GRUENDEL, J., concurring. I concur with the well reasoned majority opinion. When a zoning board of appeals elects to enumerate specific conditions in granting a variance, those conditions must be set forth with clarity. I write separately to address the line of precedent relied on by the defendant in this appeal, the zoning board of appeals of the town of Madison, and the trial court in the proceeding below, regarding the import of the variance application in ascertaining the scope of a granted variance.

The precedent of our appellate courts instructs that, at times, a review of the variance application is of use in determining the proper scope of a variance granted by a zoning board of appeals. In *Raymond* v. *Zoning Board of Appeals*, 164 Conn. 85, 87, 318 A.2d 119 (1972), at issue was the plaintiff's ability to engage in the repair of motor vehicles on the property in question, which "[f]or many years prior to the plaintiff's application . . . had been used for a gasoline service station as a nonconforming use." On appeal, the plaintiff claimed, inter alia, that the Ridgefield zoning board of appeals years earlier had granted a variance permitting that activity on the property. Id., 86. In rejecting his claim, our Supreme Court looked to the plain language of the variance application. It stated: "On May 17, 1967, Else C. Jensen applied to the defendant board for a variance to permit the improvement, reconstruction and partial relocation of a gasoline station building located at 93 Wilton Road West, together with the improvement of appurtenant facilities to permit the applicant to continue operation of a gasoline station as a nonconforming use. The intended use to be made of the premises was stated as follows: 'Sale of gasoline and related products and general business uses ordinarily coincidental with the operation of a gasoline station.' On June 14, 1967, the defendant board granted the application for the variance." Id., 87. Utilizing that application to determine the scope of the variance granted, the court concluded that "[t]he variance granted in 1967 was not an extension of the nonconforming use to permit repairs. The application was for a variance to permit the applicant to continue operation of a gasoline station as a nonconforming use for the '[s]ale of gasoline and related products and general uses ordinarily coincidental with the operation of a gasoline station.' This language contains no suggestion that the applicant was then seeking permission to engage in the repair of motor vehicles . . . ." Id., 87–88.

Similarly, this court in *L & G Associates, Inc.* v. *Zoning Board of Appeals*, 40 Conn. App. 784, 787, 673 A.2d 1146 (1996), addressed a claim that the trial court "improperly considered the entire public record, rather

than considering solely the plain language of the variance certificate" to ascertain the scope of a granted variance. We began our analysis by noting that "[o]ur Supreme Court, in determining the use of property that a variance allows, has considered not only the language of the variance certificate, but also the specific use of the property proposed by the applicant, as set forth in the variance application. See *Raymond* v. *Zoning Board of Appeals*, [supra, 164 Conn. 87–88]. Courts in other states have also looked to both the variance application and the legal description of the property as it is set forth in the variance certificate to determine the uses that the variance allows." *L & G Associates, Inc.* v. *Zoning Board of Appeals*, supra, 787. In articulating our disagreement with the argument advanced by the appellant, we explained that "[t]he proposition that the scope of a variance is determined by examining the specific use proposed in the variance application and approved by the zoning board of appeals is a necessary corollary of the limited nature of variances." Id., 787–88. Thus, whereas the appellant insisted that the trial court improperly considered the variance application and the entire public record in determining the scope of the granted variance, this court concluded that "[t]he trial court would have been remiss had it failed to do so."[1] Id., 788; see also *Gangemi* v. *Zoning Board of Appeals*, 54 Conn. App. 559, 564, 736 A.2d 167 (1999) (relying in part on variance application to discern scope of granted variance), rev'd on other grounds, 255 Conn. 143, 763 A.2d 1011 (2001).

That precedent is grounded in practical and compelling considerations. First, it recognizes that a variance is no insignificant matter, as it runs with the land in perpetuity; see General Statutes § 8-6 (b); and constitutes "authority extended to the owner to use his property in a manner forbidden by the zoning enactment." *Burlington* v. *Jencik*, 168 Conn. 506, 508, 362 A.2d 1338 (1975). Because the granting of a variance "affords relief from the literal enforcement of a zoning ordinance, it will be strictly construed to limit relief to the *minimum variance* which is sufficient to relieve the hardship." (Emphasis added; internal quotation marks omitted.) *L & G Associates, Inc.* v. *Zoning Board of Appeals*, supra, 40 Conn. App. 788; see also 3 E. Yokley, Zoning Law and Practice (4th Ed. MacGregor 2002) § 20-13, p. 20-59 (variance granted "must be the minimum one sufficient to relieve the hardship complained of"); R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (3d Ed. 2007) § 9:8, p. 263 (strict construction of variance ensures that "minimum variance to relieve the hardship" granted); 8 E. McQuillan, Municipal Corporations (3d Ed. Rev. 2000) § 25.162 (variances "should be strictly construed"). That strict construction effectuates the "essential purpose of a board of appeals" to furnish "elasticity in the application of regulatory measures so that they do not operate in an arbitrary

or confiscatory, and consequently unconstitutional, manner"; *Florentine* v. *Darien*, 142 Conn. 415, 425, 115 A.2d 328 (1955); accord 4 P. Salkin, American Law of Zoning (5th Ed. 2010) § 39-7, p. 39-26 (zoning board of appeals "created to interpret, to perfect, and to insure the validity of zoning"); while at the same time adhering to the well established principle that the variance power should be carefully exercised in limited fashion. See, e.g., *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 857, 670 A.2d 1271 (1996) (power to grant variance should be sparingly exercised); *Pleasant View Farms Development, Inc.* v. *Zoning Board of Appeals*, 218 Conn. 265, 271, 588 A.2d 1372 (1991) (power to authorize variance only granted for relief in specific and exceptional instances); *Baccante* v. *Zoning Board of Appeals*, 153 Conn. 44, 47, 212 A.2d 411 (1965) (power to grant variance exercised "only to avoid an unnecessary hardship"). Permitting a reviewing court in certain circumstances to look to the variance application helps ensure that its interpretation of the scope of a granted variance is limited to the minimum necessary to relieve the hardship demonstrated by the applicant.

On a more basic level, the aforementioned precedent embodies principles of fundamental fairness, in that—absent an indication to the contrary by the zoning board of appeals—the scope of a granted variance should not be interpreted to extend beyond that requested by the applicant and considered by the board.[2] By way of example, consider the property owner with a relatively straightforward variance application seeking to construct a ten foot by ten foot shed on the westerly side of the applicant's five acre property. Because of the unique nature of the parcel and the local setback requirements, the applicant requests a twenty foot side yard variance. Throughout the variance application, the accompanying documentation and the representations of the applicant at the public hearing, the zoning board of appeals repeatedly is assured that the scope of the variance requested is simply to permit the construction of a ten foot by ten foot shed within the side yard setback. Accordingly, the board grants the variance requested, stating simply that the applicant's request for a twenty foot side yard setback is approved. On appeal, should the scope of that variance be interpreted as if a twenty foot variance has been granted to run the full length of the westerly side yard setback of this five acre property? *Raymond* and *L & G Associates, Inc.*, answer that query in the negative, instructing that a reviewing court may instead look to what precise relief the applicants requested from the board in pursuing a variance from the local zoning regulations.[3]

Ideally, the zoning board of appeals in such instances carefully and precisely would articulate the parameters of the variance granted, whether through the imposition of specific conditions or the use of limiting language.[4] We do not live in an ideal world, nor one where attor-

neys, architects and engineers alone populate local land use agencies. Rather, they are comprised of citizens from all walks of life, serving their communities on a voluntary basis. As our Supreme Court observed more than one half century ago, "[i]t must be borne in mind . . . that we are dealing with a group of laymen who may not always express themselves with the nicety of a Philadelphia lawyer. Courts must be scrupulous not to hamper the legitimate activities of civic administrative boards . . . ." *Couch* v. *Zoning Commission*, 141 Conn. 349, 358, 106 A.2d 173 (1954). Property owners requesting a slight variance from the local zoning regulations should not reap the windfall of a significantly vaster grant due to technical imprecision or inadvertence on the part of their fellow citizens in acting on the application as members of the zoning board of appeals. *Raymond* and *L & G Associates*, *Inc.*, recognize this reality by permitting a reviewing court to consider the proposed use presented to the board in the variance application in ascertaining the proper scope of a granted variance.[5]

That is not to say that a reviewing court in every instance must consider the variance application. In both *Raymond* v. *Zoning Board of Appeals*, supra, 164 Conn. 87, and *L & G Associates*, *Inc.* v. *Zoning Board of Appeals*, supra, 40 Conn. App. 787, no conditions or limiting language were attached to the variances at issue. In such instances, a reviewing court is left to speculation and conjecture as to whether the respective boards considered the scope of the variances granted, which plainly "have no place in appellate review."[6] (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009). By contrast, the board in the present case was careful to enumerate specific conditions to the granted variance, and none prohibited the activity proposed in the plaintiffs' 2007 building permit request. The present case, thus, is distinguishable from the precedent relied on by the defendant in this appeal.

In my view, when a board elects to attach specific conditions to a variance, which "are inextricably linked, the viability of the variance being contingent upon the satisfaction of the conditions"; *Burlington* v. *Jencik*, supra, 168 Conn. 510; the canon expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—should apply. In such instances, in which the board expressly evinces an intent to limit the scope of the variance granted, an inference that other conditions not mentioned were excluded by deliberate choice is warranted. See generally *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 319 n.15, 968 A.2d 396 (2009). Thus, in the absence of clearly articulated conditions, the representations contained in the variance application can be of use in defining the scope of the variance. However, when a board specifi-

cally enumerates conditions attached thereto, I believe the variance application should not be used to impose one that the board has declined to set forth in its specified conditions. That view accommodates both the liberal discretion afforded to local land use agencies; see, e.g., *Alvord Investment, LLC* v. *Zoning Board of Appeals*, 282 Conn. 393, 408–409, 920 A.2d 1000 (2007); and the policy of employing a strict construction of variances "to limit relief to the minimum variance which is sufficient to relieve the hardship." (Internal quotation marks omitted.) *L & G Associates, Inc.* v. *Zoning Board of Appeals*, supra, 40 Conn. App. 788.

Furthermore, even in those instances such as *Raymond* and *L & G Associates, Inc.*, in which the board has not imposed any conditions on the variance, resort to the variance application is not dispositive of the issue of its proper scope. Many times, the variance application may be ambiguous or imprecise as to what is being requested. That is the case here, as a review of the October 5, 2001 variance application by the plaintiffs, Victor Anatra and Heather Anatra, sheds little light on whether the activity proposed in the 2007 building permit request was contrary to the representations contained in the 2001 variance application. That application concerned only the construction of a residential building on the same footprint of an existing nonconforming structure. In that application, the plaintiffs represented that the "[r]esidential use [of the building] will remain the same without expanding the footprint of the building." They did not represent that no other buildings, which under the Madison zoning regulations included the proposed deck at issue here; see Madison Zoning Regs., § 19.4; would be constructed in the future, particularly ones in full compliance with the setback requirements contained in those regulations. As such, the variance application is, at best, ambiguous and, at worst, irrelevant to a consideration of the proper scope of the granted variance. Yet *Raymond* and *L & G Associates, Inc.*, do not stand for the proposition that resort to a variance application is mandatory or determinative in such instances; rather, such review is but one tool for a reviewing court in certain circumstances to ascertain the proper scope of a granted variance. That tool has no use in the present case.

The precedent of *Raymond* and *L & G Associates, Inc.*, instructs that in determining the proper scope of a granted variance, a reviewing court at times may consider "not only the language of the variance certificate, but also the specific use of the property proposed by the applicant, as set forth in the variance application." *L & G Associates, Inc.* v. *Zoning Board of Appeals*, supra, 40 Conn. App. 787. Although such resort is not warranted in the present case, our decision today should not be read to contravene, let alone overrule, that precedent.

[1] In light of this precedent, the trial court in the present case understand-

ably stated in its memorandum of decision that our "courts are not restricted to the four corners of the variance certificate in determining the effect of a variance."

[2] Just as "[i]t is axiomatic that an appellate decision stands only for those issues presented to, and considered by, the court in that particular appeal"; *Dept. of Public Safety* v. *Freedom of Information Commission*, 103 Conn. App. 571, 582 n.10, 930 A.2d 739, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007); I believe variances must be interpreted to grant no more relief than that requested by an applicant and that which is demonstrated to be necessary to alleviate the hardship.

[3] In *Dodson Boatyard, LLC* v. *Planning & Zoning Commission*, 77 Conn. App. 334, 338–39, 823 A.2d 371, cert. denied, 265 Conn. 908, 831 A.2d 248 (2003), this court rejected the defendant's reliance on *L & G Associates, Inc.*, for its contention that the trial court had failed to consider the entire record in determining the scope of the granted variance. In its one paragraph analysis of the issue, this court did not discuss or distinguish that precedent, nor did it cite to *any authority* to support that analysis. See id., 339. As such, it cannot be said that *Dodson Boatyard, LLC*, overruled sub silentio *L & G Associates, Inc.*, particularly in light of the established policy of this court dictating that "one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 759, 966 A.2d 239 (2009). Since its publication in 2003, no appellate decision addressing a similar issue has cited to or relied on *Dodson Boatyard, LLC*. To the extent that *Dodson Boatyard, LLC*, contravenes the established precedent of our Supreme Court permitting a reviewing court to consider the variance application; *Raymond* v. *Zoning Board of Appeals*, supra, 164 Conn. 87–88; proper regard for our role as an intermediate appellate tribunal bound by the precedent of our Supreme Court precludes our reliance on that decision. See *DePietro* v. *Dept. of Public Safety*, 126 Conn. App. 414, 422 n.3, A.3d (2011) (adhering to "the bedrock principle that, as an intermediate appellate body, we are not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court").

[4] For example, regarding the hypothetical set forth above, a board could grant a twenty foot side yard setback variance not to exceed a width of ten feet or a height of twelve feet and to be located within eighty feet of the rear property marker on the westerly side.

[5] In that respect, resort to review of a variance application is akin to the "exception" contained within our clearly erroneous standard of review. See generally *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 613, 931 A.2d 319, cert. denied, 284 Conn. 929, 934 A.2d 244 (2007). Though for the most part highly deferential to the determination of the body below, the clearly erroneous standard nevertheless permits reversal when a reviewing court possesses a definite and firm conviction that a mistake has been committed. See, e.g., *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 544, 893 A.2d 389 (2006). That, in essence, is what the courts confronted in reviewing the plaintiff's claim and the plain language of the variance certificate in *Raymond* and *L & G Associates, Inc.*

[6] "In hearing the plaintiff's appeal from the decision of the zoning board of appeals, the Superior Court acts as an appellate body." *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 603 n.1, 942 A.2d 511, cert. denied, 289 Conn. 901, 957 A.2d 871 (2008).