Short Name:Turek v. Milford ZBA

Long Name:Jack E. Turek et al. v. Zoning Board of Appeals for the City of Milford
Other Parties:
Opinion No.: 139592
Conn.Sup. Cite:
Docket Number:LNDCV156063404S
As-is Docket Number:LND-CV-15-6063404-S
Other Docket Numbers:
As-is Other Docket Numbers:
Venue:Judicial District of Hartford, Land Use Litigation Docket at Hartford
File Date:April 4, 2018
Caption Date:April 4, 2018
Judge (with first initial, no space for Sullivan, Dorsey, and Walsh):Berger, Marshall K., J.
Opinion Title:MEMORANDUM OF DECISION

I

On October 9, 2012, the waterfront home of the plaintiffs, Jack E. Turek and Donna Weaver, at 59 Hillside Avenue in Milford was destroyed by Hurricane Sandy. The damage was so extensive that the structure was demolished.[1] To construct a new home, they sought variances from certain zoning bulk

[1] It was reported that approximately 850 homes suffered damage. K. Dixon, "The Aftermath of Superstorm Sandy in Milford," *Connecticut Post*, (last modified June 13, 2016), available at http://www.ctpost.com/local/article/The-aftermath-of-Superstorm-Sandy-in-Milford-8100487.php#photo-10307359 (last visited April 2, 2018) (copy contained with exhibits). Six thousand Connecticut residents filed claims with the Federal Emergency Management Agency. T. Connor, "2012 in Review: Superstorm Sandy," *Connecticut Magazine*, (January 1, 2013), available at http://www.connecticutmag.com/the-connecticut-story/in-review-superstorm-sandy/article_a42227fl-6919-532f-986f-49a9bae14409.html (last visited April 2, 2018) (copy contained with exhibits). Of these, over 1,000 homeowners in Milford filed claims. M. Tuhus, "Town Spotlight: Lessons Learned in Milford from Storm Sandy," *Hartford Courant*, (December 1, 2016), available at http://www.courant.com/new-haven-living/features/hc-nh-milford-spotlight-20161119-story.html (last visited April 2, 2018).

regulations[2] on May 26, 2015.[3] (Return of Record [ROR], Item 1.) After a public hearing, the defendant, the zoning board of appeals of the city of Milford (board), unanimously denied the application on June 9, 2015. (ROR, Item 18, pp. 23-24.) On June 18, 2015, notice of the decision was published in the *Milford Mirror*. (ROR, Item 19.)

The plaintiffs commenced this appeal on July 2, 2015, alleging that the board's denial was illegal, arbitrary and an abuse of discretion. Primarily, the issue is the height of the structure[4] and the interplay of different laws and regulations imposed by the Federal Emergency Management Agency (FEMA), the state and the city as the property is within the special flood hazard area (SFHA). On September 22, 2015, the board filed an answer. The return of record was filed on March 15, 2016 (pleading [pl.] #110.00).[5] On May 17, 2017, the board filed the zoning regulations of the city of Milford (regulations), revised to August 1, 2011 (pl. ##123.00-124.00), with

---

[2] The brief of the defendant, the zoning board of appeals of the city of Milford, sums up the plaintiffs' requested variances as:

1. Reduction in the (south) side yard setback from 10 feet to 8.46 feet (Regulations §3.1.4.1);

2. Reduction in the (south) deck stairs setback from 8 feet to 4.4 feet (Regulations §4.1.4);

3. Increase in number of stories from three to four (Regulations §3.1.4.1); and

4. Increase in height from 35 feet to 39.5 feet (Regulations §3.1.4.1).

[3] The plaintiffs had filed a previous variance application that was denied by the board without prejudice in December 2014. (ROR, Item 17; Item 18, p. 1.)

[4] On the second page of the board's brief, it asserts that "the third requested variance (number of stories) has become moot because the [p]lanning and [z]oning [b]oard changed the applicable [z]oning [r]egulations to permit four stories. The [b]oard had no problem with the first two requested setback variances."

[5] Record item two, containing a zoning location survey, existing and proposed site plans and the average grade and building height, was filed in paper format. Additionally, a corrected version of the first page of record item eighteen was electronically filed on September 15, 2016 (pl. #111.00).

amendments to the regulations to October 1, 2014 (pl. #125.00). On April 26, 2017, the plaintiffs filed their brief and the board filed its brief on May 23, 2017. Supplemental briefs were filed by the parties on June 16, 2017, and June 19, 2017. This court heard the appeal on August 9, 2017, and on December 5, 2017.

II

General Statutes §8-8(b), in relevant part, provides that "any person aggrieved by any decision of a board . . . may take an appeal to the superior court for the judicial district in which the municipality is located . . ." General Statutes §8-8(a)(1) defines "aggrieved person" as "a person aggrieved by a decision of a board" and, in relevant part, provides that "[i]n the case of a decision by a . . . zoning board of appeals, 'aggrieved person' includes any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board."

Before this court on August 9, 2017, the parties stipulated that the plaintiffs owned the subject property during the application process and it was not contested that they currently own the property. Exhibit 1. Accordingly, this court finds that they are aggrieved. See *Handsome, Inc. v. Planning & Zoning Commission,* 317 Conn. 515, 527, 119 A.3d 541 (2015) ("[i]t is well established that a party may be aggrieved for purposes of appeal by virtue of its status as a property owner").

III

General Statutes §8-6(a)(3), in relevant part, authorizes a zoning board of appeals to "vary the application of the zoning bylaws, ordinances or regulations in harmony 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, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed . . ."

"A zoning board of appeals is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal . . . A reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the board] must be upheld by the trial court if they are reasonably supported by the record . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [board] supports the decision reached . . . The agency's decision must be sustained if an examination of the record

discloses evidence that supports any one of the reasons given." (Citation omitted; internal quotation marks omitted.) *Caruso v. Zoning Board of Appeals,* 320 Conn. 315, 321, 130 A.3d 241 (2016). "The burden of proof to demonstrate that the board acted improperly is upon the plaintiffs." (Internal quotation marks omitted.) *E&F Associates, LLC v. Zoning Board of Appeals,* 320 Conn. 9, 15, 127 A.3d 986 (2015).

"In light of the existence of a statutory right of appeal from the decisions of local zoning authorities, however, a court cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty." (Internal quotation marks omitted.) *Kalimian v. Zoning Board of Appeals,* 65 Conn.App. 628, 631, 783 A.2d 506, cert. denied, 258 Conn. 936, 785 A.2d 231 (2001). "[T]he nature and functions of a board of appeals or adjustment . . . is created to keep the law 'running on an even keel' by varying, within prescribed limits and consonant with the exercise of a legal discretion, the strict letter of the zoning law, in cases of claims having real merit which can be granted consistently with the spirit and purposes of the general plan. It has preserved the constitutionality and popularity of the zoning ordinance, and, more than that, it has made the law capable of being enforced . . . It may grant relief subject to conditions, and thereby obtain results not attainable in any other way . . . We

must remember that the machinery of government would not work if it were not allowed a little play in its joints . . . Nowhere is this more applicable than to zoning ordinances; the saving elasticity is mainly afforded through boards of adjustment. Much depends upon the skill, sound judgment, and probity of the members. It is essential to their functions that they be invested with liberal discretion. They are accorded the benefit of a presumption that they act fairly, with proper motives, and upon valid reasons, and not arbitrarily." (Citations omitted; internal quotation marks omitted.) *St. Patrick's Church Corp. v. Daniels,* 113 Conn. 132, 139, 154 A. 343 (1931).

"A variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town . . . A zoning board of appeals is statutorily authorized to grant a variance if two requirements are met: (1) the variance will not affect substantially the comprehensive zoning plan; and (2) the application of the regulation causes unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan." (Citation omitted; internal quotation marks omitted.) *Caruso v. Zoning Board of Appeals, supra*, 320 Conn. 321.

"Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance." *Bloom v. Zoning Board of Appeals,* 233

Conn. 198, 207, 658 A.2d 559 (1995). "[General Statutes §8-6] clearly directs the board to consider only conditions, difficulty or unusual hardship peculiar to the parcel of land which is the subject of the application for a variance." *Hyatt v. Zoning Board of Appeals,* 163 Conn. 379, 382, 311 A.2d 77 (1972).

IV

A

The court must first consider whether the board gave reasons for its action. "[W]here a zoning commission has formally stated the reasons for its decision the court should not go behind that official collective statement of the commission. It should not attempt to search out and speculate upon other reasons which might have influenced some or all of the members of the commission to reach the commission's final collective decision." *DeMaria v. Planning & Zoning Commission,* 159 Conn. 534, 541, 271 A.2d 105 (1970). "[T]he failure of the zoning agency to give such reasons requires the court to search the entire record to find a basis for the commission's decision." (Internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission,* 220 Conn. 527, 544, 600 A.2d 757 (1991).

In the present case, the board argues in its brief that it did not state reason. Nevertheless, after commission member Howard Haberman made the motion to deny the variance but before the vote, he stated, "Reason for the motion obviously the height is

an issue for us but other parts of the application are okay, there's room to change the application." (ROR, Item 18, p. 23.) While short, this constitutes a reason for the decision. Thus, the court will not "search out and speculate upon other reasons which might have influenced some or all of the members of the commission to reach the commission's final collective decision." See *DeMaria v. Planning & Zoning Commission, supra*, 159 Conn. 541.

B

Presently in a residential zone (R-5), 59 Hillside Avenue was undisputedly created in 1901 prior to Milford's first zoning regulations of 1930. (ROR, Item 1.) It is .09 of an acre or approximately 4,076 square feet. (ROR, Item 2, p. 1.) Section 3.1.4.1 of the regulations requires lots in the R-5 zone to be a minimum of 5,000 square feet. (ROR, Zoning Regulations [Regs.],[6] p. III-13.) Thus, the lot is nonconforming.

According to the plaintiffs' brief, the lot is also very narrow, i.e., approximately 113 feet long with 28.2 feet along the shore of the Long Island Sound to the east and with 32 feet of frontage on Hillside Avenue to the west.[7] The plaintiffs also represent that the lot ranges from 8.3 to 8.9 feet above sea level at the shore and slopes up to 13 above sea level at Hillside Avenue. The now destroyed house was over 100 years old with two

[6] "Regs." refers to regulations contained in pleadings ##123.00 or 124.00. "Regs., Pl. #125.00" refers to the amended regulations contained in pleading #125.00 for which there is no pagination.

[7] Record item two indicates slightly different measurements. (ROR, Item 2, p. 1.)

stories, 1,500 square feet of living space and a detached garage and shed. (ROR, Item 2, pp. 1-2; Item 18, pp. 2, 6.) The proposed house would have four stories and 1,600 square feet of living space[8] with the garage on the lowest level, storage and utility maintenance on the highest level and a shed-type roof. (ROR, Item 2, p. 3; Item 18, pp. 2, 10.) As previously noted, the lot is in the SFHA straddling two zones—a special flood hazard area (VE 13)[9] and a coastal high hazard area (AE 13), with the majority of the lot in AE 13.[10] (ROR, Item 2, pp. 1-2.)

Section 6.2.4 expressly allows a variance to be granted that would extend a nonconforming use.[11] (ROR, Regs., Pl. #125.00.) Additionally, §6.3.6(c) provides that the "owner of such damaged or destroyed building or structure may replace and

---

[8] While the proposed house would be approximately 100-square-foot larger, it was conceded before this court that this minimal increase is not at issue. (ROR, Item 18, p. 2.)

[9] Section 5.8.2 of the regulations identifies VE as "a Coastal High Hazard Area." (ROR, Regs., p. V-47.)

[10] "FEMA defines the [SFHA] as the area having a 1 [percent] probability of flooding at least 1 foot in a given year. The SFHA is synonymous with the 100-year floodplain. Three zones fall within the [SFHA]. Areas that are expected to be inundated by one or more of swiftly moving water or water with waves greater than 3 feet are designated as the V Zone (also known as Coastal High Hazard Area). Areas that expect less than three feet of flooding or waves of less than 3 feet are designated A Zones. The Coastal A (or Coastal AE) Zone is a non-regulatory term for A Zone areas for which waves are between 1.5 and 3 feet and the primary cause of flooding is tidal, astronomical, or storm-related rather than riverline. National Flood Insurance Program] building standards are identical for A and Coastal A zones. The base flood elevation (BFE) is the height of the 100-year flood surface including waves." The Nature Conservancy, "Adapting to the Rise: A Guide for Connecticut's Coastal Communities," (2013), p. 4, available at http://www.ct.gov/ctrecovers/lib/ctrecovers/TNC_Adapting_to_the_Rise.pdf (last visited April 2, 2018) (copy contained with exhibits).

[11] Additionally, §4.1.4.3 provides: "Notwithstanding the provisions of ARTICLE VI, Section 6.3 of the Regulations, a zoning permit may be issued to allow the height of an existing dwelling in an area regulated under the provisions of Section 5.9, Flood Hazard and Flood Damage Prevention, to be increased along with minimal stairway/landing extensions when said dwelling does not conform to required yards caused by the adoption of zoning regulations, subsequent to the dwelling's construction. However, such dwelling may not be relocated on the lot without a variance, if required. Building height shall follow the height regulations of the applicable zone." (ROR, Regs., Pl. #125.00.) It has been held that a vertical expansion or adding a story to a nonconforming structure is not de minimis. See *Munroe v. Zoning Board of Appeals,* 75 Conn.App. 796, 810-11, 818 A.2d 72 (2003).

reorganize the same amount of gross interior floor space in a manner to more nearly conform to these Regulations." (ROR, Regs., Pl. #125.00.) Section 6.2.6(c) provides that "restoration of any use within a flood hazard area shall be allowed to be increased in height to comply with the requirements of §5.8, Flood Hazard and Flood Damage Prevention Regulations. The structure containing the nonconforming use shall not exceed the height limitation for its respective zone." (ROR, Regs., Pl. #125.00.)

Section 3.1.4.1 of the regulations limits the height of homes in the R-5 zone to thirty-five feet. (ROR, Regs., p. III-13.) Section 11.2 defines "building height" essentially as the vertical distance measured in feet from the average elevation of the ground to the top of the building.[12] (ROR, Regs., pp. XI-4.) The average elevation of the lot is 10 feet and 8.4 inches above sea level. (ROR, Item 2, p. 3.). If measured from the average elevation, the plaintiffs' proposed house would be 34 feet and 11.5 inches high. (ROR, Item 2, p. 3.) Nevertheless, §5.8.2 provides that

[12] Specifically §11.2, in relevant part, defines "building height" as follows: "The vertical distance measured in feet from the average existing level of the ground surrounding the building or addition thereto and within ten (10) feet thereof up to the midpoint height of a pitched roof or up to the level of the highest main ridge or peak of any other type of structure, or the total number of stories in a building including basements and/or half-stories. The number of points necessary for an 'average' computation shall be based on appropriate contour intervals or spot elevations as required by the Planning and. Zoning Board. The existing level shall mean the actual or approved elevations of the property at the time of application . . . The interpretation of this definition shall be at the sole discretion of the Planning and Zoning Board." (ROR, Regs., pp. XI-4-XI-5.)

structures in the SFHA must comply with all federal and state regulations concerning flood hazards.[13] (ROR, Regs., p. V-47.)

FEMA has promulgated certain regulations for owners of properties in the SFHA who seek to obtain flood insurance under the National Flood Insurance Program (NFIP). Specifically, FEMA's regulations mandate that homes be built thirteen feet above mean sea level. Additionally, the state building code apparently requires an additional two feet of freeboard[14] so that the base of the home must be fifteen feet above mean sea level (MSL). (ROR, Item 2, p. 3; Item 13; Item 18, pp. 3, 6.) In light of these provisions, the seaward slope of the lot and the height of the proposed structure as measured from the fifteen feet above MSL, the plaintiffs requested a variance from the 35-foot height restriction of §3.1.4.1 to 39.5 feet although it is undisputed that the actual height of the home

---

[13] Section 5.8.2, in relevant part, provides: "Zoning Applicability: Flood Hazard and Flood Damage Prevention Regulations shall apply to all lands, buildings, structures, structural alterations and uses in any Zoning District where lands, buildings, structures, structural alterations and uses are, or are proposed to be located, below the regulatory flood protection elevations as defined herein. The areas of special flood hazard identified by the Federal Emergency Management Agency (FEMA) in its Flood Insurance Study (FIS) for New Haven County, Connecticut, dated December 17, 2010, and accompanying Flood Insurance Rate Maps (FIRM), dated December 17, 2010, and other supporting data applicable to the City of Milford, and any subsequent revisions thereto, are adopted by reference and declared to be a part of this regulation . . . Areas of special flood hazard are determined using base flood elevations (BFE) provided on the flood profiles in the Flood Insurance Study (FIS) for a community . . ." (ROR, Regs., p. V-47.)

[14] "Freeboard is any extra elevation of the lower floor above the BFE that yields a margin of safety from floodwater and wave action." The Nature Conservancy, "Adapting to the Rise: A Guide for Connecticut's Coastal Communities," (2013), p. 5, available at http://www.ct.gov/ctrecovers/lib/ctrecovers/TNC_Adapting_to_the_Rise.pdf (last visited April 2, 2018) (copy contained with exhibits). The plaintiffs' original counsel asserted before the board that the state building code required two additional feet of freeboard. (ROR, Item 18, pp. 3, 6.) Current counsel argues it is one additional foot of freeboard in the plaintiffs' brief. The difference of one foot is not determinative.

would be 38 feet and 3.1 inches high. (ROR, Item 2, p. 3; Board's Supplemental Brief [pl. #127.00], p. 2.)

At the public hearing on June 8, 2015, the plaintiffs asserted that the house suffers from a five-foot penalty, i.e., the average grade of over ten feet plus the five feet to meet the FEMA and state requirement that house be built at MSL plus fifteen feet. (ROR, Item 13; Item 18, p. 6.) The regulations make no allowance for this when determining the building height. The board may not accept any application that does not comply with the FEMA and state requirements under §9.2.3(3).[15] (ROR, Regs., p. IX-2.)

The plaintiffs argue that the combination of the topography, the slope, the location in two zones in the SFHA and the FEMA and state regulations present a unique hardship not impacting other properties within the same district.[16] Specifically, they assert that the required fifteen feet cuts into the thirty-five-foot maximum height for the plaintiffs' house. Additionally, they posit that other homes on Hillside Avenue directly on Long Island Sound may be subject to the same combination of regulations, but many more within the same zone and not on

---

[15] Section 9.2.3(3) provides that "[n]o application to perform new construction or substantial improvements (as defined) to any dwelling with a lowest floor elevation below the regulatory flood protection shall be accepted by the Zoning Board of Appeals." (ROR, Regs., Pl. #125.00.)

[16] As to the other requested variances, i.e., the side yard requirement of §3.1.4.1 of 10 feet to 8.46 feet; from §3.1.4.1, three stories to four stories; and the requirement of §4.1.4 of 8-foot deck stairs to 4.4 feet; (ROR, Item 6); the board does not contest the side yard or deck stair requests. (ROR, Item 18, p. 23.) It is undisputed that the regulation change eliminating the language regarding stories renders the variance request for four stories moot. Thus, the court only addresses the denial of the variance request as to the proposed dwelling's height.

Long "Island Sound may not be subject to the same requirements.

Unequal treatment would seem to violate General Statutes §8-2(a) requiring "[a]ll such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district . . ." "The thrust of the statutory requirement of uniformity is equal treatment." *Harris v. Zoning Commission,* 259 Conn. 402, 431, 788 A.2d 1239 (2002). A regulation does not violate the uniformity requirement when the regulation is applied to standard and substandard lots equally. *Id.* ("We conclude, however, that the fact that the amendment has this differing *effect* on parcels of land throughout the town does not render its *application* inconsistent or unequal . . . It is undisputed that, although the amendment ultimately has a differing effect on parcels of land depending on the presence and amount of wetlands, watercourses and slopes greater than 25 percent, it is applied to every parcel within its purview consistently and equally." [Citation omitted; emphasis in original.]); see also *Schefer v. City Council,* 279 Va. 588, 595, 691 S.E.2d 778, 782 (2010) ("There is no dispute that the City uniformly applies its building height regulations for one-family dwellings on standard lots and uniformly applies its building height regulations for one-family dwellings on substandard lots

in the [zone]. In sum, under [the ordinance] the building height regulations for one-family dwellings on all substandard lots are applied identically, and those regulations for one-family dwellings on standard lots are applied identically. We thus hold that [the ordinance] does not violate the uniformity requirement"). Nevertheless, the present case is distinguishable based upon the facts as will be discussed hereinafter.

The plaintiffs also argue that the planned house reduces certain nonconformities that had previously existed.[17] (ROR, Item 2, pp. 1-2; Item 13.) Therefore, they assert that an exception to the hardship requirement should apply under *Adolphson v. Zoning Board of Appeals,* 205 Conn. 703, 535 A.2d 799 (1988), and *Vine v. Zoning Board of Appeals,* 281 Conn. 553, 916 A.2d 5 (2007).

C

1.

The first requirement for the granting of a variance is that it must be shown not to affect substantially the comprehensive zoning plan. *Caruso v. Zoning Board of Appeals, supra*, 320 Conn. 321. "The comprehensive plan is to be found in the scheme of the zoning regulations themselves." *Whittaker v. Zoning Board of Appeals,* 179 Conn. 650, 656, 427 A.2d 1346 (1980). "The first part of the test, that the use requested by the variance application is in accord with the comprehensive zoning

[17] Removing the existing nonconforming garage and incorporating it in the house apparently impacts the height of the proposed house.

plan, is usually met when the use to be allowed by the variance is consistent with other uses in the area." *Amendola v. Zoning Board of Appeals,* 161 Conn.App. 726, 738, 129 A.3d 743 (2015).

In the present case, evidence similarly suggests that many homes are on small lots with similar setbacks. (ROR, Item 13.) Additionally, the regulations—and therefore the plan—contain both the thirty-five-foot height restriction[18] and the minimum elevation requirement from which a structure in the SFHA would be measured. The board states on pages fifteen and sixteen of its brief that the purpose of the thirty-five height restriction is only to insure that a waterfront house will "not unreasonably obstruct water views of inland properties." Additionally, counsel before this court conceded that the height limitation is no more than an aesthetic protection.[19]

---

[18] It should be noted that General Statutes §8-2(a) expressly authorizes zoning commissions "to regulate . . . the height, number of stories and size of buildings and other structures" among other things.

[19] Aesthetic protections may be a valid exercise of the police power. *Welch v. Swasey,* 214 U.S. 91, 108, 29 S.Ct. 567, 53 L.Ed. 923 (1909); *Landmark Land Company, Inc. v. City and County of Denver,* 728 P.2d 1281, 1285 (Colo. 1986). "[A]esthetic concerns can be a valid basis for denial of a permit by a local governing body, so long as a judgment based on those concerns is supported by objective facts or evidence." (Emphasis in original; internal quotation marks omitted.) *Wireless Towers, LLC v. City of Jacksonville,* 712 F.Sup.2d 1294, 1302 (M.D.Fla. 2010).

Nevertheless, such considerations are not without limits and depend on enabling legislation. "It is unnecessary to discuss the extent to which sufficiently defined aesthetic standards may properly influence the decision of a zoning commission . . . Certainly, vague and undefined aesthetic considerations alone are insufficient to support the invocation of the police power, which is the source of all zoning authority." (Citation omitted.) *DeMaria v. Enfield Planning & Zoning Commission, supra*, 159 Conn. 541; see also *Murphy, Inc. v. Westport,* 131 Conn. 292, 296, 40 A.2d 177 (1944) ("there are a number of fairly recent decisions which hold that, where esthetic considerations afford the sole ground for the enactment of laws or ordinances affecting the individual's use of his land, they are void"); *JLO Paddock, LLC v. Town of Wallingford Zoning Board of Appeals,* Superior Court, judicial district of Fairfield, Docket No. CV-03-0473908-S (July 10, 2003, Radcliffe, J.) ("The [board] justified its refusal to grant a variance to the plaintiff . . . citing 'aesthetic' considerations. Such considerations, standing alone, are insufficient to support the denial of a variance").

This court has held that aesthetic concerns must be weighed against an owner's ability to exercise their property rights subject to certain regulations. See *Lawrence v. Department of Energy & Environmental Protection,* Superior Court, land use litigation docket at Hartford, Docket No. LND CV-15-6066232-S (July 18, 2016, Berger, J.), aff'd, 178 Conn.App. 615, 176 A.3d 608 (December 12, 2017). In the present case, two aspects of the plan must be balanced and analyzed: the aesthetic height limit and the public safety elevation requirement for homes in the SFHA.

As previously discussed, the regulations limit the height of a home without accounting for—and yet requiring compliance with—FEMA and state elevation mandates. Before this court, the board's counsel posited that a similarly situated existing thirty-five-foot high house that was not destroyed by a hurricane or a super storm or a tidal surge, but which needed to comply with the height limitation and the elevation requirements, *would be required to remove upper portions or stories of the home*. Owners of such a house, like the plaintiffs herein, would not be entitled to a variance because of the strict application of the

---

"Aesthetics as a basis for regulating the use of land has always been suspect because of the obvious subjectivity of aesthetic judgments." T. Tondro, *Connecticut Land Use Regulation* (2d ed. 1992), p. 109. "Zoning regulations cannot be based on aesthetics, since the enabling statute, General Statutes §8-2, does not refer to aesthetics as a proper consideration for zoning, unlike statutes in other states. Several cases indicate that aesthetic considerations alone are insufficient to regulate land under the police power." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) §4:48, p. 184. "[A]llowing aesthetic considerations to control zoning without concrete standards would give unlimited discretion to land use agencies to arbitrarily decide land use based on personal preferences of the agency members, or worse, favoritism not subject to any meaningful judicial control or review." *Id.*, p. 185.

thirty-five-foot height limitation. This court does not agree. "It is an abiding principle of jurisprudence that common sense does not take flight when one enters a courtroom." (Internal quotation marks omitted.) *Gazo v. Stamford,* 255 Conn. 245, 266, 765 A.2d 505 (2001).

Connecticut municipalities, where appropriate, must consider "sea level change scenarios published by the National Oceanic and Atmospheric Administration in Technical Report OAR CPO-1"[20] in the municipal plan of conservation and development.[21] General Statutes §8-23(d)(11). Milford's December 2012 Plan of Conservation and Development also acknowledges this fact. Specifically, it states: "As required by the NFIP, the City mandates Flood Hazard Reduction requirements on new construction and substantial

---

[20] In a study by James O'Donnell for the Connecticut Institute for Resilience and Climate Adaptation and Department of Marine Sciences, University of Connecticut, he states that:

> CT is special (location and oceanography, weather, geology). Consequently,
>
> We will get more [sea level rise] than other areas, and the predictions have prediction intervals.
>
> We should plan for [fifty centimeters] (almost [two feet]) increase by 2,050 and alert people that in the future higher thresholds may be required.
>
> The increase in the area impacted will not be very large because of the geology of [Connecticut].
>
> We should institute a decadal review and update to ensure new science is incorporated in the planning to minimize costs and maximize safety.
>
> Since the coastal areas are flat small increases in [mean sea level] will cause a large increase in flood risk. The geometry and orientation of the Sound causes tides and surge to be larger in the west of [Connecticut] so the impact of [sea level rise] on the flood risk is higher in the east. J. O'Donnell, Connecticut Institute for Resilience and Climate Adaptation and Department of Marine Sciences, University of Connecticut, "Coastal Flood Risk in Connecticut," (2017), available at https://circa.uconn.edu/wp-content/uploads/sites/1618/2017/10/Coastal-Flood-Risk-in-CT-ODonnell.pdf (last visited April 2, 2018) (copy contained with exhibits).

[21] General Statutes §22a-93(19) defines "rise in sea level" as "the arithmetic mean of the most recent equivalent per decade rise in the surface level of the tidal and coastal waters of the state, as documented in National Oceanic and Atmospheric Administration online or printed publications for said agency's Bridgeport and New London tide gauges."

repair/improvement of existing structures to prevent future flood damage. There are, however, almost 3,800 structures that remain susceptible to serious damages as a result of coastal flooding, some of which experience repetitive property damage . . . Approximately [forty-five] structures must be retrofit to be made flood compliant from the Storm Irene event alone. The City will continue to make it a high priority to prevent flood damage through mandating flood-compliant design for new and substantially improved structures within the flood zone and will assist homeowners in applying for grants to achieve this goal where possible." City of Milford, "Milford-2022 Plan of Conservation and Development Milford, Connecticut," (December 2012), p. 49, available at https://www.ci.milford.ct.us/sites/milfordct/files/file/file/finalpocddec2012.pdf (last visited April 2, 2018) (copy contained with exhibits). Yet, the regulations here do not resolve the conflict between the flood hazard regulations and the height limitation.

The aesthetic height regulation should not outweigh consideration of the elevation requirement based upon public safety. See *De Sena v. Board of Zoning Appeals of Incorporated Village of Hempstead,* 45 N.Y.2d 105, 109, 379 N.E.2d 1144, 1146, 408 N.Y.S.2d 14 (1978) ("when denial of a variance is sought to be justified on aesthetic grounds, the public interest in regulation is not necessarily as strong as in those cases involving

threats to the public safety"). Constructing and maintaining elevated homes benefits homeowners, the owners of the neighboring properties, the community itself[22] and insureds and the NFIP more broadly. See G. Gaul, Yale Environment 360, Yale School of Forestry and Environmental Studies, "How Rising Seas and Coastal Storms Drowned the U.S. Flood Insurance Program," (May 23, 2017), available at https://e360.yale.edu/features/how-rising-seas-and-coastal-storms-drowned-us-flood-insurance-program (last visited April 2, 2018) (copy contained with exhibits). The requirement to elevate homes allows homeowners to qualify for the NFIP and creates stronger and safer structures.

The general scheme of Milford's regulations recognizes this. Section 4.1.16.2, in relevant part, provides that "[n]o building or structure shall be constructed or located within 25 feet of the seasonal high water level, mean high watermark, or legally established boundary of any tidal waterbody, watercourse, wetland or flood hazard area (natural or man-made and named

---

[22] Like §5.8.4.8.1(4) of Milford's regulations; (ROR, Regs., pp. V-52-V-53); §1.5.44.140(A)(4) of Bridgeport's municipal code, in relevant part, provides that in deciding a variance application the board "shall consider all technical evaluations, all relevant factors, standards specified in other sections of this chapter, and:

a. The danger that materials may be swept onto other lands to the injury of others;

b. The danger to life and property due to flooding or erosion damage . . . City of Bridgeport, "Municipal Code," (amended through November 6, 2017), available at https://library.municode.com/ct/bridgeporticodes/code_of_ordinances?nodeId=BRIDGEPORT_CONNECTICUT_MUNICIPAL_CODE (last visited April 2, 2018) (copy contained with exhibits). Section 6.139.1(h)(5) of Greenwich's regulations provides similarly. Town of Greenwich, "Building Zone Regulations, January 2018" (amended to December 20, 2017), p. 10-24, available at http://www.greenwichctorg/upload/medialibrary/b4c/pz-building-zones-web-january-2018.pdf (last visited April 2, 2018) (copy contained with exhibits).

or unnamed) per the Milford Coastal Management Plan and the Connecticut Coastal Management Act . . ." (ROR, Regs., p. IV-5.) Under §5.8.4.8.1(4), in considering variances, the board, in relevant part, "shall consider all technical evaluations, all relevant factors, standards specified in other sections of this Section 5.8 and: (a) The danger that materials may be swept onto other lands to the injury of others. (b) The danger to life and property due to flooding or erosion damage . . . (h) The relationship of the proposed use to the current Plan of Conservation and Development and flood plain management program of that area. (j) The expected heights, velocity, duration, rate of rise, and sediment transport of the flood waters and the effects of wave action, if applicable expected at the site . . ." (ROR, Regs., pp. V-52-V-53.) As to new building applications, §5.8.5.2 recognizes that: "(1) The flood hazard areas of Milford are subject to periodic inundation which results in loss of life and property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief and impairment of the tax base, all of which adversely affect the public health, safety and general welfare. (2) These flood losses are caused by the cumulative effect of obstructions in areas of special flood hazards, which increase flood heights and velocities, and when inadequately anchored, damage uses in other areas. Uses that are

inadequately flood-proofed, elevated or otherwise protected from flood damage also contribute to the flood loss." (ROR, Regs., p. V-54.) Specific to the AE and VE zones, §5.8.6.1 provides: "(1) Buildings and structures shall be designed with low flood damage potential. (2) Buildings and structures shall be constructed and placed on the lot so as to offer the minimum resistance to the flow of flood waters. (3) structures shall be firmly anchored to prevent flotation which may result in damage to other structures. (4) Service facilities such as electrical and heating equipment shall either be constructed at or above the regulatory flood protection elevation or be otherwise structurally flood-proofed." (ROR, Regs., p. V-55.) As to residential buildings, §5.8.6.2 provides: "Dwellings and other similar buildings designed for human habitation shall be constructed on fill, pilings, interrupted walls, or elevated by other acceptable means so that the lowest floor level is at the regulatory flood protection elevation or higher. Elevating members of the structure should be properly footed to withstand saturated conditions and located so as to reduce scour effects." (ROR, Regs., p. V-55.)

In the present case, the plaintiffs are proposing to build a home that meets the thirty-five-foot height regulation applicable to all homes within the zone and that complies with the more important flood hazard elevation requirement. In other shoreline

Connecticut communities,[23] such a request would not be considered to affect substantially the comprehensive zoning plan; indeed, it would be considered just the opposite. It cannot be said that this variance request negatively impacts the comprehensive plan. The court is mindful that "[t]he question is

[23] Evidently, our Long Island Sound communities differ on their approach on dealing with the reality of sea level rise. (ROR, Item 13.) All twenty-four shoreline towns have regulations to meet the FEMA requirements, but thirteen out of twenty-four do not take into account the state building code. See W. Rath, Center for Energy & Environmental Law, University of Connecticut School of Law, "Municipal Resilience Planning Assistance Project," (2017), p. 29, available at https://circa.uconn.edu/wp-content/uploads/sites/1618/2017/10/Municipal-Resilience-Planning-Assistance-Project-Rath.pdf (last visited April 2, 2018) (copy contained with exhibits). Eight towns allow elevation changes without the need for a variance; *id.*, p. 37; and take into account the base flood elevation in determining building height. For example, note eight of table three of Bridgeport's zoning and subdivision regulations provide: "In flood plain areas where the lowest floor of the building is elevated to meet the flood damage prevention standards, the maximum total building height shall be measured from the Base Flood Elevation (BFE)+1' elevation." Planning and Zoning Commission of the City of Bridgeport, "Zoning & Subdivision Regulations," (amended to October 30, 2017), p. 182, available at http://www.bridgeportct.gov/filestorage/341650/341652/345965/343658/2017_Zoning_Handbook.pdf (last visited April 2, 2018) (copy contained with exhibits). Section 5.2.2 of Fairfield's zoning regulations, in relevant part, provides: "No building or other structure shall exceed the following height . . . [for the A, B and C zones] Two and one-half (2 1/2) stories or thirty-two (32) feet, whichever is less except that dwellings located within the 100-year flood zone are allowed one foot of additional height for every two (2) feet of vertical distance between existing average grade and the base flood elevation." Fairfield Town Plan and Zoning Commission, "Zoning Regulations," (amended to May 23, 2017), pp. 19-20, available at http://www.fairfieldct.org/filestorage/10726/11028/12429/12431/Zoning_Regulations.pdf (last visited April 2, 2018) (copy contained with exhibits). Section 6.139.1(c)(22.1) of Greenwich's building zone regulations defines "grade plane, flood zone" as "[a] reference plane from which to measure the number of stories, height, and floor area of dwelling units in residential zones within the Flood Hazard Overlay Zone. The flood zone grade plane shall be measured from two feet (2') below the Base Flood Elevation, or the grade plane as defined under Section 6-5(a)(26), whichever is higher. If the structure complies with Section 6-139.1(f)(11)(A and D), the floor area below the flood zone grade plane shall be excluded. The area below the flood zone grade plane shall not count as a story provided there is no more than 7' from the flood zone grade plane to the top of the finished floor. (6/17/2014)." Town of Greenwich, "Building Zone Regulations, January 2018," (amended to December 20, 2017), p. 10-12, available at http://www.greenwichct.org/upload/medialibrary/b4c/pz-building-zones-web-january-2018.pdf (last visited April 2, 2018) (copy contained with exhibits). Section 273-91(O) of the zoning code of Guilford provides: "For buildings or structures in Flood hazard areas as defined by FEMA, average height shall be measured from the Base Flood Elevation minus four (4) feet or average grade whichever is higher. No building shall be higher than 40 ft. total height from average grade. (see 273-2 for definitions)." Town of Guilford, "Zoning Chapter 273," (amended through May 12, 2017), p. 93, available at http://www.ci.guilford.ct.us/wp-content/uploads/PZ-REGS-051217.pdf (last visited April 2, 2018) (copy contained with exhibits). Norwalk's schedule of height and bulk of building for residential zones A, AA and AAA allows for "2 1/2 stories and 35 feet, maximum of 40 feet to peak; except for structures located in Flood Zones A or V, where 1 additional foot in height shall be permitted to the midpoint and to the peak"; for B, C and D zones: "2 1/2 stories & 30 feet, maximum of 38 feet to peak; except for structures located in flood zones A or V, where one (1) additional foot in height shall be permitted to the midpoint and to the peak." City of Norwalk, Building Zone Regulations, "Schedule Limiting Height and Bulk of Buildings, Residential, City of Norwalk, Part 1" (amended to November 24, 2017), available at https://norwalkct.org/DocumentCenter/View/371 (last visited April 2, 2018) (copy contained with exhibits).

not whether the trial court would have reached the same conclusion, but whether the record before the [board] supports the decision reached." (Internal quotation marks omitted.) *Caruso v. Zoning Board of Appeals, supra*, 320 Conn. 321. Nevertheless, it "cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty." (Internal quotation marks omitted.) *Kalimian v. Zoning Board of Appeals, supra*, 65 Conn.App. 631. Therefore, this court holds that the board's denial based solely upon the aesthetic height requirement—which the plaintiffs' proposed structure arguably meets—does not consider the nuances and immediacy of flood hazard or sea level rise and the elevation requirements in the plan and is thus contrary to law and logic.

2.

The second requirement for the granting of a variance is a showing that "the application of the regulation causes unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan." (Internal quotation marks omitted.) *Caruso v. Zoning Board of Appeals, supra*, 320 Conn. 321. "The second part of the test, that the zoning regulation cause unusual hardship to the land unnecessary to carrying out the zoning plan, is generally more difficult to satisfy, but remains an absolute [necessity] as a condition precedent to the granting of a zoning variance . . . The applicant has the burden of proving hardship

and must establish both the existence of a sufficient hardship and that the claimed hardship is . . . unique . . . The claimed hardship must originate in the zoning ordinance . . . meaning that because of some peculiar characteristic of [the] 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 . . . In other words, a legal hardship must [relate] to the property for which the variance is sought and not to the personal hardship of the owners thereof . . . Thus, a property owner's [d]isappointment in the use of property does not constitute exceptional difficulty or unusual hardship . . . and principles of equity, fairness to the applicant, and lack of adverse consequences to surrounding properties do not meet the test for a legally recognized hardship . . . Finally, the hardship must be different in kind from that generally affecting property in the same zoning district." (Citations omitted; internal quotation marks omitted.) *Amendola v. Zoning Board of Appeals, supra*, 161 Conn.App. 738-39.[24]

In the present case, the board discussed hardship. Representative of that discussion was Haberman's comment: "Yeah, I think what I struggle with is the fact that the property and the way that the grade, mean grade is measured in our, by the regs, it doesn't just affect this particular lot, it affects a lot of

[24] In *Amendola,* the court held that variances were improperly granted for the improvement of a nonconforming shoreline lot as the hardship was nothing "other than personal preference disappointed by the regulations." *Id.*, 742. The facts herein are distinguishable.

lots down there on the shoreline and in granting this variance for that height were in essence amending the regulations and I don't think that's the purpose of this Board. If it were just particular this lot alone, then I get it, there's a peculiarity, a hardship but I think it extends beyond just this lot and I think again, by granting that piece of the variance, the request would be, in essence, amending the regs and I don't think, again, I don't think that's the purpose of this Board."[25] (ROR, Item 18, p. 21.) The board evidently believed, in part, that the plaintiffs' variance request was a result of the house design.[26]

"Where the condition which results in the hardship is due to one's own voluntary act, the zoning board is without the power

---

[25] "[A variance] should not be used to accomplish what is in effect a substantial change in the uses permitted in a residence zone. That is a matter for the consideration of the zoning commission . . . The power to repeal, modify or amend a zoning ordinance rests in the municipal body which had the power to adopt the ordinance, and not in the zoning board of appeals." (Citation omitted; internal quotation marks omitted.) *Kaeser v. Zoning Board of Appeals,* 218 Conn. 438, 446, 589 A.2d 1229 (1991).

[26] The board cites *Jaser v. Zoning Board of Appeals,* 43 Conn.App. 545, 548, 684 A.2d 735 (1996), as support for its argument that the hardship here is self-created. In *Jaser,* the court did not apply *Adolphson* and reversed a trial court decision to sustain an appeal of the denial of a variance. *Id.* The plaintiffs' lot was bordered in the rear by tidal wetlands and their home was destroyed by fire. *Id.*, 546. The plaintiffs submitted plans to rebuild showing a home conforming to all setback requirements, but later sought a variance from the setback requirements claiming hardship. *Id.* The court found that a "hardship was not shown because the plaintiffs admitted that a house, even though not the type that they desired, could have been built on the lot while conforming to the setback requirements." *Id.*, 548. The present case is distinguishable on the facts.

Additionally, the *Jaser* court noted that "[t]o establish a hardship under General Statutes §8-6, an applicant must show not only that he is thwarted in a desired use of land, but also that he is being completely or almost completely deprived of the use of the value of that land." *Id.*, 546 n.2. "Short of regulation which finally restricts the use of property for any reasonable purpose resulting in a practical confiscation, the determination of whether a taking has occurred must be made on the facts of each case with consideration being given not only to the degree of diminution in the value of the land but also to the nature and degree of public harm to be prevented and to the alternatives available to the landowner." (Internal quotation marks omitted.) *Lost Trail, LLC v. Weston,* 140 Conn.App. 136, 146, 57 A.3d 905, cert. denied, 308 Conn. 915, 61 A.3d 1102 (2013).

In the present case, the strict application of the height limit as applied to the plaintiffs' proposed house would likely not deny the plaintiffs all reasonable use of their property. Under the present design, the alternative would likely leave the home with half of its previous living space and significantly decrease the value of the property. Nevertheless, the issue of whether this would be a taking is not before this court.

to grant a variance." (Internal quotation marks omitted.) *Vine v. Zoning Board of Appeals, supra*, 281 Conn. 561. The record suggests that the city preferred a straight or extended gable roof. (ROR, Item 18, pp. 1, 9-11.) The plaintiffs maintain, however, that the lot is situated in a high velocity wind area and that the roof is specially designed to withstand high wind loads. A change of roof design could cause it to be subject to greater wind damage. (ROR, Item 18, p. 9.) Additionally, the plaintiffs argue that the newly designed home reduces several nonconformities. (ROR, Item 2, p. 1, Item 18, pp. 3-5.) Therefore, they assert that an exception to the hardship requirement should apply under *Adolphson v. Zoning Board of Appeals, supra*, 205 Conn. 708-10, and *Vine v. Zoning Board of Appeals, supra*, 281 Conn. 559.

In 1988, in *Adolphson v. Zoning Board of Appeals, supra*, 205 Conn. 705-06, an abutting plaintiff challenged the granting of a variance changing a nonconforming use of an aluminum casting foundry to an automobile repair shop. The trial court dismissed the appeal holding that the repair shop "would be far less offensive to the surrounding residents than a foundry." *Id.*, 706. The Supreme Court agreed holding that "if the hardship is created by the enactment of a zoning ordinance and the owner of the parcel could have sought a variance, then the purchaser has the same right to seek a variance and, if his request is supported

in law, to obtain the variance . . . Otherwise the zoning ordinance could be unjust and confiscatory." (Citation omitted.) *Id.*, 712-13.

In 2001, in *Stancuna v. Zoning Board of Appeals,* 66 Conn.App. 565, 567, 785 A.2d 601 (2001), an abutting plaintiff challenged the granting of a variance from side yard setback requirements. Affirming the trial court's dismissal of the appeal, the Appellate Court concluded "that the court properly found that [the applicant's] claimed hardship is legal and not economic or self-created. There was a valid basis for granting his variance because adherence to the strict letter of the zoning regulation would cause unusual hardship. Without the variance, the twenty-foot setback requirement on the [applicant's] fifty-foot lot would limit him to constructing a ten-foot wide building in a commercial zone. As the board reasoned, without the variance, the twenty-foot setback would effectively perpetuate the property's present nonconforming use, a single-family residence in a commercial zone. We conclude that the court properly sustained the board's decision that there is a valid hardship basis for granting the variance." *Id.*, 571.

In 2007, in *Vine v. Zoning Board of Appeals, supra*, 281 Conn. 556, the applicant sought to turn three contiguous lots into two lots, but one of the lots did not meet the minimum square-foot requirement as a utility easement could not be calculated as

part of the square footage. *Id.* The trial court dismissed the abutting plaintiff's appeal of the granting of the variance rejecting the argument that there was no hardship because the plaintiff could still put a house on one of the lots and noting that the owner could have built houses on all three of the lots. *Id.*, 558. The Appellate Court reversed concluding that only extreme financial hardship could justify the granting of the variance. *Id.*, 559. Citing *Adolphson* and *Stancuna,* the Supreme Court sided with the trial court stating: "In cases in which an extreme hardship has not been established, the reduction of a nonconforming use to a less offensive prohibited use may constitute an independent ground for granting a variance." *Id.*, 562. It held, "granting the variance would increase the size and buildable area of the lots, resulting in a development that more nearly conforms to the technical requirements of the town's zoning regulations. Moreover, if [the applicant] currently can build three houses on the property, granting the variance to allow conversion of the property into two buildable lots would reduce the density of the development, which presumably would be 'less offensive to the surrounding residents.' . . . Even if [the applicant] currently is limited to building two houses on the property, granting the variance could not result in a more offensive use of the property." (Citation omitted.) *Id.*, 570. The court concluded "that the board's decision granting [the

applicant's] application for a variance should be affirmed on the ground that it would reduce the nonconforming use of the property." *Id.*, 572.

In 2009, in *Hescock v. Zoning Board of Appeals,* 112 Conn.App. 239, 241-42, 962 A.2d 177 (2009), an abutting plaintiff appealed the granting of a variance from a 100-foot high tide setback requirement so the applicants could build a new home on a lot situated in a coastal area management overlay district and a flood hazard overlay district. The applicants sough to raze an existing house forty-four feet from the mean high tide and build a new house forty-seven feet from the mean high tide. *Id.*, 242. In granting the variance, the board's stated reason was brief—"as presented—will diminish existing non-conformity and will address and improve flood zone issues." (Internal quotation marks omitted.) *Id.*, 247. The trial court dismissed the appeal concluding that the new construction would conform to the coastal zone regulations. *Id.*, 248.

Affirming the trial court, the Appellate Court stated that "the [trial] court in the present case properly concluded that the law developed in *Vine, Adolphson* and *Stancuna* was fully applicable to the present circumstances." *Id.*, 260. The court held that "there was substantial evidence that the new construction would reduce and eliminate existing nonconformities and present less of a hazard in case of a flood, and there was no evidence that

replacing the existing house would result in even minimal harm to the neighborhood. It is important to also note that the board concluded that with time, all of the houses in the neighborhood would conform to the flood zone requirements and that the defendants were on the cutting edge of new development." *Id.*, 261. Hence, the court concluded, "the [trial] court properly upheld the board's conclusion that the elimination and reduction of nonconformances in the present case presented an independent basis for granting a variance." *Id.*

In 2013, in *West Lordship Beach Corporation v. Stratford Board of Zoning Appeals,* Superior Court, judicial district of Fairfield, Docket No. CV-12-6027976-S (Aug. 12, 2013, Radcliffe, J.),[27] the court dismissed an appeal challenging the granting of a variance and coastal area management permit to rebuild a nonconforming cottage that had been destroyed by Hurricane Irene in 2011. The court held, "Given the fact that the destruction of the cottage occurred as the result of extraordinary weather conditions, it cannot be found that any hardship was self-inflicted, or the result of any action of the property owner . . . The [board] was fully justified, in granting the requested variance, in order to reestablish a lawful, nonconforming structure utilizing the same footprint, at a location where it had existed for decades. The hardship relates to

[27] Petition for certification was denied on December 13, 2013.

the application of the zoning regulations to the property in question, rather than any criteria which are personal to the applicant, or are in any way caused by the actions of the applicant." *Id.*

In 2015, in *Verrillo v. Zoning Board of Appeals,* 155 Conn.App. 657, 659-60, 111 A.3d 473 (2015), an abutter challenged the granting of a variance to expand an existing nonconforming residence. On a substantially undersized lot, the applicant sought to renovate the house and change it from two stories to three. *Id.*, 664-65. The board granted the variance noting that they would be gaining "a FEMA compliant building." *Id.*, 670. The trial court sustained the appeal holding that there was no hardship. *Id.*, 671-72.

The Appellate Court affirmed the trial court based upon the homeowner's goal as "what our appellate courts have characterized as personal considerations, such as the desire to obtain more space or to modernize an antiquated building." *Id.*, 691. The court went on to add that "an applicant's disappointment in the use of the subject property, namely, *the inability to build a larger structure*, is personal in nature and not a proper basis for a finding of hardship." (Emphasis in original; internal quotation marks omitted.) *Id.*, 692. It concluded that "neither the applicants' personal desire to expand their existing nonconforming structure to obtain additional, more comfortable

space nor their desire to modernize that structure constitute legal hardship under our law." *Id.*, 695. It also rejected the notion that the hardship arose from the inability to comply with any building codes as the applicants did not submit any evidence that an expansion was necessary rather than preferable. *Id.*, 696-97.

In *Mayer-Wittman v. Zoning Board of Appeals of the Town of Stamford,* judicial district of Stamford-Norwalk, Docket No. CV-16-6027735-S (Dec. 29, 2016, Karazin, J.T.R.) (63 Conn. L. Rptr. 599),[28] the court upheld the board's granting of a variance from a height limitation to rebuild a cottage also destroyed by Hurricane Sandy. Similar to the present case, the ancillary cottage had been built in 1920, was nonconforming and required a variance to comply with FEMA regulations. *Id.* With a base elevation of 8.7 feet, the cottage had been 18 feet and 10 inches high—more than 3 feet above the existing height limitation of 15 feet. *Id.* The owner sought a variance[29] to build a 27-foot and 9-inch structure that had to be elevated an additional 8 feet to meet FEMA requirements. *Id.* Its living space was not increased. *Id.*

Both the trial court and the board noted that the flood restrictions were not peculiar to this house, but also impacted other structures in the neighborhood. *Id.* Nevertheless, the court

---

[28] Petition for certification was granted on February 22, 2017, and the appeal was transferred to the Supreme Court on October 4, 2017, Docket No. SC 19972.

[29] The owner also sought a number of other side and rear yard variances which are not critical to the court's analysis here.

held that the applicant had proven hardship due to the cottage's location in both the VE and AE flood zones and the necessity to raise the structure eight feet to comply with flood regulations. *Id.* "[T]he increased nonconformity does not have the singular purpose of enhancing the [applicant's] personal use of the sea cottage, but instead has the purpose of bringing the sea cottage into compliance with the current FEMA and city of Stamford flood regulations. The only way for the [applicant] to comply with both of these regulations is to increase the height of the structure by elevating the lowest horizontal point of the home an additional eight feet . . . The record shows that the usable space of the sea cottage is not increasing, but the existing structure is simply moving upward and three feet north to meet flood requirements . . . In addition, the livable space within the sea cottage is not changed as a result of the variance." (Citations omitted.) *Id.*

In distinguishing *Hescock* and *Verrillo,* the court stated, "There is however an important distinction between *Hescock* and *Verrillo*. *Hescock v. Zoning Board of Appeals, supra*, 112 Conn.App. 245, involved the entirely new construction of a more flood compliant structure after the previous structure was rendered uninhabitable by a storm. Making the new structure compliant with flood regulations, but still being in violation of the zoning regulation regarding proximity to the high tide line,

was a reduction in a nonconforming use and helped ensure safety . . . *Verrillo,* on the other hand, dealt with a situation where the defendant applied for a variance on the grounds that he needed more living space and wanted to modernize his residential dwelling . . . Due to the nature of his property, the defendant in *Verrillo* could not expand his home horizontally in any direction without violating zoning ordinances, so he applied for multiple variances to increase the size of his home . . . The zoning board approved the requested variances . . . The court found that the defendant purchased the home and property understanding the limitations inherent to them, and thus, the board's decision to grant these variances only on the grounds of personal hardship was insufficient . . . Thus, the court overturned the board's ruling as an abuse of discretion because it was allowing for a variance based upon convenience and personal hardship, not a hardship inherent in the property." (Citations omitted.) *Mayer-Wittman v. Zoning Board of Appeals of the Town of Stamford, supra*, Superior Court, Docket No. CV-16-6027735-S.

In *Nejdl v. Zoning Board of Appeals,* Superior Court, judicial district of Middlesex, Docket No. CV-15-6014141-S (Jan. 24, 2017, Quinn, J.T.R.) (63 Conn. L. Rptr. 762), the court dismissed the appeal of an abutter challenging the granting of variances from side yard setback requirements and from

aggregate ground coverage in the tearing down of a 1903 cottage to put up a new residence that reduced other nonconformities.[30] The court discussed *Verrillo* and found it "neither controlling nor helpful to the analysis in this case." *Id.* "An independent basis for approving the actions of the [board] is found in the narrow exception carved out of the rule requiring a showing of hardship before a variance may properly be granted. See *Verrillo, supra* at pages 725, 726. This narrow exception is explicitly discussed and noted with approval in *Verrillo,* citing cases standing for the narrow exception outlined. Those cases are *Adolphson v. Zoning Board of Appeals,* 205 Conn. 703, 705 (1988); *Hescock v. Zoning Board of Appeals,* 112 Conn.App. 239 (2009); and *Vine v. Zoning Board of Appeals,* 281 Conn.App. 553, 562 (1977)." *Nejdl v. Zoning Board of Appeals, supra*, Superior Court, Docket No. CV-15-6014141-S. The court concluded that the variances were properly granted under the exception as the new home would be more in line with the zoning requirements and in accordance with the comprehensive plan. *Id.*

In *Kwesell v. East Haven Zoning Board of Appeals,* Superior Court, judicial district of New Haven, Docket No. CV-15-6056545-S (May 25, 2017, Agati, J.) (64 Conn. L. Rptr. 549),[31]

[30] The court noted, "Plaintiff's apparent difficulty with this application is that the height of the dwelling is to be increased by almost ten feet; from its present height of 25 feet to 34.3 feet. Allowable in the zone is 35 feet, so the new structure would conform to the existing regulations." *Id.*

[31] Petition for certification was denied on July 26, 2017.

an abutting neighbor also sought to reverse the board's approval of a variance to rebuild a storm damaged waterfront home. The applicant sought to replace the existing home with a three-story, FEMA compliant structure in the same footprint as the existing house. *Id.* Relying on *Hescock, Mayer-Wittman* and *Nejdl,* the court dismissed the appeal concluding, "the [board] had previously approved other applications requiring compliance with the FEMA regulations the town had adopted. In addition, the [board] amended the approval with restrictions on use of the third floor. Also, the area the new home will take on the property is less than the present home. Finally, the new home would now have less living space than it does presently. This application fits the narrow exception to the requirement of a showing of need for hardship as found in the cases cited; *Hescock, Mayer-Wittman* and *Nejdl*." *Id*.

As in *Mayer-Wittman* and *Nejdl,* this court agrees that *Verrillo* is not controlling. The facts in *Verrillo* did not involve a rebuild on a vacant lot, but concerned a vertical expansion of an existing two-story nonconforming coastal cottage by adding approximately 430 square feet and a third floor. *Verrillo v. Zoning Board of Appeals, supra*, 155 Conn.App. 660, 665. Although there was some mention of meeting FEMA requirements, the structure was not in a "FEMA Flood Zone"; *id.*, 697 n.27; and compliance with FEMA was not the driving

reason for the expansion and the variance request. *Id.*, 694-95. Moreover, the court found that the impetus for the variance request was that the owners "desired more living space and storage space and they wanted to modernize the existing structure." *Id.*, 691.

The facts in *Verrillo* are significantly different from those here. In the present case, the plaintiffs' increased nonconformity does not have the singular purpose of enhancing the use of the home; they do not seek more living space or modernization. See *Mayer-Wittman v. Zoning Board of Appeals of the Town of Stamford supra*, Superior Court, Docket No. CV-16-6027735-S. Instead, they seek to rebuild a house with substantially the same square footage of the structure that was destroyed. To do so, they must comply with FEMA requirements, the state building code and Milford's regulations for properties in flood hazard zones. Similar to the holdings in *Mayer-Wittman* and *Hescock,* the hardship—or the exception to hardship—here is the total destruction of the previous home by Hurricane Sandy and the need to comply with applicable elevation requirements. Their hardship is thus not self-imposed.[32]

---

[32] Variance law is subject to specific limitations which, as demonstrated herein, occasionally conflicts with the General Statutes §8-6 purpose allowing for its "elastic" application. See *Florentine v. Darien,* 142 Conn. 415, 425, 115 A.2d 328 (1955) ("[t]he essential purpose of a board of appeals is to deal with these cases by furnishing elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional, manner"). The self-created hardship rule can and does result in disparate results. See *Hyatt v. Zoning Board of Appeals, supra*, 163 Conn. 382 ("[t]he statute clearly directs the board to consider only conditions, difficulty or unusual hardship peculiar to the parcel of land which is the subject of the application for a variance").

Furthermore, the proposed house would be safer because of the elevation requirement and it will reduce nonconformities. It would be set further back from Long Island Sound and be removed from the VE 13 zone. (ROR, Item 2.) Additionally, the building area and lot coverage are reduced. (ROR, Item 2; Item 18, p. 4.) Therefore, there is substantial evidence that the plaintiffs' proposed house would reduce existing nonconformities and present less of a hazard in terms of flooding and storm surge.[33]

For these reasons, the plaintiffs' appeal is sustained.

Berger, J.T.R.

In the present case, the board's decision conflicts with decisions of other boards expressly granting variances to conform with FEMA regulations. See, e.g., *Hescock v. Zoning Board of Appeals, supra*, 112 Conn.App. 261. Rigid interpretation of the phrase "but not affecting generally the district in which it is situated" in General Statutes §8-6 to preclude relief is interesting in such situations where perhaps a few homes or even several homes who do suffer from the same situation *but are part of a larger district* as in the current case. (ROR, Item 18, p. 21.)

Our waterfront coastal communities and their property owners must all comply with federal, state and local law concerning flood protection. It could reasonably be argued that current land use law—especially in terms of standard variance law as enunciated in *Verrillo*—is ill equipped (or outdated or perhaps even unfair) to deal with the interrelationship of those laws when catastrophe occurs and regulatory programs mandate significant changes to construction practices. Building height regulations and the rules concerning expansion of nonconforming use were not adopted with freeboard limits in mind. The ability to rebuild or conform a waterfront home to special federal, state and local building requirements resulting from catastrophe, climate change or sea level rise should not arguably differ from town to town. Yet, it apparently does. The legislature should address this issue for Connecticut. See General Statutes §22a-92(a)(5) and (9).

[33] A number of residents wrote to the board opposing the variance. (ROR, Items 8-12; Item 17, Item 18, pp. 18-19.) They expressed concern about the impact to the nature of the neighborhood, obstruction of views and setting a precedent "for future construction" or variance requests that would encourage others to overdevelop their properties. The evidence in the record is that many nearby lots are overdeveloped. (ROR, Item 11; Item 14.) Additionally, the speculative evidence of harm to the neighborhood aesthetically should not outweigh the stronger risk of harm to the neighborhood due to coastal flooding and the need for safer structures.