

# ZONING BARD OF APPEALS MEMBER- FOCUSED



**Michael A. Zizka**  
Halloran Sage

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## Basic Training for Connecticut Land Use Commissioners

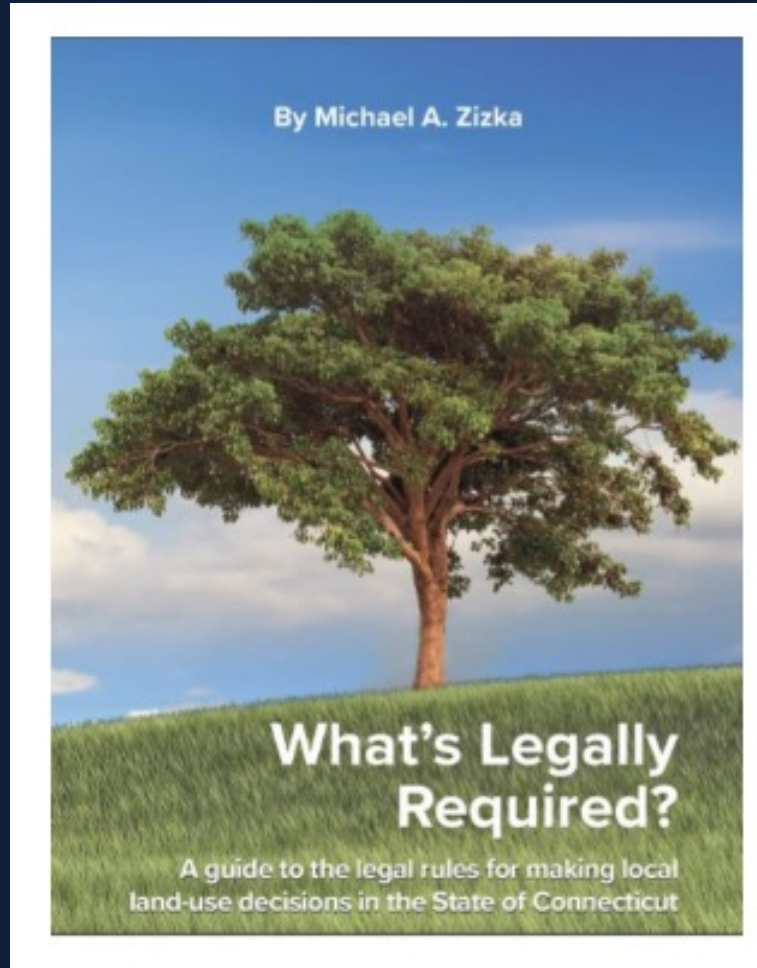
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UConn Center for Land Use Education and Research  
Department of Extension  
College of Agriculture, Health and Natural Resources



# What's Legally Required + Updates

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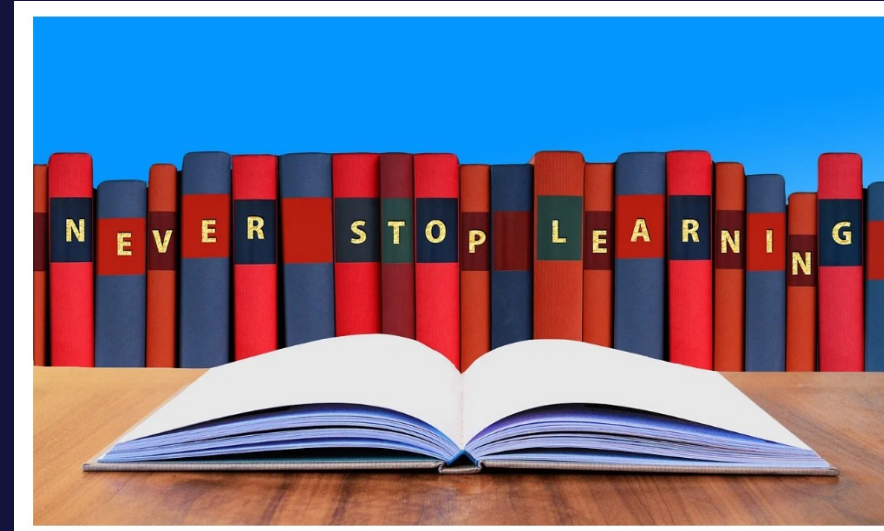
## WHAT'S LEGALLY REQUIRED EIGHTH EDITION UPDATES By Michael A. Zizka

<https://clear.uconn.edu/lua/resources/>

# Important Information

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- Training is not legal advice
- More training at:  
<https://clear.uconn.edu/training/land-use-commissioner-training/>
- Training is recorded
- Slides and recording will be posted  
<https://clear.uconn.edu/lua/>
- Interactive / use chat function
- Let's have fun!



- Attendance will be confirmed via email after each webinar  
**Please keep copy of the email for your records**

# Webinar Overview: Topics Covered

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- Statutory standards for variances, including hardship
- Differences among ZBA functions: variances, appeals, and other possible matters
- Conflicts of interest, bias and predetermination
- Freedom of Information issues around public meetings, hearings and site walks
- How to deal with applicants' and public testimony
- Role and participation of ZBA alternates
- Ex parte communications

# ZONING BOARDS OF APPEALS

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May 20, 2024



# Organizational Statutes

## C.G.S. § 8-5 (a)

In each municipality having a zoning commission there shall be a zoning board of appeals consisting of five regular members and three alternate members, unless otherwise provided by special act. Such alternate members, also referred to as “the panel of alternates”, shall, when seated as herein provided, have all the powers and duties set forth in the general statutes relating to zoning boards of appeals and their members. The regular members and alternate members of such zoning board of appeals shall be electors and shall not be members of the zoning commission, any provision of any special act to the contrary notwithstanding. Such board and such panel of alternates shall, unless otherwise provided by special act, be elected or appointed in such manner and for such terms as is determined for each by ordinance adopted by the municipality. Any vacancy in such board, including any vacancy in the panel of alternates, unless otherwise provided by ordinance or special act, shall be filled for the unexpired portion of the term, by the board of selectmen of towns or the chief executive officer of cities and boroughs. Such board by vote of its regular members only shall elect a chairman from among its members, unless otherwise provided by special act, and all meetings of such board shall be held at the call of the chairman and at such other times as the board determines and shall be open to the public. Such chairman or in his absence the acting chairman may administer oaths and compel the attendance of witnesses. The board shall keep minutes of its proceedings showing the vote of each member and each alternate member when seated upon each question or, if absent or failing to vote, indicating such fact; and shall also keep records of its examinations and other official actions. Each rule or regulation and each amendment or repeal thereof and each order, requirement or decision of the board shall immediately be filed in the office of the board and shall be a public record.

## C.G.S. § 8-5a

If a regular member of a zoning board of appeals is absent, he may designate an alternate from the panel of alternates to act in his place. If he fails to make such designation or if he is disqualified, the chairman of the board shall designate an alternate from such panel, choosing alternates in rotation so that they shall act as nearly equal a number of times as possible. If any alternate is not available in accordance with such rotation, such fact shall be recorded in the minutes of the meeting.

*The Key  
Statute:*  
C.G.S.  
§ 8-6

(a) The zoning board of appeals shall have the following powers and duties:

(1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter;

# The Key Statute: C.G.S. § 8-6

(a) The zoning board of appeals shall have the following powers and duties:

.....

(2) to hear and decide all matters including special exceptions and special exemptions under section 8-2g upon which it is required to pass by the specific terms of the zoning bylaw, ordinance or regulation



# The Key Statute: C.G.S. § 8-6

(a) The zoning board of appeals shall have the following powers and duties:

.....

(3) to determine and 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.

# First Takeaway

“ . . .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, . . .”

The hardship requirement has nothing to do with personal circumstances or desires

Rather, hardship must be based on an unusual quality in the parcel of land itself

## Representative Court Decisions

- “It is of particular significance to our analysis that, during the defendant's oral presentation to the board, he cited a **personal hardship, namely, difficulty in marketing the property for sale, and disappointment in the use of the subject property, namely, the inability to build a larger structure**, as the main impetuses for seeking a variance. Moreover, the board failed to cite any hardship that differs in kind from the hardship imposed generally on similar properties by the Greenwich zoning regulations, or any condition that is “ ‘**peculiarly oppressive**’ ” to the subject property. *Cymerys v. Zoning Board of Appeals*, 151 Conn. 49, 51, 193 A.2d 521 (1963). As the plaintiffs note, the effect of § 6-131(b) is to reduce the building area for all rear lots. **There is nothing in the record to indicate that the reduction in the building area available on the subject property is a unique effect of this regulation.** Accordingly, on the basis of the record before us, we conclude that **the court properly sustained the plaintiff's appeal from the board's decision to grant the variance.**”
- *Michler v. Planning & Zoning Bd. of Appeals of the Greenwich*, 123 Conn. App. 182, 187-88, 1 A.3d 1116 (2010)

## Representative Court Decisions

- “Instead, as the board emphasizes, “the need [for a variance] arises from the plaintiffs' desire to construct a new three-story, 1600 square foot house to replace a two-story, 1500 square foot house.” “A variance is not a tool of convenience, but one of necessity.... They are not to be granted when a reasonable use already is present, or plainly is possible under the regulations, but an owner prefers otherwise.” *Verrillo v. Zoning Board of Appeals* , 155 Conn. App. at 716, 111 A.3d 473. Moreover, a property owner's personal disappointment in the use of his property does not constitute the legal hardship necessary for the granting of a variance. See *Amendola v. Zoning Board of Appeals* , 161 Conn. App. at 746, 129 A.3d 743 (“[The applicant's] proposed additions reflect personal preference, not hardship, and could be achieved through alternative construction plans that comply with the regulations. Indeed, the mere fact that a conforming structure could be built without the need for a setback variance transforms an alleged hardship into personal disappointment.”); *Green Falls Associates, LLC v. Zoning Board of Appeals* , 138 Conn. App. 481, 494, 53 A.3d 273 (2012)...
- *Turek v. Zoning Bd. of Appeals of Milford*, 196 Conn. App. 122, 139-40, 229 A.3d 737 (2020)

## Representative Court Decisions

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- *Turek v. Zoning Bd. of Appeals of Milford*, 196 Conn.App. 122, 139-40, 229 A.3d 737 (2020) (reversing trial court’s decision to sustain appeal from Board’s denial of variance).

## Representative Court Decisions

- “Variances cannot be personal in nature, and may be based only upon property conditions. *Garibaldi v. Zoning Board of Appeals*, 163 Conn. 235, 239, 303 A.2d 743 (1972); see T. Tondro, Connecticut Land Use Regulation (2d Ed.1992) p. 124. Thus, the identity of a particular user of the land is "irrelevant to zoning." *Dinan v. Board of Zoning Appeals*, 220 Conn. 61, 66-67 n. 4, 595 A.2d 864 (1991); see T. Tondro, *supra*, p. 88 ("zoning power may only be used to regulate the 'use, not the user' of the land"). In fact, we have stated that "[p]ersonal 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." *Garibaldi v. Zoning Board of Appeals*, at 239-40, 303 A.2d 743. "[T]he basic zoning principle that zoning regulations must directly affect land, not the owners of land"; T. Tondro, *supra*, p. 137; limits the ability of zoning boards "to act for personal rather than principled reasons," particularly in the context of variances. *Id.*, p. 92.”
- *Reid v. Zoning Bd. of Appeals of Town of Lebanon*, 670 A.2d 1271, 235 Conn. 850, 857-58 (1996) (holding that variances may not be conditioned on continued ownership by applicant)

# Representative Court Decisions

- “The plaintiff is the owner of an unimproved lot in West Haven. On July 14, 1997, the plaintiff applied for variances to build a single-family house on the lot. In 1995, West Haven adopted zoning regulations that required a minimum lot size of 8000 square feet in an R-2 residential zone. Additionally, the regulations required ten foot side yards and minimum frontage of sixty feet.”
- “The lot that was the subject of the variance request was 4000 square feet and had forty feet of frontage. The plaintiff sought a variance to the side yard requirements to permit side yards of five feet and eight feet. Additionally, the application sought a variance to the frontage and lot size requirements.”
- “We are not persuaded that the board's denial of the plaintiff's application for a variance to build a single-family residence rules out any reasonable use of his property. **The board concluded only that construction of a dwelling with variances for lot size, frontage requirements and side yard requirements would not be in harmony with the general intent of the ordinances.** The plaintiff has not sustained its burden of proof, however, that the board will not allow any reasonable use of its property.”
- *A&F Constr. v. Zoning Bd. of Appeals of the City of West Haven*, 759 A.2d 101 (2000)



## Representative Court Decisions

- The basis for Berliner's claim for a variance was that for a number of years he had been unable to develop his parcel for office space. **While the record reveals the difficulties of access and topography to which his parcel is subject in attempting to develop it for this purpose, Berliner, representing himself before the board, made no showing that this parcel could not reasonably be developed for some other use permitted in a Business 1 zone or that the effect of limiting the parcel to the permitted uses only would be confiscatory or arbitrary.**
- *Miclon v. Zoning Bd. of Appeals of Town of Windsor Locks*, 378 A.2d 531, 532-33, 173 Conn. 420 (1977) (overturning board's granting of variance)



## Representative Court Decisions

- “Financial considerations are relevant [to the question of whether a variance is justified] only if the application of the regulation or ordinance practically destroys the value of the property for any use to which it may be put and the regulation or ordinance as applied to the subject property bears little relationship to the purposes of the zoning plan.’ *Bloom v. Zoning Board of Appeals*, 233 Conn. 198, 210, 658 A.2d 559 (1995).”
- “A zoning regulation that prevents land from being used for its greatest economic potential ... does not create the exceptional kind of financial hardship that we have deemed to have a confiscatory or arbitrary effect.” (Internal quotation marks omitted.) *Grillo v. Zoning Board of Appeals*, 206 Conn. 362, 370, 537 A.2d 1030 (1988) ; see also *Dolan v. Zoning Board of Appeals*, 156 Conn. 426, 430–31, 242 A.2d 713 (1968) (“[i]t is not a proper function of a zoning board of appeals to vary the application of zoning regulations merely because the regulations hinder landowners and entrepreneurs from putting their property to a more profitable use”); *Krejpcio v. Zoning Board of Appeals*, 152 Conn. 657, 662, 211 A.2d 687 (1965) (“[d]isappointment in the use of property does not constitute exceptional difficulty or unusual hardship”).”
- *E & F Assocs., LLC v. Zoning Bd. of Appeals of the Town of Fairfield*, 320 Conn. 9, 15-16, 127 A.3d 986 (2015) (overturning setback variance granted to allow vertical expansion of a commercial building).



# Representative Court Decisions


- Self-created hardships are not acceptable grounds for a variance
- “Admittedly, the plaintiffs did not contrive the division of the thirty-four-acre tract which led to the creation of the undersized lot in question. The acts of Mrs. Seymour alone created the condition which gave rise to the hardship complained of. Both the division of the tract and the eventual conveyance of the lot in question to the plaintiffs, however, occurred years after the enactment of the applicable zoning regulations, and the board could properly give consideration to these facts.”
- *Belknap v. Zoning Bd. of Appeals of Town of Easton*, 232 A.2d 922, 155 Conn. 380 (1967) (upholding denial of variance to build on undersized lot created by plaintiff’s predecessor in title)

# Representative Court Decisions

- “The [sideline] variance was sought on the grounds that the position of the house on lot 19 was due to an error made either by the surveyor or by the foundation contractor employed by the corporation, that the owner of the adjoining lot has demanded an exorbitant price for a strip of land necessary to relocate the dividing line between the lots, and that the type of construction of the house on lot 19 was such that it could not be remodeled or moved and must be demolished unless a variance is granted.”
- “One of the reasons stated [for denying the variance] is that '(t)he applicant still retains ownership of the property and the condition underlying the appeal is self inflicted.' In other words, any hardship present in the situation is due to the property owner's own error, or the error of those employed by the owner, and does not arise from the application of the zoning regulations themselves. *Wil-Nor corporation v. Zoning Board of Appeals*, 146 Conn. 27, 31, 147 A.2d 197; *Misuk v. Zoning Board of Appeals*, 138 Conn. 477, 481, 86 A.2d 180. The evidence before the board fully support this reason for its action. The board was without power to grant a variance when the claimed hardship was due to the property owner's own actions.”
- *Highland Park, Inc. v. Zoning Bd. of Appeals of Town of North Haven*, 229 A.2d 356, 155 Conn. 40, 42-43 (1967)



## Representative Court Decisions

- “[T]he fact that a particular variance request appears *de minimis* in scope is not a valid basis for granting a variance. . . . This court expressly has declined “to recognize a ‘de minimis’ deviation exception that would obviate the need for [applicants] to prove hardship.” *Morikawa v. Zoning Board of Appeals*, 126 Conn. App. 400, 413, 11 A.3d 735 (2011) ; see also R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (3d Ed.2007) § 9.3, p. 256 (“Connecticut does not recognize an exception to the hardship rule allowing de minimus [sic] variances”).
  - *Verrillo v. Zoning Bd. of Appeals of Branford*, 155 Conn.App. 657, 695, 111 A.3d 473 (Conn. App. 2015)
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# Conflicts of Interest

- CGS §§ 8-11, 8-21
  - P&ZC and ZBA members may not appear for or represent any other person or entity in any matter pending before either agency
  - A ZBA member may not participate in the hearing or decision on any matter in which he or she is directly or indirectly interested in a personal or financial sense
- Key: It's not whether YOU think you can be fair – it's whether the public would have a reasonable basis to question your ability to be fair

# Bias and Predetermination

- Bias
  - Favoritism toward an applicant, opponent, or other stakeholder
- Predetermination
  - Determining your position on a matter pending before the ZBA before you have heard all the evidence
- Key: It's not whether YOU think you can be fair – it's whether the public would have a reasonable basis to question your ability to be fair

# Ex Parte Communications

- Any communication by a Board member with another person (including another Board member) about a pending application if the communication takes place outside of a Board meeting or public hearing
- Implication may be that the Board member is acting on “secret” information or is biased in favor of the person with whom he or she spoke
- Can result in the Board’s decision being overturned by a court
- If Board member receives emails about a pending application, he or she should not respond except during a public meeting or hearing and should submit any such communication for the record



# Freedom of Information Requirements

- Yearly schedule of regular meetings to be filed with municipal clerk by January 31 – no regular meeting may be held less than 30 days after such filing
- Meetings must be open to the public unless expressly allowed as “executive sessions” (2/3 vote of members required)
- Meeting agendas must be filed with municipal clerk and posted on municipal website at least 24 hours in advance. Written notice of special meetings must be given to all members at least 24 hours in advance
- Topics at special meetings are confined to the filed agenda; members can add to regular agenda by 2/3 vote





# Freedom of Information Requirements

- Site walks by the ZBA are “meetings” and are subject to all of the FOIA requirements pertaining to meetings, including posting of agendas in advance and allowing the public to attend
- “Meetings” may include gatherings of less than a quorum of the ZBA if the participating members have the ability to act on behalf of the ZBA
- Even if a non-quorum gathering of members is not a “meeting,” it can raise questions about ex parte communications
- Site walks that occur after the commencement of a public hearing must be recorded



# Freedom of Information Requirements

- Public is not required to register or sign in to attend meetings. Sign-in list may be used to create an order of speakers at a public hearing
- If a meeting or hearing is adjourned to another date and time, a copy of the order or notice of adjournment must be conspicuously posted on or near the door of the place where the meeting or hearing was held, within 24 hours. If the adjournment is for less than 24 hours, the notice must be posted immediately.
- Written notice of votes must be available within 48 hours and recorded in minutes. Minutes must be available within 7 days.

# General Requirements for Published Notices of Public Hearings

Must contain adequate  
information about the nature  
of the application



Must be published twice in a newspaper  
having general circulation in the town.



1<sup>st</sup> notice 10-15 days before hearing



2d notice at least 2 days after 1<sup>st</sup> notice  
and 2 days before hearing



Day of notice and day of hearing not  
included in the count



# Conducting the Public Hearing

- No specific requirements for order of speaking, except that applicant should always be allowed to go first
- All materials to be considered must be available for inspection
- Hearings must be audio-recorded or video-recorded
- **CRITICAL:** Appeal hearings should focus on the specific requirements and standards of the regulations. Usually, the Board may not make a decision based on criteria that are not specified in state law or the Commission's or Board's regulations
- Parties should be allowed to ask questions of presenters
- Time limits may be placed on initial presentations so long as speaker has later opportunities to add to previous comments



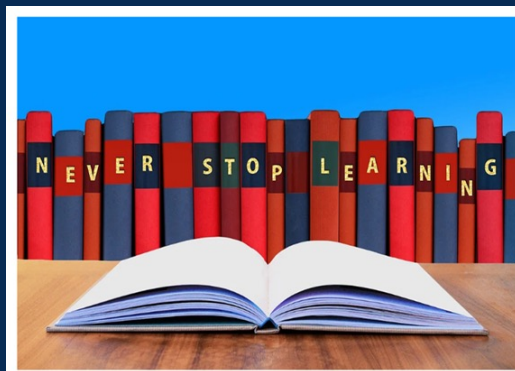
# Conducting the Public Hearing

- All information on which the Board will decide the application must be submitted at or before the public hearing. Only exception is analysis by Board staff or consultants of information already in the record.
- Once hearing is closed, it cannot be reopened unless reopening occurs before anyone has left the hearing room
- No communication about the application may be considered if made after the hearing is closed (exception for Board staff and consultants). Board must make sure all questions have been addressed by applicants or others before hearing is closed

# Making the Decision

- The decision must be based on the specific state standards and local regulations that apply to the proposal. Individual ideas of what is right and wrong or what is best for the public will not matter to a court if there are no specific written standards to support those ideas.
- Good idea to use the regulatory standards as a checklist for discussion
- Alternate Board members may not participate in post-hearing discussions unless officially seated in place of absent or recused regular Board members
- The Board should state all appropriate reasons for its decision. The reasons should be incorporated into a motion on which the agency votes.
- Notices of decisions must be published and sent to applicant within 15 days

# Thanks for participating



[s.uconn.edu/zbatraining\\_5.20.24](https://s.uconn.edu/zbatraining_5.20.24)

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