DOCKET NO.: UWY-CV18-6038377-S : SUPERIOR COURT

ALAN MIZAK and CHERYL MIZAK : J. D. OF WATERBURY

VS. : AT WATERBURY

ZONING BOARD OF APPEALS OF THE TOWN OF SOUTHBURY, STACEY C. VOIGHT And CHRISTOPHER VOIGHT : JULY 11, 2023

MEMORANDUM OF DECISION RE:PLAINTIFFS' APPEAL

On January 2, 2018, following a public hearing, the Southbury Zoning Board of Appeals (the "ZBA"), approved defendants Stacey and Christopher Voight's ("Voights") application for a variance of Section 4.4 of Southbury's Zoning Regulations ("Regulations") for their 0.115 acre lot located at 149 Oakdale Road in Southbury, Connecticut. The Voights had, without approval, constructed a storage shed in the side yard of their property 0.4 feet from the westerly property line, which is a variance from the 15 feet side yard setback requirement of the Regulations. The Voights' application also requested a variance to reduce the minimum property line setback from the rear property line required under Regulations Section 4.4 from 15 feet to 8.7 feet and to expand the maximum coverage of buildings as a percentage of lot area required under Regulations Section 4.4 from 20 percent to 20.5 percent. The Voights' property abuts property owned by plaintiffs Alan Mizak and Cheryl Mizak ("Mizaks") located at 151 Oakdale Road ("Mizak property"). The Voights' and Mizaks' properties are located in the R-20 zoning district.

PUBLICATION TO ABUTTERS

By way of a preliminary procedure, the court raised an issue during the April 4, 2023 hearing on the matter, as a review of the record by the court disclosed that on the evening of the December 5, 2017 public hearing, the ZBA was notified that the abutting property owners' notification by mailing with proof by green card receipt, were only mailed on December 4, 2017.

This was insufficient for the return of the recipients' green card confirming receipt. The ZBA opened the public hearing and continued it to January 2, 2018. The issue raised by the court is whether the failure to mail the abutter notices with green card return receipts prior to December 4, 2017 deprived the ZBA of the jurisdiction to open and continue the public hearing, as opposed to denying the application without prejudice and requiring the submission of a new application, newspaper publication ("public notice") and abutter notification with green card return receipt ("personal notice"). All the parties agreed on the record at the May 15, 2023 hearing that the application of the appropriate caselaw to the facts of the case do not rise to the level needed to demonstrate that any party was deprived of fundamental fairness and had their right to participate prejudiced so as to require a new hearing. The court also reviewed the submissions of the parties on the issue, and after a review of the applicable caselaw and review of the record, agrees that no party was deprived of fundamental fairness or had their right to participate prejudiced. Therefore, the hearing on the merits before this court was allowed to proceed on May 15, 2023.

DEFENDANT ZBA FACTS POSITION

The variance application alleged the following hardships: "a) Shed is already complete[;] b) There will be no place for us to store anything. (i.e., lawn/maintenance equipment)[.] Without the shed, we are forced to store unsightly items in the open in the yard or driveway for all to see." The variance application also listed the following characteristics "which especially affect this parcel, but not affecting generally the district in which it is situate[d;] a) Extreme topography prevents relocation of existing shed[;] b) Severely undersized lot limits possible locations[;] c) Location of septic prevents relocation; d) Location of the well prevents relocation [of the shed]." The variance application stated the following with regard to whether the variance sought is in harmony with the general purpose and intent of the Regulations: "The shed is the only source of

storage. In order for us to keep a neat & tidy property the shed is crucial. It does not adversely affect any neighboring property by way of drainage issues or sight line issues or encroachments."

At the public hearing, Mr. Voight addressed the ZBA, articulating the hardships set forth in the variance application, including the extremely small size of the lot, its steep topography and the locations of the well and septic, which made it impossible to locate the shed anywhere else on the lot. Mrs. Voight also emphasized the topography, noting it is "really steep in the rear of the property." Mr. Voight also advised the ZBA that his neighbors had been consulted and expressed support for the planned location of the shed and for the Voights' work in improving and maintaining the appearance of their property. He also noted that at least some of the ZBA members had made a site visit. A survey map submitted as a part of the permit application makes it clear according to the Voights that there is no other feasible location for the shed. The Mizaks did not attend the public hearing. However, the Mizaks submitted a November 29, 2017 letter which stated in part that the Voights "did a nice landscaping project in their front yard" and stated further that the Mizaks were "unhappy" that the Voights' shed was built "approximately 6 inches from the property line." The Mizaks' letter was read and discussed at the January 2, 2018 public hearing. The Voights expressed shock at the Mizaks' letter, stating that it was inconsistent with what they had been told by the Mizaks "many, many, times." At the close of the hearing, a motion was made to approve the variance. The defendant alleges that the ZBA members contributed to the terms of an approval motion which stated that they believed the Voights had demonstrated hardship based upon the size, topography and shape of the lot, and that the variance would not adversely affect generally the district or area in which it is located. A directive was given to the ZBA's secretary to write down the terms of the motion and the motion carried. A letter from the Southbury Zoning

Enforcement Officer ("ZEO") to the applicants formally notified them of the approval and a legal notice of the ZBA's action was published on January 10, 2018.

PLAINTIFFS' POSITION

On January 2, 2018, the defendant Zoning Board of Appeals of the Town of Southbury ("ZBA" and "Town"), following a public hearing, approved defendants Stacey and Chris Voight's ("Voights") application for a variance ("application"). The application sought to vary the requirements of Section 4.4 of the Zoning Regulations of the Town of Southbury ("Regulations") (ROR 3f). The Application requested permission for a shed to be positioned on the edge of the Voight property, located at 149 Oakdale Road, Southbury, Connecticut ("Voight property"). The Voight property abuts the Mizak property. In particular, the application requested a variance to: i) reduce the minimum property line setback from the west side property line required under Section 4.4 from 15 feet to 0.4 feet; ii) reduce the minimum property line setback from the rear property line required under Section 4.4 from 15 feet to 8.7 feet; and iii) expand the maximum coverage of buildings as a percent of lot area required under Section 4.4 from 20 percent to 20.5 percent.

The application alleged the following hardships: "a) Shed is already complete[; and] b) There will be no place for us to store anything (i.e., lawn/maintenance equipment) without the shed, we are forced to store unsightly items in the open in the yard or driveway for all to see." The application listed the following characteristics that especially affect the Voight Property: "a) Extreme topography prevents relocation of existing shed[;] b) Severely undersized lot limits possible locations [of the shed;] c) Location of septic prevents relocation [of the shed; and] d) Location of the well prevents relocation [of the shed]."

The Mizaks submitted a November 29, 2017 letter to the ZBA in which they expressed their concerns related to the application and location of the shed in correlation to their property.

The letter was read and discussed at the January 2, 2018 public hearing, but the ZBA misconstrued the concerns raised by the letter as relating solely to the cleanup of the area surrounding the shed, and not the actual location of the shed. Despite the Mizaks' concerns that the shed would be permanently located literally less than half a foot from the dividing property line between the Mizak and Voight properties, the ZBA approved the application on the sole ground that the granting of the subject variance would not adversely affect generally the district or area in which the Voight property is located. The ZBA decision to grant the application was unreasonable, improper, illegal, arbitrary, and constitutes an abuse of the discretion, responsibilities, and duties vested in the ZBA because: a) the Voights' claimed hardships are personal in nature and do not relate to the application of the Regulations to their property); b) the Return of Record (the "Record") contains no evidence that the Voights' claimed hardships are unique to their property; c) the Voights failed to establish that the variance would be consistent with Southbury's comprehensive zoning plan; and d) the denial of the Voights' application would not amount to either a practical confiscation or confiscation.

"When a zoning board states the reasons for its action, the question for the court to pass on is simply whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the commission is required to apply under the zoning regulations." (Internal quotations marks and citations omitted.) *Verrillo* v. *Zoning Board of Appeals of Town of Branford*, 155 Conn. App. 657, 672-673, 111 A.3d 473 (2015). The inquiry begins, therefore, with the question of whether the board "rendered a formal, official, collective statement of reasons for its action." *Protect Hamden/North Haven from Excessive Traffic & Pollution. Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 544, 600 A.2d 757 (1991).

A reviewing court's analysis of whether the subject zoning board has in fact set forth a statement of purpose is guided by four well established factors. First, "individual reasons given by certain members of the [zoning board do] not amount to a formal, collective, official statement of the [board] . . . and are not available to show the reason[s] for, or the ground[s] of, the [zoning board's] decision." (Internal quotations marks and citations omitted.) *West Hartford Interfaith Coalition. Inc.* v. *Town Council*, 228 Conn. 498, 514, 646 A.2d 1342 (1994); see also *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 208-209, 658 A.2d 559 (1995). Second, the remarks made by members of the subject zoning board in moving to grant a variance do not constitute a collective statement of the basis for the board's action. *Bloom* at 208-209 and 209 n.12. Third, it is not appropriate for a reviewing court to attempt to piece together a formal collective statement from the minutes of the public hearing which memorialize the discussion of the members of the board prior to a vote. See. *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission,* 220 Conn. 527, 546 n.15, 600 A.2d 757 (1991). Fourth, the rendering of a formal collective statement of purpose "involve[s] circumstances wherein the agency couples its communication of its ultimate decision with express reasons behind that decision." *Harris* v. *Zoning Commission*, 259 Conn. 402, 420-421 788 A.2d 1239 (2002). If the reviewing court is unable to find a statement of purpose made in the subject record, the court is then obligated to search the entire record to ascertain whether the evidence reveals any proper basis for the board's decision to grant the subject variances. Id. at 423.

The Record reveals only one sentence that could potentially constitute a statement of purpose: "[t]he application was approved for variance on the grounds that the granting of the variance would not adversely affect generally the district or area in which it [the Voight Property] is located." In setting forth this statement, the ZBA failed to address whether it deemed the Voights

to have met their burden of establishing: 1) a sufficient hardship; 2) a unique hardship; and 3) that the variance was consistent with the comprehensive zoning plan of the Town. The ZBA's failure to set forth a statement of purpose that incorporates the pertinent factors that must be considered in the approval of an application for variance, now requires that the Record must be examined by the court in order to determine whether there is a rational basis for the ZBA's approval.

"General Statutes § 8-6 empowers a municipal zoning board of appeals, inter alia, 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." *Verrillo*, 155 Conn. App. 657, 677, 111 A.3d 473 (2015). "[T]he granting of a variance must be reserved for unusual or exceptional circumstances. . . . An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone. . . . Accordingly, we have interpreted . . . § 8-6 to authorize a zoning board of appeals to grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. . . . Proof of exceptional

difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance." (Internal quotation marks; citations omitted.) *Bloom* at 206-208.

The first element of the test, that the variance application is in accord with the comprehensive zoning plan, is usually satisfied "when the use to be allowed by the variance is consistent with other uses in the area." *Amendola* v. *Zoning Board of Appeals of City of West Haven,* 161 Conn. App. 726, 738, 129 A.3d 743 (2015). As to the second element, "[a]n applicant's burden with respect to the hardship requirement . . . is twofold, as it must establish both the existence of a sufficient hardship and that the claimed hardship is . . . unique." (Internal quotations; citations omitted.) *Francini* v. *Zoning Board of Appeals,* 228 Conn. 785, 787, 639 A.2d 519 (1994). The granting of a variance is no insignificant matter, as it runs with the land in perpetuity. See General Statutes. § 8-6(b); *Bloom* at 206-208. As such, a zoning board may grant a variance "only where a situation falls fully within the specified requirements." *Allen* v. *Zoning Board of Appeals,* 155 Conn. 506, 510, 235 A.2d 654 (1967).

The Voights argue that as a result of their listed hardships, the current location of the newly constructed shed is the only location on their property where the shed can reasonably be located. The sole reason the shed is needed is for storage purposes. The Voights further claim a hardship based on the fact that the shed is already constructed. In essence, the claimed hardships are that the Voights are unable to build a Regulation-compliant shed on the property because it is small, sloped and limited in space as a result of the location of the septic system; all are personal to the Voights; and not sufficient. They do not arise as a result of the application of the Regulations to the Voight property, as required, but rather as a result of the Voights' preferred use of the property.

"[A] variance is properly granted only where there is a showing before the zoning board of appeals that the hardship caused by the application of zoning regulations relates to the property for

which the variance is sought and not to the personal hardship of the owners thereof . . [A] variance is not a personal exemption from the enforcement of zoning regulations. It is a legal status granted to a certain parcel of realty without regard to ownership. . . . Similarly, it is also well established that self-inflicted hardship which arises because of individual actions by the applicant will not provide a zoning board of appeals with sufficient reason to grant a variance. . . . Hardships in such instances as these do not arise from the application of zoning regulations, per se, but from *zoning requirements coupled with an individual's personal needs, preferences and circumstances.* Personal hardships, regardless of how compelling or how far beyond the control of the individual applicant, do not provide sufficient grounds for the granting of a variance." (Emphasis added.) (Citations omitted.) *Garibaldi* v. *Zoning Board of Appeals,* 163 Conn. 235, 238-240, 303 A.2d 743 (1972).

Applying the above case law, it is apparent that the hardships claimed by the Voights are personal in nature. The claimed hardship that would purportedly arise as a result of the shed already being complete is a classic example of a self-inflicted hardship. The Voights built the shed in violation of the required setbacks and maximum building coverage percentage, and further elected to complete construction of the shed despite two cease-and-desist orders from the Town. Under *Garibaldi,* such a self-inflicted hardship is not sufficient. Second, the claimed hardships are subjective and relate to the Voights' preferred use of the property to store outdoor equipment. They are not from the application of the Regulations to the Voight property. The hardships listed by the Voights relate to the characteristics of the Voight property, i.e., the size, slope, and lack of other suitable locations for construction, are also of a personal nature. Connecticut courts have long recognized that disappointment in the use of a property, namely, the inability to add a new structure to the property, is personal to the owners of the property and not inherent in the property itself.

See *Verrillo* at 691. In short, the hardships claimed by the Voights are personal in nature and do not result of the application of the Regulations to the Voight property. These claimed hardships are thus insufficient and could not have been properly considered by the ZBA in its evaluation of the application. The ZBA's decision to grant the application was unreasonable, improper, illegal and arbitrary, and constitutes an abuse of the discretion, responsibilities and duties vested in the ZBA.

A court's analysis of a claimed hardship is bifurcated to assess both the sufficiency and uniqueness of the claimed hardship. "In an administrative appeal challenging the decision of the board to grant a variance, a reviewing court must examine the record to ascertain whether it contains substantial evidence that the claimed hardship did not apply to other properties in the area." *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 559-560, 916 A.2d 5 (2007). "One seeking a variance must show that his property is peculiarly disadvantaged by the operation of the zoning ordinance and not merely that a general hardship, equally applicable to other properties in the neighborhood, results from a strict enforcement of the code." *Ward* v. *Zoning Board of Appeals,* 153 Conn. 141, 143, 215 A.2d 104 (1965). *Ward* involved the review of a zoning board's decision to approve a variance even though the subject applicant made no showing that his claimed hardships were unique. The *Ward* court held: "In upholding the board's action, the court may seem to have condoned the board's use of its variance power to alter the zoning classification of an entire neighborhood. Such a practice is incompatible with established zoning procedures and ignores the rule, so often emphasized by this court, that a variance may not be granted unless the applicant can show that the zoning ordinance works a distinct hardship on his particular piece of property and not merely a general hardship on the neighborhood at large. . . . The record . . . fails to demonstrate that a strict application of the ordinance created an unreasonable hardship or

had any adverse effect on the property of the [applicants] in comparison with other properties in the same general area. Id. at 146-147. As a result of a lack of evidence as to the unique nature of the claimed hardships, the *Ward* court sustained the subject appeal, holding the board's approval improper. The present matter is governed by *Ward.* The Record demonstrates that the Voights failed to establish that their claimed hardships were unique to their property in correlation to the surrounding neighborhood. The Record contains evidence that the claimed hardships are common to the surrounding neighborhood. At the public hearing, Mr. Chris McGinness, the Town's Zoning Enforcement Official, noted that several properties in the area have small lot sizes and that the ZBA should take this fact into consideration so as not to set a negative precedent. This acknowledgement that there are similarly situated properties in the area is fatal to any argument that the claimed hardships are unique to the Voight property. As such, the ZBA's decision to approve the Application was improper.

"A variance should not be granted unless it is in harmony with the general purpose and intent of the zoning ordinance." *Kreipcio* v. *Zoning Board of Appeals,* 152 Conn. 657, 662, 211 A.2d 687 (1965). "A variance waives the strict letter of the zoning ordinance while at the same time it preserves, or should preserve, the spirit and purpose of the ordinance." (Internal quotation marks and citations omitted.) *Verrillo* at 728. "The comprehensive plan is found in the zoning regulations themselves." (Internal quotation marks and citations omitted.) Id. at 729. The general purpose of the regulations is to allow for the construction of residential dwellings in a manner that is predictable so as to protect the property rights and value of the community. The Voights' application requests, inter alia, a variance from the required setbacks to allow the placement of a shed 0.4 feet from the plaintiffs' property. Section 4.4 of the Regulations requires 15-foot setbacks for properties within the R-20 designation. The obvious purpose is to preserve sufficient space

between structures on adjacent residential properties, with the attendant reduced congestion and conservation of property values. The purpose of the application is to satisfy the Voights' personal preference to add storage space to their property, not to build a residence. The claim of inadequate storage could be made by several other neighborhood property owners. Because this characteristic is common to the neighborhood, the ZBA essentially was enacting an impermissible zone change that would allow the virtual elimination of the setback requirements. The ZBA's approval therefore failed to preserve the spirit of the regulations. As such, the granting of the requested variance would be inharmonious with the comprehensive zoning plan of the Town.

Connecticut courts have recognized two tests which, if satisfied, render a zoning board's denial of a variance a confiscation of the property and thus a sufficient and unique hardship. The two tests are the practical confiscation test and the "tantamount to a confiscation" test. "A practical confiscation occurs when a landowner is prevented from making any beneficial use of its land as if the government had, in fact, confiscated it." *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 256, 662 A.2d 1179 (1995). "[A] practical confiscation requires a complete loss of any beneficial use." (Internal quotation marks and citations omitted.) *Verrillo* at 700. Our Supreme Court "[has] repeatedly held that considerations of financial disadvantage - or, rather, the denial of a financial advantage - do not constitute hardship, unless the zoning restriction greatly decreases or practically destroys [the property's] value for any of the uses to which it could reasonably be put." (Internal quotation marks omitted.) *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 295, 947 A.2d 944 (1994). "Thus, to prevail under a claim of practical confiscation, a party must demonstrate that a literal application of the regulations at issue will not allow any reasonable use of its property." (Internal quotation marks and citations omitted.)

Verrillo at 700. "When a reasonable use of the property exists, there can be no practical confiscation." (Internal quotation marks and citations omitted.) Id. at 701.

In contrast, the second confiscation test, the "tantamount to confiscation" test, takes into account whether denial of a variance would impart a significant diminution in value that falls short of a total loss of value as required under the practical confiscation test. "The tantamount to confiscation test thus serves as a limited exception to the practical confiscation test. Whereas the latter requires proof that denial of the variance would practically destroy the value of the property for all reasonable uses[,] the former applies in situations that fall just shy of that measure. This court clarified an applicant's burden with respect to those two differing confiscation standards in *Jaser* v. *Zoning Board of Appeals*, 43 Conn. App. 545, 546 n. 2, 684 A.2d 735 (1996), citing to *Chevron Oil Co.* [170 Conn. 146 (1976)] and stating that 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." (Internal quotation marks and citations omitted.) *Verrillo* at 704-705.

The application seeks approval to add a shed to the Voight property. The property is located in a residential neighborhood and a single-family dwelling is currently present on the property. As such, the denial of the application would not deny or hinder this residential use. Thus, a reasonable use for the property, as a residence, exists so as to preclude a claim of practical confiscation. Further, because the application relates to a shed and not the dwelling on the property, denial of the application would require only the removal of the shed. Such action would not cause a diminution in value as required to succeed under the "tantamount to confiscation" test. As a result, neither a successful claim of practical confiscation, nor a successful claim of an effect tantamount to confiscation can be mounted.

Further, as in *Verrillo,* there is no evidence in the record quantifying any alleged loss in value to the Voight property that would result from denial of the application. This proves fatal to a claim of confiscation under either test. As the *Verrillo* court held regarding the lack of evidence related to loss in value, "The record does not substantiate the claim that the applicants are being completely or almost completely deprived of the use of the value of that land. A denial of the requested variances, therefore, does not amount to a practical confiscation, nor is it tantamount to confiscation. Accordingly, confiscation is not a proper basis for a finding of hardship in this case." Id. at 707. For the foregoing reasons, the ZBA's approval of the variance sought by the Voights was unreasonable, improper, illegal, arbitrary and constitutes an abuse of the discretion, responsibilities and duties vested in the ZBA. The ZBA's decision to approve the application should be reversed by this court.

DEFENDANT ZBA'S POSITION

The variance application alleged the following hardships: "a) Shed is already complete[;] b) There will be no place for us to store anything. (i.e., lawn/maintenance equipment)[.] Without the shed, we are forced to store unsightly items in the open in the yard or driveway for all to see." The variance application also listed the following characteristics "which especially affect this parcel, but not affecting generally the district in which it is situate[d]; a) Extreme topography prevents relocation of existing shed[;] b) Severely undersized lot limits possible locations[;] c) Location of septic system prevents relocation; d) Location of the well prevents relocation [of the shed]." The variance application stated the following with regard to whether the variance sought is in harmony with the general purpose and intent of the Regulations: "The shed is the only source of storage. In order for us to keep a neat & tidy property the shed is crucial. It does not adversely affect any neighboring property by way of drainage issues or sight line issues or encroachments."

At the public hearing, Mr. Voight addressed the ZBA, articulating the hardships set forth in the variance application, including the extremely small size of the lot, its steep topography and the locations of the well and septic system, which made it impossible to locate the shed anywhere else on the lot. Mrs. Voight also emphasized the topography, noting it is "really steep in the rear of the property." Mr. Voight also advised the ZBA that his neighbors had been consulted and expressed support for the planned location of the shed, and for the Voights' work in improving and maintaining the appearance of their property. He also noted that at least some of the ZBA members had made a site visit. A survey map submitted as a part of the permit application makes it clear that there is no other feasible location for the shed. The Mizaks did not attend the public hearing. However, they submitted a November 29, 2017 letter, which stated in part that the Voights "did a nice landscaping project in their front yard." It stated further that the Mizaks were "unhappy" that the Voights' shed was built "approximately 6 inches from the property line." The Mizaks' letter was read and discussed at the January 2, 2018 public hearing. The Voights expressed shock at the Mizaks' letter, stating that it was inconsistent with what they had been told by the Mizaks "many, many, times." At the close of the hearing, a motion was made to approve the variance. The ZBA members contributed to the terms of an approval motion, which stated that they believed the Voights had demonstrated hardship based upon the size, topography and shape of the lot, and that the variance would not adversely affect generally the district or area in which it is located. A directive was given to the ZBA's secretary to write down the terms of the motion, and the motion carried. A letter from the ZEO to the applicants formally notified them of the approval, and a legal notice of the ZBA's action was published on January 10, 2018.

The standard for judicial review of an appeal from a decision to grant or deny a variance is well established. A zoning board of appeals is endowed with liberal discretion, and its decisions

are subject to review by a court only to determine whether the board acted arbitrarily, illegally or unreasonably. *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 23-24, 966 A.2d 722 (2009). The burden of demonstrating that the board has acted improperly is upon the party seeking to overturn the board's decision. *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 707, 535 A.2d 799 (1988). A reviewing court may not substitute its judgment for that of the zoning board of appeals, thereby usurping the functions and prerogatives of the board, so long as the board's decision reflects an honest judgment, after full hearing. *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 206, 658 A.2d 559 (1985). The question is not whether the trial court would have made a different decision, but whether the record supports the decision reached. *Calandro* v. *Zoning Board of Appeals*, 176 Conn. 439, 440, 408 A.2d 229 (1979).

A decision must be upheld if it is supported by substantial evidence in the record. *Smith Bros. Woodland Management, LLC* v. *Zoning Board of Appeals*, 108 Conn. App. 621, 628, 949 A.2d 1239 (2008). Substantial evidence is enough evidence to justify, if the trial were to a jury, the refusal to direct a verdict, if the conclusion sought to be drawn is one of fact. *Sampieri* v. *Inland Wetlands Agency*, 226 Conn. 579, 588, 628 A.2d 1286 (1993). General Statutes § 8-7 provides, in pertinent part: "Whenever a zoning board of appeals grants or denies any . . . variance in the zoning regulations applicable to any property . . . it shall state upon the record the reason for its decision and . . . when a variance is granted, describe specifically the exceptional difficulty or unusual hardship on which its decision is based."

"The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn the board's decision. *Francini* v. *Zoning Board of Appeals*, 228 Conn. 785, 791, 639 A.2d 519 (1994). In the present case, the plaintiffs did no more than send a letter objection and did not attend the public hearing to address the matter further. The ZBA had before it a survey

map and heard a presentation from the Voights. It detailed the hardships resulting from the size of the lot, its topography and other factors. The record also reflects that the ZBA had detailed input from the Zoning Enforcement Officer ("ZEO"), who was familiar with the site; and that at least some of the ZBA members had made a site visit.

While the issues of the size of the lot and the location of the well and septic system are evident from the survey map, the hardship caused by the particular topography of the Voights' lot is, on the record presented, a unique hardship. "The topography of a property is a recognized ground for hardship." *Levy* v. *Westport*, 2007 WL 3318079 at *3. "A hardship resulting from the peculiar topography or condition of the land or a particular location which makes the property unsuitable for the use permitted in the zone in which it lies may well be such a hardship as is contemplated by the ordinance." *Plumb* v. *Board of Zoning Appeals*, 141 Conn. 595, 601, 108 A.2d 899 (1954). The Voights bore the initial burden of proving a hardship. They did this to the satisfaction of the ZBA. Now, the burden of proof lies with the Mizaks to demonstrate that the ZBA acted improperly and in a manner that exceeded its liberal discretion. *Francini* at 791. The record reflects that the Voights gave a detailed explanation of the basis for their claim of hardship and that the plaintiffs did not articulate their position before the ZBA other than in a brief letter, which did no more than establish the fact that a variance was needed. The plaintiffs failed to address the unique hardship caused by the size, topography and other characteristics of the Voights' lot. The plaintiffs failed to sustain their burden of establishing that the ZBA acted improperly and in a manner which abused its liberal discretion in granting the variance. For all of the foregoing reasons, the Town of Southbury Zoning Board of Appeals respectfully submits that its decision must be upheld.

PLAINTIFFS' REPLY POSITION

The ZBA fails to address or counter the plaintiffs' arguments, including the following:

1. The Voights claimed hardships are personal in nature and do not arise from the application of the zoning regulations of the Town of Southbury to the Voight Property. (See Section III. a. of Plaintiffs' Brief);
2. The hardships claimed by the Voights are self-inflicted and therefore fail to satisfy the requirement that a claimed hardship be both sufficient and unique. (See Section III. a. of Plaintiffs' Brief);
3. The record contains no evidence that the Voights' claimed hardships are unique to the Voight Property. (See Section III. b. of Plaintiffs' Brief);
4. The Voights failed to establish that the variance sought by the Application would be consistent with Southbury's comprehensive zoning plan. (See Section III. c. of Plaintiffs' Brief); and
5. The record is devoid of materials that support the Board's decision to grant the Variance.

Setting aside the lack of arguments addressing any of these points, the ZBA makes several unsubstantiated claims, which the plaintiffs discuss below.

The ZBA asserts that "at least some of the ZBA members had made a site visit." To support this assertion, the ZBA cites solely to a statement made by Mr. Voight at the January 2, 2018 ZBA public hearing. The ZBA then cites to *Grimes v. Conservation Comm'n,* 243 Conn. 266, 701A.2d 101 (1997), for the proposition that "site visits are appropriate to acquaint the members of a commission with the property at issue." The record, however, indicates that Mr. Voight's statement about visits by ZBA members to his property was an assumption, not a fact. It is undisputed that the ZEO visited the site, but there is no evidence in the record that any other ZBA member made such a visit. As a result, the ZBA's attempt to infer that its members had personal knowledge of the property based on an inspection is baseless.

The ZBA incorrectly states that the individual "contributions" of its members may be aggregated and viewed by this court as the formal collective statement of the ZBA. The remarks made by individual Board members in granting a variance do not amount to a formal, collective

statement. *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 208-209 and 209 n.12, 658 A.2d 599 (1995). The communication of the ZBA's January 8, 2018 decision simply states, "The application was approved for variance on the grounds that the granting of the variance would not adversely affect generally the district or area in which it is located." This communication of the ZBA's decision contains no reference to whether the hardships claimed by the Voights were sufficient or unique to the Voight property. The ZBA's collective statement fails to incorporate the necessary elements required to grant a variance and is therefore unreasonable, improper, illegal, arbitrary and an abuse of the discretion, responsibilities and duties vested in the ZBA.

"In an administrative appeal challenging the decision of the board to grant a variance, a reviewing court must examine the record to ascertain whether it contains substantial evidence that the claimed hardship did not apply to other properties in the area." *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 559-560, 916 A.2d 5 (2007). "One seeking a variance must show that his property is peculiarly disadvantaged by the operation of the zoning ordinance and not merely that a general hardship, equally applicable to other properties in the neighborhood, results from a strict enforcement of the code." *Ward* v. *Zoning Board of Appeals*, 153 Conn. 141, 143, 215 A.2d 104 (1965).

The ZBA argues that "[w]hile the issues of size of the lot and the location of the well and septic are evident from the survey map, the hardship caused by the particular topography of the Voights' lot is, in the record presented, a unique hardship." This statement demonstrates a misunderstanding of the proper standard for granting a variance. The claimed hardships must be both sufficient and unique. *Francini* v. *Zoning Board of Appeals*, 228 Conn. 785, 787, 639 A.2d 519 (1994). While it might be apparent from the survey of the Voight property that the lot is small, and while it may also be evident that the location of the well and septic system creates a

convenience issue for the Voights, the survey of the property alone does not allow for a determination that these characteristics are unique to the Voight property. The determination of uniqueness requires a comparison of the characteristics of the Voight property, and claimed hardships therefrom, against other properties in the Voights' neighborhood. No such comparison is present in the record and therefore the ZBA could not properly have found that the hardships claimed by the Voights were unique. Further, the survey indicates that it is indeed possible to locate the shed further from the subject boundary, closer to the Voights' dwelling.

The ZBA stresses that the Mizaks did not attend the January 2, 2018 public hearing, but instead expressed their opposition to the variance through their November 29, 2017 letter. The ZBA asserts that this is somehow relevant to this court's analysis of the propriety of the ZBA's actions. The plaintiffs' failure to personally attend the hearing has no bearing on the legal issue of whether the ZBA's approval of the variance was proper and supported by the record. The ZBA's notes that Mizaks' letter complained of the shed being located "approximately 6 inches from the property line," indicating that the ZBA was made aware of the basis for the Mizaks' objection. Even if the plaintiffs failed to object to the application, that would not be a proper ground for approving the variance.

Coupled with the reasons previously set forth, the ZBA's approval of the variance sought by the Voights was unreasonable, improper, illegal, arbitrary, and an abuse of the discretion, responsibilities and duties vested in the ZBA, whose decision should be reversed by this court.

LEGAL STANDARD

"A person must be aggrieved in order to have standing to maintain an administrative appeal." *Moutinho* v. *Planning & Zoning Commission,* 278 Conn. 660, 664, 899 A.2d 26 (2006). Pleading and proof of aggrievement are prerequisites to the court's jurisdiction over a plaintiff's

appeal. Id. at 664, 899 A.2d 26. Aggrievement is a factual question for the trial court. Id. at 665, 899 A.2d 26." *Levy* v. *Town of Westport*, 2007 WL 3318079 *1.

"Where a zoning agency has stated its reasons for its actions, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the [board] was required to apply under the zoning regulations. (Internal quotation marks omitted.) *R & R Pool & Patio, Inc.* v. *Zoning Board of Appeals,* 257 Conn. 456, 470, 778 A.2d 61 (2001). It is well settled that a court, in reviewing the actions of an administrative agency, is not permitted to substitute its judgment for that of the agency or to make factual determinations on its own. Id., at 470." (Internal quotation marks omitted.) *Levy* v. *Town of Westport*, 2007 WL 3318079 *2.

"An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation, produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone. *Bloom* v. *Zoning Board of Appeals,* 233 Conn. 198, 207, 658 A.2d 559 (1995). Proof of existence of practical difficulty or unusual hardship is a condition precedent to the granting of a variance. To support the granting of a variance, a hardship must arise from a condition different in kind from that generally affecting properties in the same zoning district and must be imposed by conditions outside of the property owner's control. *Stillman* v. *Zoning Board of Appeals,* 25 Conn. App. 631, 636, 596 A.2d 1 (1991). In other words, the hardship must originate in the zoning ordinance." (Internal quotations omitted.) *Levy* v. *Town of Westport*, 2007 WL 3318079 *2.

LEGAL ANALYSIS

"A person must be aggrieved in order to have standing to maintain an administrative appeal. *Moutinho* v. *Planning & Zoning Commission,* 278 Conn. 660, 664, 899 A.2d 26 (2006).

Pleading and proof of aggrievement are prerequisites to the court's jurisdiction over a plaintiff's appeal. Id., at 664, 899 A.2d 26. Aggrievement is a factual question for the trial court. Id., at 665, 899 A.2d 26." *Levy* v. *Town of Westport*, 2007 WL 3318079 *1.

Based on the aggrievement standard recited above, the court find that the Mizaks, as abutting property owners are aggrieved and have standing to pursue this appeal. According to *R & R Pool & Patio, Inc.*, this court must determine only whether the ZBA's assigned grounds for approval of the variance are reasonably supported by the record and whether they are pertinent to the considerations which the ZBA was required to apply under the Regulations of Southbury.

Section 2.a of Application

The court will examine the claims based on the order provided in the application for a variance. The first section 2.a states "Literal enforcement of such . . . regulations would result in exceptional difficulty or unusual hardship because . . . ." The Voights' application alleged the following hardships: "a) *Shed is already complete*[; and] b) There will be *no place for us to store anything* (i.e., *lawn/maintenance equipment*) without the shed, we are *forced to store unsightly items i*n the open in the yard or driveway *for all to see*." (Emphasis added.) This falls far short of a requirement for the finding of a hardship. Our Appellate Court gives clear guidance on the insufficiency of these claims.

"The case law is replete with instances in which an applicant predicated its claim of hardship on a desire to expand an existing nonconforming structure for what our appellate courts have characterized as personal considerations, such as the desire to *obtain more space* or to modernize an antiquated building. It long has been held that 'disappointment in the use of property can hardly constitute practical difficulty or unnecessary hardship within the meaning of a zoning law or regulation.' *Berkman* v. *Board of Appeals on Zoning,* 135 Conn. 393, 399-400, 64 A.2d 875

(1949). In *Garibaldi* v. *Zoning Board of Appeals,* 163 Conn. 235, 238, 303 A.2d 743 (1972), our Supreme Court held that '*a variance is properly granted only where* there is a showing before the zoning board of appeals that the *hardship caused by the application of zoning regulations relates to the property for which the variance is sought* and *not to the personal hardship of the owners* thereof.' The court further explained that 'a variance is not a personal exemption from the enforcement of zoning regulations. It is a legal status granted to a certain parcel of realty without regard to ownership. It is for this reason that the rule is well established that the financial loss or the potential of financial advantage to the applicant is not the proper basis for a variance. . . . Similarly, it is also well established that *self-inflicted hardship which arises because of individual actions by the applicant will not provide* a zoning board of appeals with *sufficient reason to grant a variance. . . . Hardships in such instances* as these *do not arise from* the application of *zoning regulations, per se, but from zoning requirements coupled with an individual's personal needs, preferences and circumstances. Personal hardships*, regardless of how compelling or how far beyond the control of the individual applicant, *do not provide sufficient grounds for the granting of a variance.*' (Citations omitted.) Id. at 239-40, 303 A.2d 743. For that reason, '[t]he *situation of any particular owner is irrelevant*" to the determination of whether a hardship exists. *Hyatt* v. *Zoning Board of Appeals,* supra, 163 Conn. at 382, 311 A.2d 77." (Emphasis added.) *Verrillo* at 691-92.

It is hard to conceive of a more self-inflicted hardship as defined by *Verrillo* than one which "*ar[o]se because of individual[s] actions by the applicant[s]*" when coupled with the assertion by the Voights in their application that the "Shed is already complete." Not only did they make no any attempt to comply with the proper setback requirements, or at least minimize encroachment on the Mizak's side of their property which the survey map shows can be accomplished. The

Voights never sought any guidance from the ZEO regarding the construction of the shed, and further refused to comply with the ZEO's cease-and-desist orders on two occasions when instructed that they had no permission to build the shed, nor continue its construction, yet went ahead and completed the shed. Second, the fact that they claim that they have "no place for us to store anything (i.e., lawn/maintenance equipment) without the shed" is meaningless as *Verrillo* clearly states that "*Personal hardships*, regardless of how compelling or how far beyond the control of the individual applicant, *do not provide sufficient grounds for the granting of a variance*." (Emphasis added.) Id. at 239-40. Some owners with little or no lawn equipment, or who have a lawn service maintain their yards, would have no hardship by this standard. Last is the assertion that "we are forced to store unsightly items in the open in the yard or driveway for all to see." Although it is admirable for the Voights to be concerned about their neighbors viewing an unsightly collection of lawn mowing equipment, this is insufficient to support the granting of a variance.

Because this issue is dispositive, the court need not consider the other claims raised by the plaintiffs on appeal. However, for the sake of completeness, given the fact that the Voights are self-represented parties, the court will examine the other defendants' claims contained in the application for a variance, and the required standard to grant the variance.

Section 2.b of Application

Section 2.a of the variance application states "a) Extreme topography prevents relocation of existing shed b) Severely undersized lot limits possible locations c) Location of septic prevents relocation d) Location of the well prevents relocation." All are claims of merit, but meritorious claims alone cannot justify the granting of a variance alone. The claims must be unique to the property. The ZEO indicated at the January 12, 2018 public hearing that there were a number of

similarly sized lots in Southbury and the board could be setting a precedent that could lead to future issues. The court will examine this further below.

Section 2.c of Application

This final section of the application for a variance states that "The shed is the only source of storage. In order for us to keep a neat & tidy property the shed is crucial. *It does not adversely affect any neighboring property by way of* drainage issues or sight line issues or *encroachments.*" (Emphasis added.) This statement is not accurate. The minimum side yard setback in the R-20 zone where the Voights' property is located is 15 feet. The side yard setback on the side of the shed was 14 feet from the house before the construction of the shed. The side yard setback after the construction of the shed is a miniscule 0.4 feet. To say that the location "does not *adversely affect any neighboring property by way of . . . encroachments,*" is a misrepresentation of the facts.

The shed being so close to the Mizak and Voight property line does *adversely affect a neighboring property by way of the encroachment.* (Emphasis added.) The Mizaks only have inches in between their stockade fence and the Voights' shed in order to squeeze into to maintain or repair their fence. This adversely impacts the Mizaks' ability to maintain their fence.

Appellate Directive

Verrillo v. *Zoning Board of Appeals of Town of Branford*, 155 Conn. App. 657, 111 A.3d 473, 672-673 (2015) provides guidance as to the proper outcome of this appeal. Suffice to say that the facts are sufficiently similar to give this court directive. "It is well settled that [w]hen a zoning board states the reasons for its action, the question for the court to pass on is simply whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the commission is required to apply under the zoning regulations. . . . The court should not go behind the official statement of the board. In the *absence* of a statement of

purpose by the zoning [agency] for its actions, it [is] the obligation of the trial court, and of this court upon review of the trial court's decision, to search the entire record to find a basis for the [agency's] decision. Our inquiry begins, therefore, with the question of whether the board rendered a formal, official, collective statement of reasons for its action. That analysis is guided by certain established precepts. First, individual reasons given by certain members of the [zoning agency do] not amount to a formal, collective, official statement of the [agency] . . . and are not available to show the reason[s] for, or the ground[s] of, the [zoning agency's] decision. . . . although individual members of the board discussed reasons for granting the owners a variance, the board did not state a collective, official reason for its action. . . . Second, the remarks of a board member in moving to grant a variance do not constitute a collective statement of the basis for the board's action. Third, it is not appropriate for a reviewing court to attempt to glean such a formal, collective statement from the minutes of the discussion by . . . members prior to the [zoning agency's] vote. . . . Fourth, our Supreme Court has explained that the cases in which [it] held that the agency rendered a formal, official, collective statement involve circumstances wherein the agency *couples its communication of its ultimate decision with express reasons behind that decision.* See, e.g., *Caserta* v. *Zoning Board of Appeals,* 226 Conn. 80, 86, 91 n. 9, 626 A.2d 744 (1993) (letter from board to plaintiff's attorney upholding revocation of plaintiff's zoning permit and listing reasons for decision constituted statement of basis for decision); *First Hartford Realty Corp.* v. *Plan & Zoning Commission,* 165 Conn. 533, 537, 338 A.2d 490 (1973) (assigned reasons accompanying decision to change zoning classification constituted statement of basis for decision); *DeMaria* v. *Planning & Zoning Commission,* [159 Conn. 534, 540, 271 A.2d 105 (1970)] (commission's records disclosing denial of plaintiff's application and two 'reasons for den[ial]' constituted statement of basis for decision). . . ." (Citations omitted; emphasis

added.) *Harris* v. *Zoning Commission,* supra, 259 Conn. at 420–21, 788 A.2d 1239." (Citations omitted, internal quotation marks omitted.) Id. at 673-74.

As to the individual members positions, they are not consistent. ZBA member Geoff Ice stated, "Although I see some of the cited hardships that I can see are clearly land induced . . . a neighbor is unhappy with it's a clear volation so . . . I am not inclined to support granting the variance." ZBA member Lorraine Marcantonio stated "the people have tried to do the right thing . . . keeping it clean, thinking that it's organized, and it was built on a footprint that was there, that was limiting from the beginning." ZBA member Tom Pietrini stated "the only thing that really bothers me right now is the neighbor's letter. If it wasn't for that I would have no problem." ZBA alternate member Eric Hall stated ". . . my biggest thing is quite enjoyment . . . by placing a structure that close is restricting the rights of the neighbor who clearly objected. I fully understand storage . . . I don't think there is a land induced hardship other than not enough land . . . . this is a burden to the land, a burden to the neighborhood by placing it where it's been placed. . . . It violates the property line setbacks. If it was five feet off the property than I may have a different view. . . ." ZBA alternate member Conrad Hade stated ". . . I would suggest, I'll approve it but I would on the basis that the neighbor would acquis (sic) and say 'hey look I'm ok with it' and I don't know whether that's legal or not." ZBA member Mark Kane said, "In my opinion I find a lot of the hardship here is legitimate and the property is going forth with improvements. . . . What a disappointment not being heard tonight and there's nobody here. So if I was able to vote on it I would not object." ZBA chairman Paul Sullivan said, "Neighbors always carry wait (sic) with me, that's why we have the regulations. The lot is small and maybe we just can't do it, we can't have a shed. . . ." ZBA alternate member Eric Hall also stated ". . . I have a real problem anytime (sic) somebody builds something right on the lot line because I think you are taking away the rights of

the neighbor. . . . I think you'll find that the statute doesn't provide that a land induced hardship goes with square foot." ZBA member Lorraine Marcantonio also stated ". . . First of all I think that there is a hardship, septic tank is a hardship with the size of the lot . . . I would have to say the overall good, the larger good is to maintain the look of the area which a shed would do. . . ." The ZEO stated ". . . Cedar Land, Lakemere a lot of the little lake communities in town have small lots sizes. So just down on Manor Road there was a cease and desist issued last week for a shed. So I mean that what he's trying to say is *using lot size as a hardship could set a precedent for a lot of small lots in those dozen neighborhoods around town.*" (Emphasis added.) ZBA member Paul Katzmark stated ". . . it seems to me that what this shed is going to do is possibly add to the property values on both sides because you don't need the fence anymore. . . ." After ZBA Chairman Paul Sullivan asked of ZBA member Lorraine Marcantonio "are you making a motion to vote, to approve it or against it?" ZBA member Lorraine Marcantonio stated, "To approve or not approve, to approve." ZBA Chairman Paul Sullivan asked of ZBA member Lorraine Marcantonio "your motion is to approve, so now you have to give a reason why you wanted it approved." ZBA member Lorraine Marcantonio then responded "Okay, we grant the waiver for the building or the establishment of the shed which has been existing there already after reviewing the information that was presented to us and I move that we vote in favor of it." ZBA Secretary Deborah Zachariewicz asked, "What are the reasons." ZBA member Tom Pietrini stated "The granting of the waiver would not adversely affect generally the district or area in which it is located." ZBA Chairman Paul Sullivan stated "If there's more that work such as land induced hardship. Is that what you want, then add it." ZBA member Tom Pietrini responded, "Then there's the condition that the site size, topography, geographic shape, etc., but should not include location such as to limit the property unsuitable for the use permitted in the zone in which it applies." ZBA Chairman

Paul Sullivan then asked, "All in favor; opposed. Okay we have it passed." In support of the granting of the variance, the ZEO sent a January 8, 2018 letter to the Voights stating that ". . . The application was approved for Variance on the grounds that the granting of the variance would not adversely affect generally the district or area in which is located."

The above clearly demonstrates that there was a wide variety of positions regarding the application. Of all the various positions, the final reasons were stated by ZBA member Paul Pietrini "The granting of the waiver would not adversely affect generally the district or area in which it is located. He then stated "Then there's the condition that the site size, topography, geographic shape, etc., but should not include location such as to limit the property unsuitable for the use permitted in the zone in which it applies." This "claimed position of the board" was consolidated into the ZEO's letter to the Voights that "The application was approved for Variance on the grounds that the granting of the variance would not adversely affect generally the district or area in which is located." The court finds that, although limited in scope, this was the "claimed" official, collective statement of the ZBA's basis for the board's decision.

It is interesting to note that the plaintiffs are accurate that the record indicates that Mr. Voight's statement about visits by ZBA members to his property was an assumption that he made and is not a fact. It is undisputed that the ZEO visited the site but there has been no evidence identified in the record that any other ZBA member made a site visit, and none of them ever acknowledged making a site visit. As a result, the attempt to infer that the ZBA members had personal knowledge of the property based on a site inspection, when compared to other similar sized lots in the area is not possible.

As to the second requirement of *Verrillo*, it is clear that the reasoning given by ZBA member Pietrini in his motion was his and his alone. There was no collective discussion had on

the language of the motion, the reasoning for granting the motion, no other input was provided from any other ZBA member, and no motions to amend or modify the motion to approve the variance was made by any other ZBA member. The court finds that, although limited in scope, this was the "claimed" official, collective statement of the ZBA's basis for the board's decision, as it was voted on by all ZBA members. As to the third requirement of *Verrillo*, since the ZBA made a limited statement, it was adopted and included in the ZBA's ZEO in his letter to the applicant, the court will not attempt to gleen a more "formal, collective statement" from the minutes of the discussion by ZBA members prior to the ZBA vote but will examine the scope of the statement. As to the fourth and final requirement of *Verrillo*, "the agency rendered a formal, official, collective statement involve circumstances wherein the agency *couples its communication of its ultimate decision with express reasons behind that decision*," the court will examine the scope of the statement.

This court has a clear directive to follow. "It is well established . . . that the granting of a variance must be reserved for unusual or exceptional circumstances. . . . An applicant for a variance must show that, because of some peculiar characteristic of his property, *the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone*. . . . Accordingly, we have interpreted . . . § 8–6 to authorize a zoning board of appeals to grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) *adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan*. . . . Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance." (Citations omitted; footnote omitted; internal quotation marks

omitted.) *Bloom* v. *Zoning Board of Appeals,* supra, 233 Conn. at 206–208, 658 A.2d 559. The granting of a variance is no insignificant matter, as it runs with the land in perpetuity. See General Statutes § 8–6(b)." (Emphasis added.) *Verrillo* at 678-79. Given the collective statement by the ZBA that "The application was approved for Variance on the grounds that the granting of the variance would not adversely affect generally the district or area in which is located," the court will find that number one above that the "variance must be shown not to affect substantially the comprehensive zoning plan" has not been satisfied. Number two above, that "Proof of *exceptional difficulty or unusual hardship is absolutely necessary* as a condition precedent to the granting of a zoning variance" is also problematic. (Emphasis added.)

The issue in *Verrillo,* as applicable here, was simple, the applicants desired more living and storage space. Here, the Voights explained the hardship in the record at 4f as "having an enclosed, roofed storage structure is paramount to keeping lawn care equipment, tools & storage items in best possible condition. Our Supreme Court in *Verrillo* drew a straight line in the sand.

"The case law is replete with instances in which an applicant predicated its claim of hardship on *a desire to expand* an existing nonconforming structure *for what our appellate courts have characterized as personal considerations, such as the desire to obtain more space* or to modernize an antiquated building. It long has been held that disappointment in the use of property can hardly constitute practical difficulty or unnecessary hardship within the meaning of a zoning law or regulation. *Berkman* v. *Board of Appeals on Zoning,* 135 Conn. 393, 399-400, 64 A.2d 875 (1949). In *Garibaldi* v. *Zoning Board of Appeals,* 163 Conn. 235, 238, 303 A.2d 743 (1972), our Supreme Court held that *a variance is properly granted only where there is a showing* before the zoning board of appeals *that the hardship caused by the application of zoning regulations relates to the property* for which the variance is sought and *not to the personal hardship of the owners*

thereof. The court further explained that a variance is not a personal exemption from the enforcement of zoning regulations. It is a legal status granted to a certain parcel of realty without regard to ownership. It is for this reason that the rule is well established that the financial loss or the potential of financial advantage to the applicant is not the proper basis for a variance. . . . Similarly, *it is also well established that self-inflicted hardship which arises because of individual actions by the applicant will not provide a zoning board of appeals with sufficient reason to grant a variance*. . . . *Hardships* in such instances *as these* do not *arise from* the application of zoning regulations, per se, but from zoning requirements coupled with *an individual's personal needs, preferences* and circumstances. *Personal hardships, regardless of how compelling* or how far beyond the control of the individual applicant, *do not provide sufficient grounds for the granting of a variance*. (Citations omitted.) Id., at 239–40, 303 A.2d 743. For that reason, [t]he situation of any particular owner is irrelevant" to the determination of whether a hardship exists. *Hyatt* v. *Zoning Board of Appeals,* supra, 163 Conn. at 382, 311 A.2d 77." (Emphasis added; internal quotations omitted." *Verrillo* at 691-92. Our Supreme Court similarly has recognized that "the fact that an owner is prohibited from adding new structures to the property does not constitute a legally cognizable hardship." *Bloom* v. *Zoning Board of Appeals,* supra, 233 Conn. 210–11 n. 13, 658 A.2d 559 (1995).

The *Verrillo* opinion further noted that "Our Supreme Court similarly has recognized that 'the fact that an owner is prohibited from adding new structures to the property does not constitute a legally cognizable hardship.' *Bloom* v. *Zoning Board of Appeals,* supra, 233 Conn. at 210–11 n. 13, 658 A.2d 559." Id. If it is hardship to not to be able to use one's property as one wishes, then most setback variance applications would have to be granted. According to *Verrillo.* "It nevertheless remains that . . . the applicants' personal desire to . . . to obtain . . . more . . . space . .

. [does not] constitute legal hardship under our law. Accordingly, those rationales do not furnish the requisite basis for a finding of hardship by the board." Id. at 696.

Confiscatory Effect

The court must examine if the direct application of the Regulations creates a confiscatory effect on the property. "Under Connecticut law, two distinct tests apply to such claims in the variance context. The first is the practical confiscation test. As the Supreme Court explained more than one-half century ago, a zoning board of appeals stands between the public and the individual property owner to protect the latter from unnecessary hardship—hardship, that is, which, owing to some condition affecting his land peculiarly, he would suffer when it is not necessary for him to do so in order to effectuate the general plan of zoning adopted for the community as a whole. A classification permanently restricting the enjoyment of property to such an extent that it cannot be used for any reasonable purpose goes beyond valid regulation and constitutes a taking without due process; id.; and amounts to practical confiscation." (Citations omitted; internal quotations omitted.) *Verrillo* at 699-700.

The first is practical confiscation. "A practical confiscation occurs when a landowner is prevented from making *any* beneficial use of its land—as if the government had, in fact, confiscated it. . . . Thus, to prevail under a claim of practical confiscation, a party must demonstrate that a *literal application* of the regulations at issue '*will not allow* any *reasonable use of [their] property*.' Practical confiscation has been found where there are no alternative uses for a vacant nonconforming property in a residential zone other than 'the construction of a single-family home. . . . When a reasonable use of the property exists, there can be no practical confiscation. *Verrillo* at 700-02. Clearly, there is currently a reasonable use of the property, as the Voights live there in in their single-family home, and there can be no practical confiscation.

"The second confiscation test, which we shall refer to as the 'tantamount to confiscation' test. . . . [t]here was no 'practical confiscation' in the present case, since a portion of the subject property could be used for some permitted use if the variance were not granted.' . . . "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." (Emphasis added.) A denial of the requested variances in the present case would not cause such a result." Id. at 703-05. Clearly, there is currently a reasonable use of the property as the Voights live there in in their single-family home, and there can be no tantamount to confiscation.

Hardship Must be Unique and Personal to the Property

"In the seminal case of *Ward* v. *Zoning Board of Appeals,* supra, 153 Conn. at 143, 215 A.2d 104, our Supreme Court noted that the requirement that a claimed hardship must be unusual and unique to the property is a fundamental one in zoning law. . . . As it explained, [o]ne seeking a variance must show that his property is peculiarly disadvantaged by the operation of the zoning ordinance and not merely that a general hardship, equally applicable to other properties in the neighborhood, results from a strict enforcement of the code. . . . In an administrative appeal challenging the decision of the board to grant a variance, a reviewing court must examine the record to ascertain whether it contains substantial evidence that the claimed hardship did not apply to other properties in the area. As our Supreme Court stated in a case where a *zoning board of appeals*, like the present case, *did not make any finding of unique hardship: [T]he board made no specific finding that exceptional difficulty or unnecessary hardship would result to the owner of the property from the strict enforcement of the regulations. It described no special circumstances in detail which do not apply to other properties in the area* and which constitute a hardship to the applicants. . . . Moreover, such findings cannot be implied from the minutes or from other portions

of the record before us. . . . [T]he variance, therefore, was not properly granted. . . . *Gross* v. *Planning & Zoning Board of Appeals,* 171Conn. 326, 328, 370 A.2d 944 (1976); see also *Francini* v. *Zoning Board of Appeals,* supra, 228 Conn. at 791, 639 A.2d 519 ("there were many other nonconforming lots in the area that were subject to the same zoning restrictions as the plaintiff's property"); *Grillo* v. *Zoning Board of Appeals,* supra, 206 Conn. at 373, 537 A.2d 1030 (*because "[t]he record does not indicate how many other property owners in the zone also had" same hardship present on their property, "[t]here is no basis . . . for assuming that [the applicant's] situation was essentially different from that of many others in the area"*) . . . ; *Allen* v. *Zoning Board of Appeals,* supra, 155 Conn. at 510, 235 A.2d 654 (stating that "there is nothing which significantly distinguishes the [applicant's] property from other property located on either [the street] or on the cul-de-sac [on which the property is located]. Unless such dissimilarity is shown, the board may not properly vary the application of the regulations."); *Kelly* v. *Zoning Board of Appeals,* supra, 21 Conn. App. at 599, 575 A.2d 249 ("[*t]here was no evidence that the application of the existing zoning regulation affected this particular parcel in a manner distinct from neighboring properties*"); *Green* v. *Zoning Board of Appeals,* 4 Conn. App. 500, 504, 495 A.2d 290 (1985) (same); 2 P. Salkin, American Law of Zoning (5th Ed.2011) § 13:16, pp. 13–46 and 13–47 ("[w]here unnecessary hardship is required for a variance, *the applicant must also show that the alleged hardship relating to the property is unique*"). (Internal citations omitted; quotations omitted. (Emphasis added.) *Verrillo* at 718-21.

The reason behind this analysis became quite clear when the Appellate Court explained further in *Verrillo*. "'When a zoning board of appeals grants a variance on grounds which apply equally to a large number of properties in a given area, it in effect establishes a new zoning regulation applicable to that area. . . . Arguments concerning the general unsuitability of a

neighborhood to the zoning classification in which it has been placed are properly addressed to the promulgators of the ordinance and not to those who have been empowered to grant variances. . . . The granting of a variance must be reserved to those situations involving exceptional or unusual circumstances.' (Citation omitted; footnote omitted.) *Ward* v. *Zoning Board of Appeals,* supra, 153 Conn. at 144–45, 215 A.2d 104. '[T]he purpose of variances . . . is not to work major changes in a zoning plan, or to correct errors of judgment in zoning.' (Footnotes omitted.) 101A C.J.S., supra, § 301, p. at 387. The variance is an instrument of relief, not rezoning. As our Supreme Court has held, '[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. . . .' If the requirements of the R–2 residential district are particularly oppressive to the many undersized properties therein, the proper forum for redress is the town zoning commission." Id. at 724-25.

Adolphson Exception

The Verrillo court noted a possible exception. "We note that a narrow exception exists to the traditional test for obtaining a variance, on which a board properly may grant a variance despite an applicant's failure to establish the requisite hardship. In *Adolphson* v. *Zoning Board of Appeals,* supra, 205 Conn. at 705, 535 A.2d 799, the applicants owned property located in an industrial zone, on which existed an aluminum casting foundry, which was a nonconforming use. The applicants sought certain variances in order to use the property as an automobile repair shop, despite the fact that such use also was prohibited in that industrial zone. Id., at 706, 535 A.2d 799. The Zoning Board of Appeals nonetheless granted the requested variances, and the Superior Court upheld that decision on appeal, concluding that the proposed use for the subject property operating

under current regulations as to air pollution and the like would be far less offensive to the surrounding residents than a foundry." (Internal quotation marks omitted.) Id. A divided Supreme Court affirmed that determination. The majority opinion emphasized that the applicants were seeking 'to change an established nonconforming use to a less offensive nonconforming use.' Id., at 712, 535 A.2d 799. In that regard, the majority distinguished cases in which applicants sought to expand a nonconformity; id., at 708, 535 A.2d 799; recognizing the well established principle of Connecticut law that 'nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit—*[i]n no case should they be allowed to increase.*' (Emphasis added; internal quotation marks omitted.) Id., at 710, 535 A.2d 799. The court continued: 'The accepted method of accomplishing the ultimate object is that, while the alien use is permitted to continue until some change is made or contemplated, thereupon, so far as is expedient, advantage is taken of this fact to compel a lessening or suppression of the nonconformity.' (Internal quotation marks omitted.) Id. In light of the 'unchallenged finding' that the proposed use 'would be far less offensive' than the existing nonconforming use, the court held that the Zoning Board of Appeals properly granted the requested variances." Id. 725-27. The Appellate Court concluded that "The present case does not qualify under the *Adolphson* exception to the hardship requirement. The applicants here proposed *increasing* the existing nonconformity. Among their requests was a variance from the regulation prohibiting such expansion. The proposed expansion plainly would not result in lesser nonconformity on the applicants' property." Id. at 728. The same conclusion is evident here.

Comprehensive Zoning Plan

The Appellate Court elaborated further. "Even if the defendants qualified under the *Adolphson* exception or otherwise demonstrated a peculiar hardship, they still could not

prevail, as applicants seeking a variance also must demonstrate that the requested relief will not 'affect substantially the comprehensive zoning plan. . . .' (Internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals,* supra, 291 Conn. at 24, 966 A.2d 722. Put differently, 'a variance should not be granted unless it is in harmony with the general purpose and intent of the zoning ordinance.' . . . . 'The comprehensive plan is found in the zoning regulations themselves.'" *Verrillo*, at 728-29.

It is interesting to note that the ZEO stated at the January 2, 2018 public hearing. The ZEO stated after hearing comment from ZBA member Hall, "I think what Mr. Hall was trying to explain as precedence. Cedar Lake, Lakemere a lot of the little lake communities and there are several summer communities in town that have small lot sizes. So just down on Manor Road there was a cease and desist issued last week about a shed. So I mean what he is trying to say is using lot size as a hardship could set a precedence for a lot of small lots in those six dozen neighborhoods around town." The ZEO raised the issue of whether the granting of this variance would be justified. The ZBA member Chairman Sullivan stated "And we even requested the Zoning Board, and they rewrote the zoning rules for the R-20. Basically additions to a house if no closer to the property line. In other words we allow you to go up to but no closer to the property line is the emphasis." The ZBA Chairman Sullivan is clearly explaining to the ZBA members that as the Voights' house is fourteen feet from the property line, the placement of the shed should be no closer than fourteen feet to the property line. The shed is 0.4 feet from the property line. The Appellate Court in *Verrillo* clearly addressed this issue. Section 4.4 of the Regulations requires 15-foot setbacks for properties within the R-20 designation. The purpose is to preserve sufficient space between structures on adjacent residential properties, with the attendant reduced congestion and conservation of property values. The purpose of the variance application here to satisfy the

Voights' personal preference to add storage space to their property, not to build a residence, which already exists. The claim of inadequate storage could be made by several other neighborhood property owners, and likely by others in the community with similarly sized lots. Because this characteristic is likely common to the neighborhood, the ZBA essentially was enacting an impermissible zone change that would allow the virtual elimination of the setback requirements. The ZBA's approval therefore failed to preserve the spirit of the regulations. As such, the granting of the requested variance would be inharmonious with the Town's comprehensive zoning plan.

"The question is not whether the trial court would have reached the same conclusion, but whether the record before the agency supports the decision reached." *Calandro* v. *Zoning Board of Appeals*, 176 Conn. 439, 440, 408 A.2d 229 (1979). "In reviewing a decision of a zoning board, 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. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." A decision must be upheld if it is supported by substantial evidence in the record. *Smith Bros. Woodland Management, LLC* v. *Zoning Board of Appeals*, 108 Conn. App. 621, 628, 949 A.2d 1239 (2008). Substantial evidence is enough evidence to justify, if the trial were to a jury, the refusal to direct a verdict, if the conclusion sought to be drawn is one of fact. *Sampieri* v. *Inland Wetlands Agency*, 226 Conn.

579, 588, 628 A.2d 1286 (1993). Nothing has been identified from the record that would demonstrate otherwise. This court finds in its analysis of the record that there is not substantial evidence in the record to support the ZBA's decision to grant the variance.

"In *Raffaele* v. *Planning & Zoning Board of Appeals,* supra, 157 Conn. 454, 254 A.2d 868, our Supreme Court addressed whether the proposed expansion of a nonconformity was in harmony with the comprehensive zoning plan. The court noted that '[a]n essential element in the board's consideration of the appeal would be the settled proposition that zoning regulations in general seek the elimination rather than the enlargement of nonconforming uses.' In reviewing the regulations at issue, the court stated that '[n]owhere in the regulations is there any indication that an extension of a nonconforming use is to be permitted. . . . It is the intent of building zone regulations generally that nonconforming uses should not be allowed to increase, and an extension of the space allotted to a nonconforming use is a proscribed extension of that nonconforming use and is inconsistent with the policy and comprehensive plan of the regulations." (Citations omitted.) *Verrillo* at 729. Here neither party presented the comprehensive zoning plan in the Regulations, but ZBA Chairman Sullivan's statement noted above that the reply he received from the Southbury Zoning Commission that "we allow you to go up to but no closer to the property line" is significant evidence of the position of the Zoning Commission on its interpretation the regulations involving the comprehensive zoning plan. This was completely ignored by the motion to approve the variance application made by ZBA member Pietrini stated, "The granting of the waiver would not adversely affect generally the district or area in which it is located." This flies in the face of the directive from the Zoning Commission to the ZBA.

The Appellate Court noted that under these circumstances in another case, the Supreme Court "set aside the granting of a variance in *Bradley* v. *Zoning Board of Appeals,* 165 Conn. 389,

334 A.2d 914 (1973), due to a lack of harmony with the comprehensive plan. The court stated in relevant part that '[t]o allow zoning boards of appeal to grant variances authorizing uses nowhere permitted in the zoning regulations of the town would fly in the face of that clearly expressed policy. To do so would, in effect, give zoning boards the capacity to shape the development of the community with little or no regard for the community plan as expressed in the general zoning regulations. . . . [W]e fail to see how the authorization of a use not permitted in the zoning regulations possibly could be in harmony with their intent and purpose.' (Citation omitted.) Id. at 393, 334 A.2d 914. Cognizant of the 'fundamental distinction between the legislative function of the zoning commission, and the administrative and quasi-judicial functions of the zoning board of appeals'; T. Tondro, supra, p. 129; the court explained that '[b]y authorizing a use not permitted within the zoning regulations the board, in effect, amended those regulations. . . . [T]he granting of the variance authorizing a use nowhere permitted in the zoning regulations was not 'in harmony' with those regulations and clearly amounted to an amendment thereto. Such an action endangers the orderly process of zoning, usurps the legislative function of the zoning and planning commission, and is thus illegal and an abuse of the board's discretion." (Citations omitted.) *Bradley v. Zoning Board of Appeals,* supra, at 395–96, 334 A.2d 914." *Verrillo* at 729-30.

The Appellate Court concluded that "We have scoured the entire record in search of a proper basis for the board's decision to grant the requested variances to expand the existing nonconforming structure. The record does not substantiate a finding that (1) a legally cognizable hardship exists peculiarly affecting the applicants' property, or (2) the proposed expansion would not affect substantially the comprehensive zoning plan. The record also indicates that the *Adolphson* exception does not apply. We therefore conclude that the Superior Court properly

sustained the plaintiff's administrative appeal." *Verrillo* at 732. This court has no alternative but to reach the same conclusion.

CONCLUSION

The burden of proof to demonstrate that the Southbury Zoning Board of Appeal acted improperly is upon the party seeking to overturn the board's decision, the plaintiffs Alan Mizak and Cheryl Mizak. The Mizaks have demonstrated that ZBA's variance approval sought by the co-defendants Stacey and Christopher Voight was improper and constitutes an abuse of the discretion on the part of the ZBA. The plaintiffs' appeal is hereby SUSTAINED.

BY THE COURT

D'Andrea, Robert A., J.

7/11/2023 Decision entered in accordance with the foregoing. J.D.N.O. Sent. Copies mailed to Stacy C. Voight & Chris Voight. Copy emailed to Reporter of Judicial Decisions. Tracy Barnes asst. Clerk