

Variances, Nonconformities and More: A Primer

ROUTINE ZONING CASE OFFERS EXCELLENT SUMMARY OF THE LAW

By **CHRISTOPHER J. SMITH**

On March 10, the Appellate Court released a comprehensive decision addressing zoning variances and nonconformities, with a valuable discussion on what constitutes a “formal, official, collective statement of reasons” for a land use board’s decision. As a bonus, the court provides an analysis of what is required to substantiate a claim that a regulation has a confiscatory effect on a property.

The case, *Verrillo v. Zoning Board of Appeals*, 155 Conn.

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App. 657 (2015), involves a matter where the Branford ZBA granted eight variances, which essentially permitted the applicant-landowner to expand an existing single-family house that was nonconforming as to coverage and most, if not all, applicable setbacks. The variances permitted the expansion of these nonconformities. The nonconforming house is on an undersized lot.

A neighbor appealed the ZBA’s decision claiming that the applicant didn’t establish required legal hardship; therefore, the variances were improperly granted. The Superior Court reviewed the administrative record, agreed with the plaintiff neighbor and sustained the neighbor’s appeal, thereby invalidating the variance approvals.

The Appellate Court affirmed the Superior Court’s decision in



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a 75-page decision. Anyone who is involved with land use—from professional staff, board members and landowners—should take the time to read this decision, for the following summary cannot cover the detailed analy-

sis of the important issues addressed by the court (and don't forgo the footnotes).

At the outset, the court addresses what constitutes a board's formal statement of its reasons for decision. When a board formally states its reasons for a decision, a reviewing court is limited to such when determining the appropriateness of the board's action. Absent a decision "with express reasons" stating a "basis or rationale" for the board's findings and conclusions, the court is left to search the record for evidence to support the decision.

Therefore, it's very important for a board to take the time to state, in a motion, the board's collective reasons for rendering a decision. The following do not constitute part of a formal decision: (1) a board member's statements during deliberations or voting; (2) the remarks of a board member when moving to approve or deny an application; and (3) references in the board's minutes.

The Appellate Court next provides an overview of variance authority, its requirements, standards and limitations, and the need for substantial evidence in the record to reasonably support the board's decision. This may be "old hat" for veterans, but it's a nice overview for new board

members or anyone not seasoned in the process.

The opinion's next section addresses legal hardship, which must be the result of a zoning regulation's peculiar or unique impact to the subject property, which is different from the regulation's impact on other properties in the same zone district. The impact must be beyond the control of the landowner (i.e., not self-created). A desire to improve one's home isn't enough. The court ultimately finds that the landowner's essential reasons for the requested variances are to expand the house's living and storage space, and modernize the structure—not legal hardship.

The court then provides an excellent summary of the law concerning zoning nonconformities. A valid nonconformity is a constitutionally protected vested right that runs with a property (i.e., it's not tied to the owner). Although afforded many protections from being taken away, a vested nonconformity cannot be expanded.

Next the court reviews, and dismisses, the following claims of hardship: (1) the house expansion would make the house "more [building or fire] code complaint"; (2) a three-foot-wide easement on one side of the house required the request-

ed house expansions; and (3) the application of the setback and coverage regulations have a confiscatory effect on or destroy the value of the property. The Appellate Court found that the administrative record lacked substantial evidence to support these claims.

Finally, the court discusses the narrow exception to having to establish legal hardship when changing a nonconforming use to a less offensive nonconforming use, or reducing bulk/area nonconformities. This exception doesn't apply in this matter because the landowner proposed to expand existing nonconformities. For the same reason, the court found the requested variances inconsistent with the comprehensive plan (zoning regulations and zone map), which prohibits the expansion of nonconformities.

In conclusion, after an excellent summary of the law concerning variances, nonconformities and other issues, the court held that the record doesn't contain substantial evidence of required legal hardship. Therefore, the variance requests were improperly approved. A simple variance case? Yes, but a learned decision well worth the read. ■