

Memorandum

To: CBA Planning and Zoning Section

From: Jason Klein, Wilder Gleason, James Perito, Marjorie Shamsky, Evan Seeman
(Legislative Subcommittee)

Date: 11-8-19

RE: **Rationale for Amending Conn. Gen. Stat. 8-6**

Recent cases (Verillo v. ZBA, 155 Conn. App. 657, 1112 A.3d 473 (1915) and E&F Assocs., LLC v ZBA, 320 Conn. 9, 127 A.3d 986 (2015) and Mayer-Wittman v. ZBA, 2019 LEXIS 310 have reiterated the longstanding and restricted grounds for granting variances. When based on “exceptional difficulty” or “unusual hardship,” the applicant must demonstrate that without the requested variance he is denied reasonable use of his property or that the denial of the variance would practically destroy the value of the property for all reasonable uses. This is an extraordinarily difficult standard to meet. The other avenue to sustain a variance is the Vine v. ZBA, 281 Conn.553, 916 A. 2d 5 (2007) and Adolphson v. ZBA, 205 Conn. 703 (1988) line of cases where a “reduction in non-conformities” allows the granting of a variance if exceptional difficulty or hardship cannot be established. This state of the law eviscerates the utility of seeking a variance and provides opponents with easy grounds for an appeal, leverage to negotiate a settlement and the ability to substantially delay and, in some cases, stop development or reasonable use of a property.

Review of the law in neighboring jurisdictions indicates that Connecticut’s standards for granting “dimensional” or “area variances”, as opposed to “use variances”, are much stricter than standards in abutting states. The committee believes Connecticut’s standards should be modified to grant more flexibility so the local ZBA may grant “area” or “dimensional” variances based on review of a multitude of factors in deciding and to re-balance the competing interests of applicants and opponents.

The Statutes in Rhode Island and New York both distinguish between “use variances”: (for which stricter standards apply) and “area” or “dimensional variances.” In Rhode Island the zoning board can grant a dimensional variance if it finds

“that the hardship suffered by the owner of the subject property if the dimension variance is not granted amounts to *more than a mere inconvenience to the applicant.*” RI Gen Statutes 45-24-41 (e) (2) (Emphasis supplied)

The RI statute specifically notes that, “The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief.”

In New York “area variances” are allowed by balancing various considerations such as:

“...the benefit to the applicant if the variance is granted as weighed against the detriment of the health, safety and welfare of the neighborhood or community by such grant.”
(McKinneys Chap 62, Art. 10, Section 267-b 3.(b).

The NY statute lists other factors which are to be considered and weighed by the board with none of the factors to be solely determinative.

Massachusetts law requires proof that: (1) due to circumstances concerning soil conditions, the shape of the lot, or the topography of the land; which (2) especially affect the land but not the zoning district generally; (3) literal enforcement of the zoning ordinance would cause a substantial hardship (financial or otherwise); and (4) relief can be granted without substantial detriment to the public good; (5) without nullifying or substantially derogating from the intent or purpose of the ordinance. See M.G.L. c.40 A Section 10. Each statutory requirement must be met, and case law suggests that variances should be “sparingly granted.” While this standard is strict, it is not as strict as the Connecticut standard as interpreted by Connecticut cases which reject financial considerations as a ground for hardship.

The committee proposes to distinguish between “use” and “area” variances as NY and RI do. The standard for granting “use” variances would remain essentially unchanged with “unusual hardship” and “reduction in non-conformities” being grounds for granting same, unless the local zoning regulations specifically prohibit use variances.

We propose to substantially revise the standard for granting “area variances” which typically are intended to address aesthetic and privacy concerns and to preserve property values. Under the proposed statute the requirement of “hardship” or “reduction in non-conformities” would be eliminated and the ZBA would have broad discretion to balance various factors and determine if the proposed variance is appropriate. The board would be authorized to grant an Area variance where:

“...(i) the need for the variance is due to conditions not affecting generally the district or zone in which the property is situated, and (ii) the benefit to the applicant of granting such variance exceeds any detriment to the health, safety and welfare of the neighborhood or community by such grant.”

In making its decision the Board would consider eight (8) enumerated factors, many of which will be familiar to land use lawyers. Will the variance adversely impact the neighborhood or be a detriment to nearby properties? Can the benefit sought be achieved without a variance? Will the variance have an adverse impact on physical or environmental conditions in the neighborhood? Will the variance be consistent with the plan of development? Is the non-conformity self-created? Will the variance be consistent with the plan of development?

We also added new factors such as whether the variance will:

(4).“...facilitate compliance with other regulatory requirements concerning life, health or safety including, but not limited to, regulations for flood prone areas and accessibility for disabled persons.

(5)“...reduce impacts on a wetland, watercourse or upland review areas” or

(7)“...adversely affect eligibility for the National Flood Insurance Program.”

The first new factor (4 above) focuses on the growing regulatory environment addressing concerns which conflict with standard area and bulk requirement of Euclidian zoning regulations. For instance: FEMA, ADA, Building Code and the like.

The second new factor (5 above) focuses on reducing impacts on wetlands and watercourses and related upland review areas; and the

Third new factor (7 above) focuses on whether the variance will adversely affect eligibility for the National Flood Insurance Program).

We believe each of these factors should be given greater weight by Boards and courts to encourage compliance with same. Applicants should be encouraged to satisfy FEMA regulations, ADA requirements, hurricane safety and other considerations of the Building Code and the like. In addition, environmental objectives of the statutes and regulations pertaining to wetlands, watercourses, and upland review areas as well as the National Flood Insurance Program should be grounds for adjustments in Area restrictions. These regulatory requirements were enacted long after the ZBA hardship standard in Section 8-6 and we feel they should be considered in the ZBA's decision process. In our view, these factors should be weighed against the aesthetic, privacy, and preservation of property concerns which area, setback and bulk regulations are designed to protect. Note, that under our proposal, no "hardship" or "reduction in non-conformities" needs be shown to justify an Area Variance.

We also codify the Vine/Adolphson line of cases by specifically allowing the Board to grant variances if the proposal reduces the degree of non-conformity. We intentionally declined to define what "reduction in non-conformities" means because caselaw does not define it and, in our view, the ZBA is best positioned to review the facts of each application and determine if the reduction justifies granting the variance.

We believe the proposed statute does not materially change the standard for granting "use variances," while still imposing stricter standards than Rhode Island and requiring consideration of factors already considered under existing Connecticut law. We also believe that local Boards act in a manner consistent with our proposed statute in evaluating and deciding applications as opposed to enforcing the strict hardship standards imposed by Connecticut courts. Our intent is to make the law conform more nearly to the way Boards act by giving Boards greater discretion to grant "area variances" and applicants greater confidence that, once granted, the Board's decision to approve an Area variance will withstand an appeal.

We received the following suggestions at the last CBA PZC Section meeting (suggestions are in **bold**)

1. **Relabel "Area Variance"** We choose to retain the label but made the definition more specific by including "area, bulk and setback".
2. **Do not allow an increase in "density" to result from an Area variance.** We considered this suggestion carefully. After a robust debate, we declined to adopt it. We doubt that Boards will ever allow a single-family residence in a single-family zone to be converted to a multifamily use (which, under our proposed version of CGS Section 8-6 would be a "Use" variance which requires "hardship."). We then noted that many commercial zone applications seek variances of FAR limits. When such limits are varied the Board is often allowing greater density. We support such variances and believe that if the statute prohibited increased density as a result of an Area variance then variances of FAR requirements would not be granted which, in our view, thwarts the intent of the proposed statute.
3. **Include "disability and "flood zone" variances in the statute.** The changes we made to the factors a ZBA must consider now include specific references to compliance with accessibility requirements and Flood regulations. (See (d) (4) and (5)). We felt distinguishing among standard variances, disability variances and flood variances, was

too complicated and would be confusing as this proposed statute works its way through the General Assembly. We specifically allow Boards to limit the time for accessibility variances to the occupancy of a residence by a disabled person. (See (f)).

4. **Tighten standards for granting variances.** In (d)(i) we incorporated the concept that the variance must be "...due to conditions not affecting generally the district or zone in which the parcel is located" in order to restrict the Board's power effectively to rezone an area.

We deleted the language that no particular factor is to be determinative in the Board's decision.

We declined to require Boards to find that most of the factors they must consider favor granting the variance. The NY statute does not require the Board to find most of the factors apply. In addition, many of the enumerated factors may not apply in a particular application. We trust that local Boards will be sensitive to the need to be consistent with the plan of development as noted in factor (d)(8).

We eliminated the requirement that the conditions justifying the variance be unique to the applicant's property and not affecting the neighborhood as there are many zones with smaller neighborhoods of similar properties which are undersized and/or will have conditions similar to those of an applicant's parcel.

5. **Delete "exceptional difficulty" from statute:** We eliminated from CGS Section 8-6 the concept of "exceptional difficulty" as courts have not distinguished it from "hardship." We preserved the "hardship" requirement for Use variances.

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