LAVINE, J., concurring. I agree with the decision reached by the majority, but I write separately to clarify the hardship claimed by the defendant Jennifer Bartiss-Earley. I also believe that *Osborne* v. *Zoning Board of Appeals*, 41 Conn. App. 351, 675 A.2d 917 (1996), should not be relied on in the analysis of the claims in this appeal.

Some of the facts cited by the majority deserve amplification to place the hardship claimed by Bartiss-Earley in perspective. The photographs of the swimming pool in the record demonstrate that the swimming pool is an aboveground pool, not one built in the ground. In her application for a hearing, Bartiss-Earley requested a variance for an existing pool and deck. In response to the question regarding the specific hardship claimed, she wrote: "[A] permit was issued for the pool [and] deck in 1994 despite the fact that they did not conform to the side and rear yard requirements.[1] A variance would allow the deck to be rebuilt in its present dimensions with respect to the rear yard and for future improvements/repairs to the pool with respect to the rear and side yard." During the hearing, Bartiss-Earley expressed her opinion that she was faced with a hardship because a 1994 building permit "was issued for this under false pretenses." Members of the defendant zoning board of appeals of the town of Plainville (board) asked Bartiss-Earley to clarify why the variance was being requested at that time. When informed that Bartiss-Earley was seeking the variance to repair the existing deck, members of the board explained that if they granted a variance pursuant to her application of October 26, 2005, she would have to apply for a building permit to repair or to replace the swimming pool within six months or she would have to return at a later time to request a variance to repair or to replace the pool. The board granted the application for the variance on the ground that the nonconformity "is a hardship that she unfortunately bought into." Although the result seems somewhat harsh at first blush, I agree with the majority that under the controlling law, Bartiss-Earley's reliance on the 1994 building permit is not a hardship for which a variance should be granted.[2]

In their briefs, the parties cite and offer various arguments with respect to a 1996 decision of this court, *Osborne* v. *Zoning Board of Appeals*, supra, 41 Conn. App. 351. I respectfully disagree with the reasoning of *Osborne* and the manner in which the majority here seeks to distinguish it. See footnote 4 of the majority opinion. The general rule in Connecticut is that a variance will not be granted if the hardship is self-created, including hardships created by the applicant's predecessor in title. As I construe the history of this rule, I

believe that it is founded in the law of agency. The independent contract doctrine, relied on in *Osborne*, has its roots in employment and insurance, not zoning, law. Moreover, a surveyor is a professional, one who is required to pass rigorous examinations and to obtain a license from the state.

The hardship rule as related to zoning variances has been a consistent part of our jurisprudence as far back as 1931. "Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship. Financial considerations alone . . . cannot govern the action of the board. They are bound to take a broader view than the apparent monetary distress of the owner. Otherwise, there would be no occasion for any zoning law." (Internal quotation marks omitted.) *Thayer* v. *Board of Appeals*, 114 Conn. 15, 22, 157 A. 273 (1931); see also *Devaney* v. *Board of Zoning Appeals*, 132 Conn. 537, 542, 45 A.2d 828 (1946). "Where the basis upon which the claim of hardship rests is financial in nature, there rarely can be justification for a variance. . . . [T]he hardship, if such it may be called, did not originate in the ordinance. The defendants have brought it on themselves." (Citations omitted.) *Celentano* v. *Zoning Board of Appeals*, 136 Conn. 584, 587, 73 A.2d 101 (1950).

"By its very definition, a variance is granted with respect to a particular piece of property; it can be enjoyed not only by the present owner but by all subsequent owners. . . . It follows then 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." (Citation omitted.) G*aribaldi* v. *Zoning Board of Appeals*, 163 Conn. 235, 239, 303 A.2d 743 (1972).

A factual situation somewhat similar to the one here was presented in *Misuk* v. *Zoning Board of Appeals*, 138 Conn. 477, 86 A.2d 180 (1952). In that case, the property owner sought to construct a house with an attached garage on a lot in Meriden. Id., 478. "Preparatory to actual construction, [the property owner] and his contractor laid out that part of the foundation which was farthest away from the plaintiff's property. In doing so, they measured from a pipe, set in the ground, erroneously assumed by them to mark the southerly boundary of the lot. As a matter of fact, the correct boundary was a few feet farther to the south." Id., 478–79. Our Supreme Court concluded that the zoning board improperly had granted a variance, stating: "It must be borne in mind that the predicament which arose did

not originate in the ordinance or in other conditions beyond the control of the [property owner]." Id., 481.

In *Highland Park, Inc.* v. *Zoning Board of Appeals*, 155 Conn. 40, 229 A.2d 356 (1967), our Supreme Court had occasion to decide a case in which a dwelling house was constructed within the setback. "The 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 . . . ." Id., 42. The court concluded that "any present hardship 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." (Emphasis added.) Id., 43. This conclusion by our Supreme Court brings me to my disagreement with *Osborne* v. *Zoning Board of Appeals*, supra, 41 Conn. App. 351.

In *Osborne*, this court reversed the denial of a zoning variance where the foundation of a dwelling house in Guilford had been placed within the setback. This court concluded that the surveyor, who was blamed for the error, was an independent contractor. "The surveyor testified before the board that he was retained by the *architect*, and not by the defendant property owner, to mark the offset for the building, and that the surveyor incorrectly placed one of the stakes 0.6 of a foot, seven inches, closer to the west boundary than it should have been. The architect also testified that because of the 'tightness' of the lot, *he*, not the defendant [property owner], took the precaution of hiring the surveyor to set corner stakes before construction. Nowhere does it appear in the record that the surveyor was other than an independent contractor or that the surveyor was retained by the defendant." (Emphasis in original.) Id., 354. In my view, the court's reasoning in *Osborne* is unpersuasive. Irrespective of who hired the surveyor, the architect was the property owner's agent, and so, derivatively, was the surveyor.

This court offered in further support of its conclusion that the owner of the Guilford property was not bound by the surveyor's mistake and that there was no evidence that "the surveyor was other than an independent contractor in control of his own means and methods of work, except to the result of his work; *Tianti* v. *William Raveis Real Estate, Inc.*, 231 Conn. 690, 697, 651 A.2d 1286 (1995) . . . ." (Internal quotation marks omitted.) *Osborne* v. *Zoning Board of Appeals*, supra, 41 Conn. App. 355. *Tianti* was an action brought by the commissioner of labor pursuant to General Statutes § 31-72 on behalf of two of the defendant's real estate agents for unpaid commissions. *Tianti* v. *William Raveis Real Estate, Inc.*, supra, 694. *Tianti* relied on the definition of an independent contractor from cases concerning malpractice insurance; see *Silverberg* v. *Great Southwest Fire Ins. Co.*, 214 Conn. 632, 639, 573

A.2d 724 (1990); and unemployment compensation pursuant to General Statutes § 31-270. See *Latimer* v. *Administrator*, 216 Conn. 237, 248, 579 A.2d 497 (1990). *Tianti* and the cases cited therein arise out of employment and insurance law. The situation with regard to a real property owner who engages a surveyor to perform a task is not an employment situation to which employment and insurance law pertains.

Moreover, a property owner may hire, retain or enter into a contract with a surveyor to perform a particular service, much the same way that the property owner may hire, retain or enter into a contract with a builder to construct a fixture on the land. See *Highland Park, Inc.* v. *Zoning Board of Appeals*, supra, 155 Conn. 43. Both the surveyor and the builder in all likelihood possess skills the property owner does not have, and their work must be self-directed. A surveyor is a professional subject to regulations of the profession and the laws of this state. See General Statutes § 20-299 (2). As such, a surveyor generally will not be under the control of the landowner who engages him or her. Although a surveyor may go about doing the survey according his or her own methods, he or she nonetheless was employed by the owner of real property. See General Statutes § 20-299 (2). If the owner of property relies on the surveyor's work, he or she ratifies the work, and the property owner and his or her successors in title should not be permitted to disavow errors in the survey, if any, on the ground that the surveyor was an independent contractor.

For these reasons, I believe the reasoning informing the *Osborne* decision is questionable and that it should not be relied on in the analysis of the claims on appeal. Otherwise, I concur in the opinion of the majority.

[1] Reference is made to a 1986 mortgage survey, which is purported to be the survey used when the prior owner of the property applied for the building permit to construct the deck and pool in 1994. The registered land surveyor certified with respect to the map to the mortgagee bank and the title insurance company that "this map is substantially correct, the structure is located as shown, and unless otherwise noted, does not violate the zoning regulations of the town of Plainville." As the majority makes clear in footnote 2, there are different categories of surveys. See, e.g., *Kramer* v. *Petisi*, 285 Conn. 674, 683–84, 940 A.2d 800 (2008) (comparative negligence applied to claim of negligent misrepresentation where purchaser failed to obtain new survey).

[2] At the hearing Bartiss-Earley represented in part, "I'm requesting this variance to allow me in the future to replace or repair the pool, as it probably over time will need replacement or repair, as well as to, in the near future, replace the existing deck with the existing footprints as they are depicted on the map provided to you." The map submitted by Bartiss-Earley demonstrates that remedying the nonconformity might be described more accurately as an inconvenience than a hardship if the above the ground pool needs to be replaced.