



## Falling On Your Sword: Self-Created Hardship And Variances

CASE OF THE TOO-TALL HOUSE OFFERS A LESSON FOR PROPERTY OWNERS

By EMILEE MOONEY SCOTT

Landowners with hardships preventing them from making reasonable use of their land can always seek a variance from the zoning regulations. Way back in 1921, the U.S. Department of Commerce developed the first draft of the Standard State Zoning Enabling Act, starting the bloodline found today in virtually every local zoning ordinance.

The variance was the center of much debate, even after the initial draft was adopted. It was intended to save local zoning regulations from rare challenges when they rendered properties largely undevelopable. The language is familiar: “To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.”

Connecticut courts, like all others across the country, have made clear that landowners who cause their own hardships need not apply for variances. But what about the landowner who is only indirectly responsible for the hardship?

Call it one step removed from the causation.

In the recent case *Morikawa v. Zoning Board of Appeals of Town of Weston*, the Appellate Court labored to reconcile the rules and succeeded in parsing the fine line separating the relievable hardship inherently unique to property or caused by oth-

ers, from the hardship suffered at one’s own hand.

A zoning variance grants permission to act in a manner that would normally be prohibited by the town’s zoning regulations. In short, it allows a property owner to do something otherwise illegal. A zoning board of appeals pursuant to Connecticut General Statutes § 8-6(a)(3) may grant a zoning variance only when it will not substantially affect the comprehensive zoning plan and to do otherwise would cause unusual and unnecessary hardship. Otherwise, the “whole fabric of town-and city-wide zoning will be worn through in spots and raveled at the edges” and the purpose of zoning—to protect property values and encourage orderly development—will be thwarted. See *Pleasant View Farms Development Inc. v. Zoning Board of Appeals*, 218 Conn. 265, 270-71 (1991).

To ring the variance bell, the applicant must show the hardship arises from features unique to the land itself. In *Stillman*



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*v. Zoning Board of Appeals of the City of Redding*, 25 Conn. App. 631, 636-37 (1991), the health-code-driven separation of a well and a septic tank on a half-acre lot made the construction of an addition impossible except within the zoning setback. The unusual configuration of the property caused the hardship, so the Appellate Court easily upheld the Zoning Board of Appeal’s grant of a variance.

### Self-Created Hardships

Woe unto those landowners, however, who create their own hardship. We can go back a half century to *Booe v. Zoning Board of Appeals of the City of Shelton*, 151 Conn. 681, 683 (1964), to see the bedrock of this principle that there is no relief for self-created hardship. The town of Shelton required a minimum lot size of five acres for a hotel.

A landowner who had owned many acres, and sold all but four, applied for a variance to build a hotel on the remaining parcel. Since it was the landowner’s fault that the lot was too small for a hotel, the Supreme Court held that he was not eligible for a variance.

When the hardship is the result of voluntary action *on behalf* of the applicant, it will be considered self-created. But sever that agency relationship, and get at least one degree of separation from the landowner to the actor causing the hardship, and the courts are open

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to holding that the zoning board of appeals, in its discretion, may grant a variance. *Rural Water Co. v. Zoning Board of Appeals*, 287 Conn. 282, 295 (2008).

In *Morikawa*, the Appellate Court gamely took on these competing rules. In 2005, Joseph and Lois Ryan applied for a permit to construct a single-family house in Weston. Their land was zoned for single-family houses, with a maximum height of 35 feet. Initially, their plans called for a house 38 feet high, so the zoning enforcement officer instructed them to revise their plans. The Ryans gave the town revised plans with a roof height of 35 feet, the town approved the plans, and the Ryans built their dream home.

Unfortunately for the Ryans, the finished house ended up somewhat supersized. The zoning enforcement officer went to the site to follow up on an unrelated complaint and saw that the completed roof was almost 38 feet tall. Was the architect or the contractor at fault? It didn't matter; a mistake had obviously been made.

The zoning enforcement officer issued a cease and desist order. The Zoning Board of Appeals upheld the order, which still stands (so does the house). The ZBA invited the Ryans to petition for a zoning variance, which they did. The ZBA granted it, finding "the variance to the code is *de minimis* as to the way the property is laid out, the siting of the house and the topography."

The Ryans' neighbors appealed the ZBA's decision to the Superior Court, which reversed the ZBA's grant of the variance, holding that

Connecticut law does not recognize *de minimis* variance.

The court also concluded that even if the ZBA had based its decision on the mistake of the architect or contractor, the Ryans had no right to a variance because the mistake would be attributed to the Ryans, just as if they had made it themselves. The Ryans appealed to the Appellate Court, arguing that their hardship was not self-created, and that the ZBA had the authority to grant a variance where the violation is *de minimis*.

The Appellate Court nixed the *de minimis* argument quickly and firmly. Some states do allow variances without a showing of hardship where the violation is *de minimis*, but Connecticut is not one of them. In Connecticut, "the reduction of a nonconforming use to a less offensive prohibited use may constitute an independent ground for granting a variance," negating the need to demonstrate hardship. In all other cases, however, a showing of hardship is absolutely required.

## Surveyor's Error

A 1996 Appellate Court case gave the Ryans some cold comfort on the self-created hardship issue. In *Osborne v. Zoning Board of Appeals*, a house had been constructed in violation of the setback requirements because of a surveyor's error. In that case, the Appellate Court held that the surveyor was an independent contractor retained by the architect and not the landowners, and thus that the hardship had not been self-created.

Furthermore, as the old structure had been even closer to the property line, the variance reduced a prior non-conforming use.

The Appellate Court distinguished the Ryans' situation from that in *Osborne*. First, the variance they sought did not reduce a prior non-conforming use. More importantly, however, the Ryans had been working directly with the contractor and architect.

In *Osborne*, the architect had hired the surveyor at his own initiative, not at the direction of the landowner. The Ryans, by contrast, knew about problems with the roof line and "had sufficient involvement in the building process to be chargeable with the outcome." The Ryans may not have made the mistake directly, but the mistake was made by people working on their behalf. Therefore, the hardship was self-created and the Ryans had no claim to a variance.

Those employing architects, contractors, and other building professionals take heed: where a hardship is created by someone working on the applicant's behalf, it will be construed to be self-created and there will be no right to a variance. There is this corollary: Make sure those who are making mistakes are not under your direction and are at least one degree of separation removed from you.

Unfortunately for conscientious landowners, is the fact that those who work hardest to oversee their construction are the least likely to be treated kindly by the ZBAs and the courts. ■