

June 7, 2020

Memorandum

To: Somers Zoning Board of Appeals

From: John H. Parks

Re: **Eastman Variance Applications – Supplemental Memorandum on Practical Difficulty and Unnecessary Hardship in Excavating Rock Ledge**

The variance applications reference the legal basis for a finding of practical difficulty and unnecessary hardship where there is rock ledge. The case cited is *Rodenstein v. Board of Appeal of Boston*, 149 N.E.2d 382, 337 Mass. 333 (1958). <https://tinurl.com/rockvariance>

Rodenstein v. Board of Appeal of Boston is a Massachusetts case because there is apparently no reported Connecticut Zoning Board of Appeals (ZBA) case addressing rock ledge. It is not surprising, however, because rock ledge is the very epitome of the type of circumstance where a variance is fully justified. The rock is a pre-existing condition. It is not self-created. It is unique to a property and it is an impediment to reasonable use of the property. There are no reported ZBA cases on rock ledge in Connecticut because, we assume, variances for excavation are routinely and appropriately granted. Thus, no litigation and no reported cases.

However, further research beyond the ZBA cases has turned up a rock ledge case in Connecticut arising from a Planning Commission's action. But, first *Rodenstein v. Board of Appeal of Boston*.

The necessity for a variance was obvious in *Rodenstein v. Board of Appeal of Boston*. There, variances were granted many years before for a large filling station on residentially-zoned land. The owner sought a variance to expand parking onto the balance of the lot, also zoned residential. He argued that his substantial hardship was that the land could not be developed in a residential use because of the extensive rock formation.

The Zoning Board “was of [the] opinion that this is a specific case where a literal enforcement of the law involves a substantial hardship upon the owner and where desirable relief may be granted without substantial detriment to the public and without substantially derogating from the intent and purpose of the zoning law. By a unanimous vote of its members it granted the variance.”

The trial court “expressly found that this land was largely rock formation, so called ‘pudding stone’” rendering the land unusable for anything but parking and justifying the variance. The Massachusetts Supreme Judicial Court (the Commonwealth’s highest court), affirmed the trial court’s decision upholding the Zoning Board’s grant of the variance for the

parking: “The evidence before the board and the judge of the presence of ‘pudding stone’ in large quantities under the surface of the locus warranted the finding of the board and the judge to the effect that the locus was an unusual piece of land which could not be reasonably used for any purpose other than a parking lot.”

The Connecticut case is *Shailer v. Planning & Zoning Commission of the Town of Haddam*, 26 Conn. App. 17, 596 A.2d 1336 (App. Ct. 1991). <https://tinyurl.com/Shailer-case> It involved a planning commission waiving certain requirements for a 28-lot subdivision because of “practical difficulty and unnecessary hardship” where there was rock ledge. The decision uses the word “variance” to describe the waiver. The variances sought were to allow a steeper road grade and to alter the typical road grading section. The conditions imposed by the Planning Commission also addressed the rock ledge, authorizing a modification of the plans accordingly: “in the event that rock ledge is encountered during such installation, the town engineer must modify the basin design to eliminate the need to remove ledge.”

The planning commission granted the waivers/variances, the trial court held for the planning commission, and the Appellate Court affirmed, quoting first from the trial court’s decision:

“Thus, it was acknowledged that while the regulations themselves are reasonable, when applied to Cortul's site, they result in practical difficulty and unusual hardship. Therefore, it is found that the commission did not violate § 5.1 of the regulations in approving the waivers.”

And then holding:

Although such a determination was not favorable to the plaintiff, on review of the record, we cannot say that the determination was not legally correct or factually supported. [citation omitted]. We conclude, therefore, that the trial court properly determined that the commission complied with § 5.1 of its subdivision regulations in granting waivers in this case.

In summary, the Connecticut Appellate Court has held that rock ledge is a proper basis for the issuance of a variance under the “practical difficulties and unnecessary hardship” test.