to build another garage on the lot did not justify the variance on grounds of a topographic hardship.⁷⁷ In another case a variance for an addition to a house was upheld where it could only be constructed within the setbacks.⁷⁸ Both cases relied upon the Appellate Court decision in *Stillman v. Zoning Board of Appeals of Redding*,⁷⁹ which was later questioned in *Bloom v. Zoning Board of Appeals*.⁸⁰

A setback variance was upheld for approval of the location for a new garage when it was discovered that the driveway to the existing garage was on adjacent land and had to be discontinued when it was fenced off by the owner of the abutting parcel, and due to topographic conditions on the property including steepness

⁷⁴*Fleet National Bank v. Zoning Board of Appeals of Town of Winchester*, 54 Conn.App. 135, 141, 734 A.2d 592 (1999), overruling by implication *Caseria v. Zoning Board of Appeals of Bridgeport*, 14 Conn.L.Rptr. 407, 1 Conn.Ops. 717, 718, 1995 WL 360794 (1995).

Jaffe v. Town of Westport Zoning Board of Appeals, 37 Conn.L.Rptr. 309 (2004).

⁷⁵*Armstrong v. Westport Zoning Board of Appeals*, 1998 WL 851466 (1998).

⁷⁶*Merlo v. Zoning Board of Ap-*

peals of Wethersfield, 16 Conn.L.Rptr. 394, 1996 WL 166348 (1996).

⁷⁷*Remesch v. Town of Andover*, 10 Conn.Ops. 133, 2003 WL 22709024 (2003).

⁷⁸*Brown v. Zoning Board of Appeals of Town of New Fairfield*, 22 Conn.L.Rptr. 406, 4 Conn.Ops. 894, 1998 WL 417592 (1998).

⁷⁹*Stillman v. Zoning Board of Appeals of Redding*, 25 Conn.App. 631, 596 A.2d 1 (1991).

⁸⁰*Bloom v. Zoning Board of Appeals*, 233 Conn. 198, 210, 658 A.2d 559, 565 (1995).

of the grade of the land, a new driveway could not be constructed to access the existing garage without causing safety problems.⁸¹

Where the design of a proposed building had a roof line which exceeded the height limitation in the zoning regulations, there was no hardship which would allow a variance even though an existing adjacent structure was the same height and the new building was consistent with the neighborhood.⁸²

There was sufficient hardship for a variance where the zoning setback line on a vacant lot which existed before there were zoning regulations in the town limited the owner to a 10 foot wide building.⁸³

A side yard setback variance to allow the expansion of a house was upheld where the zoning board of appeals found that there was a hardship due to the location of an existing deck and pool at the rear of the house, and the location of the septic system and leaching fields on the other side of the house which were there when the owners bought the property, and the board found that abutting owners would not be adversely affected by the variance.⁸⁴

The granting of variances for a garage and additions to a house with historic significance was upheld where the owners purchased the property believing that they could build a garage based upon a variance granted 20 years earlier which ran with the land, and the location of the house and driveway limited where a garage could be built; the court concluded that these limitations were not personal to the owners and would exist no matter who owned the property.⁸⁵

It was held in one case that the zoning board of appeals exceeded its authority in granting a variance where there was a boundary line dispute in litigation with an abutting property owner, because there would be no hardship until the case was lost by the applicant, and the variance was not ripe for adjudication; the trial court's reasoning was that this was only a potential hardship, so that the variance would not be necessary if the applicant prevailed in the boundary line dispute litigation.⁸⁶ This decision is questionable, because at the time of the variance ap-

⁸¹Theodorides, Sr. v. New Milford Zoning Board of Appeals, 9 Conn.Ops. 1332, 2003 WL 22390683 (2003).

⁸²Esposito v. Zoning Board of Appeals of Town of Hamden, 25 Conn.L.Rptr. 315, 2000 WL 157893 (2000).

⁸³Stancuna v. Zoning Board of Appeals of Town of Wallingford, 66 Conn.App. 565, 785 A.2d 601 (2001).

⁸⁴Kelley v. Willington Zoning Board of Appeals, 29 Conn.L.Rptr. 551, 2001 WL 649444 (2001).

⁸⁵Weber v. Town of Ridgefield Zoning Board of Appeals, 10 Conn.Ops. 917, 2004 WL 1463924 (2004).

⁸⁶DeMarchant v. Middletown Zoning Board of Appeals, 33 Conn.L.Rptr. 541, 2002 WL 31928600 (2002).

plication it was arguable that there was hardship and a variance was required, and the standing to request a variance should be based on the then existing situation and not possible future events.

The denial of a variance was upheld where the property owner of a large parcel of land sold the development rights to the state, making it impossible for the owners to subdivide the property to create another lot for a second residence; the court held that the failure to have a second residence on one lot, which was not allowed by the zoning regulations, was not unique, was only a personal financial hardship and did not amount to an unconstitutional taking of the land.⁸⁷

A variance for land along the shore was upheld where the zoning board of appeals found hardship because of beach erosion, and the location and size of the residence was changed from two prior applications which had been denied, since the hardship arose from forces of nature and the unusual characteristics of the property, and even though the owner had added some acreage to the parcel.⁸⁸ A height variance for historic buildings which were in disrepair and designed for a use which was no longer economically feasible was upheld, where the board had concluded that the location on the parcel and its orientation to other buildings created a unique hardship, and there was no adverse impact on the neighborhood from granting the variance.⁸⁹ A setback variance for an addition to commercial manufacturing use was upheld where there was evidence that the manufacturing processes required proximity to the existing structure, and inland wetlands on the property restricted where the addition could be built.⁹⁰

A variance to build an addition on a house for a second dwelling unit for an elderly relative of the owner with medical problems was denied because it was a personal hardship, and the cost to the relative of living somewhere else was an economic hardship which was insufficient to support a variance.⁹¹

Where an existing inn purchased an adjacent parcel for purposes of expansion of the building, the uniqueness of the orig-

⁸⁷John and Joan Linderman Trust v. Franklin Zoning Board of Appeals of Town of Franklin, 34 Conn.L.Rptr. 279, 2003 WL 1477294 (2003).

⁸⁸Overshore Association, Inc. v. Zoning Board of Appeals of Town of Madison, 8 Conn.Ops. 1332, 2002 WL 31501896 (2002).

⁸⁹Maiorano v. New Haven Board of Zoning Appeals, 9 Conn.Ops. 230, 2003 WL 294598 (2003).

⁹⁰Simons Co. v. City of Shelton, Zoning Board of Appeals, 9 Conn.Ops. 529, 2003 WL 1874760 (2003).

⁹¹Panebianco v. Borea, 9 Conn.Ops. 413, 2003 WL 1227961 (2003). See also Lagasse v. Zoning Board of Appeals of Town of Andover, 9 Conn.Ops. 1511, 2003 WL 22903869 (2003), variance for an addition to an existing house was not justified because one of the owners was partially disabled and had difficulty climbing

inal parcel did not justify a finding of hardship for setback variances and a variance to extend the business zone boundary further into the adjacent residential zone on the adjacent, recently acquired parcel.⁹²

A variance was improperly granted to expand a building which housed a nonconforming commercial use in a residential zone even though the property had been held in continuous ownership by the same person since the enactment of zoning in the town, because this was only a personal hardship and did not meet the basic zoning concept that zoning regulations must directly affect land, not the owners of land.⁹³ The Appellate Court also distinguished cases which held that a variance could be granted to change an established nonconforming use to a less nonconforming use or to eliminate a nonconforming use, because under the evidence before the zoning board of appeals the business use would be expanded, even though there were some benefits from the variance, and it would allow the owner to operate the business more efficiently and remain competitive, that was legally insufficient to prove hardship.⁹⁴

A setback variance was upheld for a house on a small lot which did not meet the minimum lot size for the zone of 20,000 square feet because without a variance the house would be the size of a two or three car garage, which was impractical, and other houses in the area were also on small nonconforming lots, which met the requirement that a variance cannot adversely affect the comprehensive plan.⁹⁵

A variance allowing three lots to use two accessways rather than having direct frontage on a street was overturned because there was no hardship and the property could be developed without a variance, even though there would be better sight lines on the street and the proposed accessway was more practical and less expensive.⁹⁶

stairs.

⁹²*Stember v. Zoning Board of Appeals of City of Norwalk*, 10 Conn.Ops. 422, 2004 WL 616118 (2004).

⁹³*Horace v. Zoning Board of Appeals of Town of Salem*, 85 Conn.App. 162, 167, 168, 855 A.2d 1044, 1048 (2004).

⁹⁴*Horace v. Zoning Board of Appeals of Town of Salem*, 85 Conn.App. at 169-172, 855 A.2d at 1049-1050, distinguishing *Adolphson v. Zoning Board of Appeals*, 205 Conn. 703, 712,

535 A.2d 799, 803 (1988) and *Stancuna v. Zoning Board of Appeals*, 66 Conn.App. 565, 572, 785 A.2d 601, 606 (2001).

⁹⁵*MacDonald v. Town of Waterford*, 10 Conn.Ops. 815, 2004 WL 1326071 (2004).

⁹⁶*Georgetown North Owners, Inc. v. Planning and Zoning Board of Appeals of Town of Greenwich*, 10 Conn.Ops. 1133, 2004 WL 1966272 (2004).

Connecticut does not recognize an exception to the hardship rule allowing de minimus variances, which is applied in some other states.⁹⁷

Variance applications are frequently filed to allow the use of vacant undersized lots where the applicant-owner also has title to an adjacent lot. Many municipalities have merger provisions whereby two or more adjacent undersized lots are considered as one parcel for zoning purposes. The effect of merger provisions on the issue of hardship for a variance on an undersized vacant lot is discussed in section 53:6. On confiscation as a ground for a variance see section 54:8.

§ 9:4 The purchase with knowledge rule and its exceptions

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ☞497

C.J.S., Zoning and Land Planning § 239

If the purchaser of property who acquired it with knowledge of the zoning regulations attempts to devote it to a use which is not allowed by the regulations, in other words an illegal use, (and which is not a nonconforming use), he is barred from obtaining a variance under the purchase with knowledge rule.¹

Where a lot becomes undersized as a result of action of the zoning commission in changing the ordinance, the property owner may obtain a variance.²

A person who buys a nonconforming lot or who acquires property with a nonconforming use caused by a change in the zoning regulations has the same right to obtain a variance as the seller of the property, and is not barred from obtaining a variance by

⁹⁷Wine Seller Spirits v. Zoning Board of Appeals of Town of Fairfield, 40 Conn.L.Rptr. 814 (2006) (refusing to recognize this concept in a liquor outlet separation distance appeal).

[Section 9:4]

¹Abel v. Zoning Board of Appeals of City of Norwalk, 172 Conn. 286, 289, 374 A.2d 227, 228 (1977); Spencer v. Zoning Board of Appeals of Town of Stratford, 15 Conn.App. 387, 391, 544 A.2d 676, 678 (1988); Clapp v. Zoning Board of Appeals of City of Milford, 29 Conn.Sup. 4, 6, 268 A.2d 919, 920 (1970); Baccante v. Zoning Board of Appeals of City of Bridgeport,

153 Conn. 44, 48, 212 A.2d 411, 413 (1965); Celentano v. Zoning Board of Appeals of City of Hartford, 136 Conn. 584, 587, 73 A.2d 101, 102 (1950).

²Kulak v. Zoning Board of Appeals of City of Stamford, 184 Conn. 479, 482, 440 A.2d 183, 184 (1981); Johnny Cake, Inc. v. Zoning Board of Appeals of Town of Burlington, 180 Conn. 296, 300, 301, 429 A.2d 883, 885, 886 (1980); Whittaker v. Zoning Board of Appeals of Town of Trumbull, 179 Conn. 650, 658, 427 A.2d 1346, 1350 (1980) Schultz v. Zoning Board of Appeals of Town of Berlin, 144 Conn. 332, 130 A.2d 789 (1957).

the purchase with knowledge rule.³ Since zoning considers the use of the land and not the owner, the purchaser of land is not barred by the concept of self-created hardship from obtaining a variance if the predecessor in title who owned the land when the zoning restriction occurred could have established hardship, and a subsequent owner is not barred by the purchase with knowledge concept. However, the purchase with knowledge rule would bar the buyer of an illegal lot from obtaining a variance where he purchased the property with knowledge of the problem.⁴ For example, the owner was not entitled to a variance when the lot was improperly divided by a predecessor in title.⁵ There is a fine line between these two situations; the cases make a distinction between purchasing a nonconforming lot (or one with a nonconforming use) and purchasing a lot which is illegal, which has a problem due to self-created hardship, or applying for a use not allowed in the zone. Where property was purchased with knowledge that it was in a zone where the proposed use was prohibited, that was considered a voluntary assumption of hardship which did not allow a variance.⁶

The purchase with knowledge rule applied where property was bought with the knowledge that it could not be used for manufacturing purposes, so that there was a voluntarily assumed hardship by the conscious decision to buy the property despite the known prohibition of the proposed use in the zoning regulations.⁷

Whether or not a variance can be used to change a nonconforming use to another nonconforming use depends on the terms of

³*Johnny Cake, Inc. v. Zoning Board of Appeals of Town of Burlington*, 180 Conn. 296, 300, 301, 429 A.2d 883, 885, 886 (1980); *Kulak v. Zoning Board of Appeals of City of Stamford*, 184 Conn. 479, 482, 440 A.2d 183, 184 (1981); *Petruzzi v. Zoning Board of Appeals of Town of Oxford*, 176 Conn. 479, 483, 408 A.2d 243, 246 (1979).

Sydoriak v. Prospect Zoning Board of Appeals, 10 Conn.Ops. 695, 2004 WL 1153749 (2004); *Garlasco v. Zoning Board of Appeals of Town of Bridgewater*, 40 Conn.L.Rptr. 562 (2006) (lot without frontage on a road where the zoning regulations had a direct frontage requirement).

⁴*Haines v. Zoning Board of Appeals of Town of Oxford*, 26 Conn.App. 187, 193, 599 A.2d 399, 402 (1991); *Abel v. Zoning Board of Appeals of City of Norwalk*, 172 Conn. 286, 289, 374 A.2d 227, 228 (1977). *Spalding v.*

Board of Zoning Appeals of City of New Haven, 144 Conn. 719, 722, 137 A.2d 755, 756 (1957).

⁵*Haines v. Zoning Board of Appeals of Town of Oxford*, 26 Conn.App. at 193, 599 A.2d at 402; *Vine v. Zoning Board of Appeals of Town of North Branford*, 93 Conn.App. 1, 20, 887 A.2d 442 (2006) (quoting this text).

⁶*Mandanici v. Zoning Board of Appeals of City of Shelton*, 50 Conn.App. 308, 311, 312, 717 A.2d 287, 288, 289 (1998).

Vichi v. Stonington Zoning Board of Appeals, 10 Conn.Ops. 1357, 2004 WL 2167037 (2004).

⁷*Kalimian v. Zoning Board of Appeals of City of Norwich*, 65 Conn.App. 628, 632, 633, 783 A.2d 506, 509, 510 (2001), cert. denied 258 Conn. 936, 785 A.2d 231 (2001).

the zoning ordinance.⁸ Under proper circumstances, a zoning board of appeals can grant a variance to change a nonconforming use to a less offensive nonconforming use.⁹ The purchase with knowledge rule did not apply when the boundaries of the applicant's lot were created when the town cut a road through a previously existing subdivision, so that neither the applicant or a predecessor in title were responsible for the nonconformity of the lot; the court stated that the right to seek a variance was not lost merely because a subsequent purchaser takes the land with the knowledge that the current zoning regulations would prohibit the use.¹⁰

§ 9:5 Reasons for a variance; judicial review of action taken

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ◊544, 709
C.J.S., Zoning and Land Planning §§ 257, 277

Whenever a zoning board of appeals grants a variance, it is required to state the reasons for its action.¹ It is not enough that the board states that there is a hardship; the record must support a finding that there was unnecessary hardship or practical difficulties peculiarly affecting the premises in question.² Where the regulations have a requirement for the board to make specific findings, such as the special circumstances amounting to hardship, the board must make them.³

Where the board denies a variance, the test on appeal is whether any of the reasons given are valid and supported by the

⁸See section 52.2 and contrast *Wells v. Zoning Board of Appeals of City of Shelton*, 180 Conn. 193, 198, 429 A.2d 467, 469 (1980) (change of use prohibited) with the other cases.

⁹*Adolphson v. Zoning Board of Appeals of Town of Fairfield*, 205 Conn. 703, 535 A.2d 799 (1988).

Stancuna v. Zoning Board of Appeals of Town of Wallingford, 66 Conn.App. 565, 572, 785 A.2d 601, 607 (2001).

¹⁰*Sydoriak v. Zoning Board of Appeals of Town of Prospect*, 90 Conn.App. 649, 660 (2005) (setback variances to build a house on a vacant lot).

[Section 9:5]

¹C.G.S.A. § 8-7.

²*Nash v. Zoning Board of Appeals of Town of East Hartford*, 165 Conn. 576, 577, 345 A.2d 35, 35 (1973); *Daw v. Zoning Board of Appeals of Town of Westport*, 63 Conn.App. 176, 183, 772 A.2d 755 (2001).

³*Gross v. Planning and Zoning Board of Appeals of Town of Greenwich*, 171 Conn. 326, 327, 328, 370 A.2d 944, 945, 946 (1976), *Carlson v. Zoning Board of Appeals of Town of Berlin*, 158 Conn. 86, 90, 255 A.2d 841, 844 (1969).

record.⁴ Where the zoning board of appeals fails to state its reasons for granting or denying a variance, the Superior Court must search the record to attempt to find some basis for the action taken.⁵

Where the variance is granted, the court would have to find evidence of hardship and compliance with the two part test for a variance.⁶ The burden of proof on these issues is on the applicant where the board states no reasons for its decision.⁷

§ 9:6 Similar prior variance applications

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ⇨491, 547
C.J.S., Zoning and Land Planning §§ 239, 257, 262

If it appears that there was a similar, prior variance application which was denied for the same property, the zoning board of appeals can not properly grant a second variance application.¹ "The test to be applied is whether new or additional facts appear showing a change of conditions or other considerations materially affecting the merits, intervening since the former decision."² Where a prior variance was granted subject to conditions but the board, on advice of town counsel, declared the first vote void

⁴Green v. Zoning Board of Appeals of Town of Westport, 4 Conn.App. 500, 502, 495 A.2d 290, 290 (1985).

⁵Grillo v. Zoning Board of Appeals of City of West Haven, 206 Conn. 362, 369, 537 A.2d 1030, 1033 (1988); Stankiewicz v. Zoning Board of Appeals of Town of Montville, 15 Conn.App. 729, 546 A.2d 919 (1988), judgment affirmed 211 Conn. 76, 556 A.2d 1024 (1989); Hovanesian v. Zoning Board of Appeals of City of New Britain, 162 Conn. 43, 46, 290 A.2d 896, 897 (1971); Ward v. Zoning Board of Appeals of Town of Hartford, 153 Conn. 141, 144, 215 A.2d 104, 106 (1965).

⁶Smith v. Zoning Board of Appeals of Town of Norwalk, 174 Conn. 323, 387 A.2d 542 (1978).

⁷Carini v. Zoning Board of Appeals of Town of West Hartford, 164 Conn. 169, 171, 172, 319 A.2d 390, 391, 392 (1972), cert. denied 414 U.S. 831, 94 S.Ct. 64, 38 L.Ed.2d 66 (1973),

rehearing denied 414 U.S. 1087, 94 S.Ct. 610, 38 L.Ed.2d 494 (1973); Ward v. Zoning Board of Appeals of Hartford, 156 Conn. at 144, 215 A.2d at 106.

[Section 9:6]

¹Laurel Beach Association v. Zoning Board of Appeals of City of Milford, 166 Conn. 385, 349 A.2d 834 (1974); Consiglio v. Board of Zoning Appeals of City of New Haven, 153 Conn. 433, 438, 217 A.2d 64, 66 (1966); Mynyk v. Board of Zoning Appeals of Town of Stratford, 151 Conn. 34, 37, 193 A.2d 519, 520 (1963); Bright v. Zoning Board of Appeals of Town of Fairfield, 149 Conn. 698, 183 A.2d 603 (1962); Dubiel v. Zoning Board of Appeals of Town of East Hartford, 150 Conn. 75, 186 A.2d 74 (1962).

²Lennon v. Zoning Board of Appeals of City of Willimantic, 16 Conn.Sup. 324, 325 (1948); Rommell v. Walsh, 127 Conn. 272, 277, 16 A.2d 483, 485 (1940).

because of improper notice a second approval with different conditions did not violate this rule because it applies only when the prior action was validly taken.³

Where there are successive applications the trial court determines first whether the two applications seek substantially the same relief, and second, if they are essentially the same, whether there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter involved.⁴

The board can reverse a prior decision if there has been (1) a material change of circumstances, or (2) other considerations have intervened affecting the merits and no vested rights have arisen.⁵ Once the board has made a decision and it is published, the no reconsideration rule applies.⁶ Reconsideration of the initial decision can only occur before publication of the decision, and only when there is justification and good cause is shown.⁷ A decision of a zoning board of appeals vacating a variance before notice of it was published was upheld where there had been no personal notice to adjacent property owners and even though the zoning regulations only required notice by publication.⁸ The rule prohibiting a different result on a second application applies only when the latter application seeks substantially the same relief as the former one.⁹ The administrative agency has some discretion to determine whether the relief requested in the two applications is substantially the same.¹⁰ On appeal the Superior Court does not decide the question de novo and is limited to determining whether the record before the zoning board of appeals supports

³Wright v. Zoning Board of Appeals of Town of New Fairfield, 174 Conn. 488, 492, 391 A.2d 146, 147 (1978).

⁴Laurel Beach Association v. Zoning Board of Appeals of City of Milford, 66 Conn.App. 640, 645, 785 A.2d 1169, 1174 (2001).

⁵Wright v. Zoning Board of Appeals of Town of New Fairfield, 174 Conn. 488, 492, 391 A.2d 146, 147 (1978); Sipperley v. Board of Appeals on Zoning of Town of Westport, 140 Conn. 164, 98 A.2d 907 (1953) (overruled in part by, Fiorilla v. Zoning Bd. of Appeals of City of Norwalk, 144 Conn. 275, 129 A.2d 619 (1957)).

⁶Sharp v. Zoning Board of Appeals of Town of Easton, 43 Conn.App. 512, 525, 526, 684 A.2d 713, 719

(1996).

⁷Id. at 523, 684 A.2d at 718, citing St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343 (1931).

⁸Liucci v. Suffield Zoning Board of Appeals, 27 Conn.L.Rptr. 624, 2000 WL 1196488 (2000).

⁹Grillo v. Zoning Board of Appeals of West Haven, 206 Conn. 362, 367, 537 A.2d 1030, 1032 (1988).

¹⁰Malmstrom v. Zoning Board of Appeals of City of East Hartford, 152 Conn. 385, 207 A.2d 375 (1965). See also Carlson v. Fisher, 18 Conn.App. 488, 498, 499, 558 A.2d 1029, 1034 (1989), and section 22.11; Fiorilla v. Zoning Board of Appeals of City of Norwalk, 144 Conn. 275, 279, 129 A.2d 619, 621 (1957).

its findings.¹¹ A change in the owner of the property is not a material change in circumstances,¹² nor is commencement of construction without proper zoning approvals.¹³ In one case an application to use land for a parking lot was approved even though a similar prior one had been denied, where there was increasing traffic congestion in the area, and allowing parking with conditions and limitations was in the public interest.¹⁴ On review in the courts the question is whether the board's decision was arbitrary.¹⁵

The fact that the zoning commission previously denied a zone change does not prevent the zoning board of appeals from granting a variance for a similar use.¹⁶ A variance can be granted under proper conditions even if it extends a nonconforming use.¹⁷ Where a prior variance was granted and set aside on appeal because of defective notice, the board is not precluded from denying a new application because the prior decision is not valid.¹⁸ The zoning board of appeals cannot deny a variance to correct a discrepancy in a previously granted application where the hardship was unchanged and did not affect the comprehensive plan.¹⁹ On the basis for the rule and policy considerations, see *St. Patrick's Church Corporation v. Daniels*²⁰ and *Root v. Zoning Board of Appeals of Town of Madison*.²¹

Where a variance has been granted subject to conditions, the modification of a condition which is or becomes problematic is allowed and does not require another variance, but the applicant must show hardship, and a change in circumstances so that the condition has become unreasonable is insufficient.²²

Where the zoning regulations had changed since the denial of a

¹¹*Fernandes v. Zoning Board of Appeals of City of Bridgeport*, 24 Conn.App. 49, 54, 585 A.2d 703, 706 (1991), certification granted in part 218 Conn. 909, 591 A.2d 811 (1991).

¹²*Spencer v. Board of Zoning Appeals of City of New Haven*, 141 Conn. 155, 160, 104 A.2d 373, 375 (1954).

¹³*Id.*

¹⁴*St. Patrick's Church Corporation v. Daniels*, 113 Conn. 132, 140, 141, 154 A. 343, 345, 346 (1931).

¹⁵*Fiorilla v. Zoning Board of Appeals of City of Norwalk*, 144 Conn. at 279, 129 A.2d at 621.

¹⁶*Leveille v. Zoning Board of Appeals of Town and City of Meriden*, 145 Conn. 468, 474, 144 A.2d 45, 48 (1958).

¹⁷*Fiorilla v. Zoning Board of Appeals of City of Norwalk*, 144 Conn. at 281, 129 A.2d at 622.

¹⁸*McGavin v. Zoning Board of Appeals of Town of Westport*, 26 Conn.Sup. 251, 255, 217 A.2d 229, 232 (1965).

¹⁹*Manzi v. Westport Zoning Board of Appeals*, 8 Conn.L.Rptr. 191, 8 Conn.Super.Ct.Rpts. 149, 1993 WL 7529 (1993) (mistake in calculation of lot coverage).

²⁰*St. Patrick's Church Corporation v. Daniels*, 113 Conn. 132, 137-140, 154 A. 343, 345-346 (1931).

²¹*Root v. Zoning Board of Appeals of Town of Madison*, 41 Conn.Sup. 218, 565 A.2d 14 (1989).

²²*Fleet National Bank v. Zoning*

prior zoning permit and special exception ten years earlier so that a special exception was no longer required, and there was new information submitted to the zoning board of appeals, its decision granting a zoning permit was upheld; claims of res judicata and collateral estoppel as to the merger of two abutting lots based on the denial of the prior application were rejected by the court since merger was not decided in the prior application, and there had been a change in the zoning regulations.²³

Where a second variance application was filed for the same property (by the same applicant) seeking substantially the same relief as a prior variance application it was held that the board could approve the second application where the three lots were taxed and sold independently, a utility easement precluded compliance with a minimum square regulation for the lots, and the property line had been moved to accommodate a proposed driveway, since these factors were unknown to the board during the first application, and materially affected the merits of the prior decision.²⁴

Where an initial decision on a variance application which was granted was void because of improper notice, and a new public hearing was then held on the variance, the board was not precluded from denying the variance, which only received three affirmative votes when one board member changed her vote, even though the evidence was basically the same at the second hearing because the defective notice on the initial application deprived the board of subject matter jurisdiction.²⁵

§ 9:7 Limits on variances for conforming lots

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ⇨542.1

C.J.S., Zoning and Land Planning § 257

If the appeal involves a variance as well as an appeal from the

Board of Appeals of Town of Winchester, 54 Conn.App. 135, 141, 734 A.2d 592 (1999) overruling 21 Conn.L.Rptr. 270, 1998 WL 46689 (1998) (limitation of use of house to seasonal use only was no longer reasonable where house had connected to sewer line); *Caseria v. Zoning Board of Appeals of City of Bridgeport*, 1 Conn.Ops. 717, 1995 WL 360794 (1995) overruled by implication (restriction limiting liquor sales to those made from a restaurant's service bar).

Jaffe v. Town of Westport Zon-

ing Board of Appeals, 37 Conn.L.Rptr. 309, 2004 WL 1615960 (2004).

²³*Laurel Beach Association v. Zoning Board of Appeals of City of Milford*, 66 Conn.App. at 647, 648, 785 A.2d at 1174-1176.

²⁴*Vine v. Zoning Board of Appeals of Town of North Branford*, 93 Conn.App. 1, 22, 23, 887 A.2d 442 (2006) (dissenting opinion).

²⁵*Hallier v. Zoning Board of Appeals of the District of Short Beach*, 40 Conn.L.Rptr. 581 (2006).

decision of the zoning enforcement officer, the zoning board of appeals is required to decide the appeal prior to deciding the variance by C.G.S.A. § 8-6a. However, the filing of a variance application is not a waiver of rights on the appeal from the decision of the zoning enforcement officer.¹ If a lot qualifies as a building lot, the zoning board of appeals cannot grant a variance.²

Where the zoning board of appeals did not consider when acting on a variance application whether a structure of addition was exempted from compliance with the zoning regulations under § 8-13a of the General Statutes, the trial court could not decide that question on appeal.³

Where a setback variance was previously granted, there is no requirement for an additional variance where the use of the property is changed later from one permitted use to another permitted use.⁴

§ 9:8 Interpretation of variances

Research References

West's Key Number Digest, Wests Key Number Digest, Zoning and Planning ☞546
C.J.S., Zoning and Land Planning § 262

In determining what use is allowed under a variance granted by the zoning board of appeals, in addition to the language of the variance certificate itself, the specific use proposed in the variance application can be considered, including the legal description of the property.¹ The reason is to strictly construe the variance to provide the minimum variance to relieve the hardship.² The interpretation of a variance by the zoning board of appeals must be reasonable. In one case, where a prior variance allowed the sale of "fine furniture" the board could not claim that furniture sold on the premises was not permitted by the variance where there was no objective basis for its conclusion, and no

[Section 9:7]

¹*Minter v. Zoning Board of Appeals of Town of Berlin*, 20 Conn.App. 302, 306, 566 A.2d 997, 999 (1989).

²*Grillo v. Zoning Board of Appeals of City of West Haven*, 206 Conn. 362, 372, 537 A.2d 1030, 1035 (1988).

³*Chester v. Zoning Board of Appeals of Town of Westport*, 46 Conn.App. 148, 698 A.2d 370 (1997) (denial of variance); *Whitehead v. East Haven Zoning Board of Appeals*, 2004 WL 1462829 (Conn.Super.2004).

⁴*Wood Auto Service, LLC v. Zoning Board of Appeals of City of Hartford*, 24 Conn.L.Rptr. 679 (1999).

[Section 9:8]

¹*L & G Associates, Inc. v. Zoning Board of Appeals of City of Danbury*, 40 Conn.App. 784, 787, 673 A.2d 1146, 1148 (1996), citing *Raymond v. Zoning Board of Appeals of Town of Ridgefield*, 164 Conn. 85, 87-88, 318 A.2d 119, 120-21 (1972).

²*L & G Associates, Inc. v. Zoning Board of Appeals of City of Danbury*, 40 Conn.App. at 788, 673 A.2d at 1148.

identified objective standards or definitions.³ It has been held that an appeal may be required to the zoning board of appeals for the interpretation of the terms of a variance where it was claimed that use of the property violated the conditions or terms of the variance.⁴

³R & R Pool & Patio, Inc. v. Zoning Board of Appeals of Ridgefield, Superior Court at Danbury, 1998 WL 800203 (1998).

⁴Simko v. Ervin, 234 Conn. 498, 661 A.2d 1018 (1995).