THE TWILIGHT ZONING LAWS

THE IMPENDING JUDICIAL DEATH OF ZONING VARIANCES IN WISCONSIN

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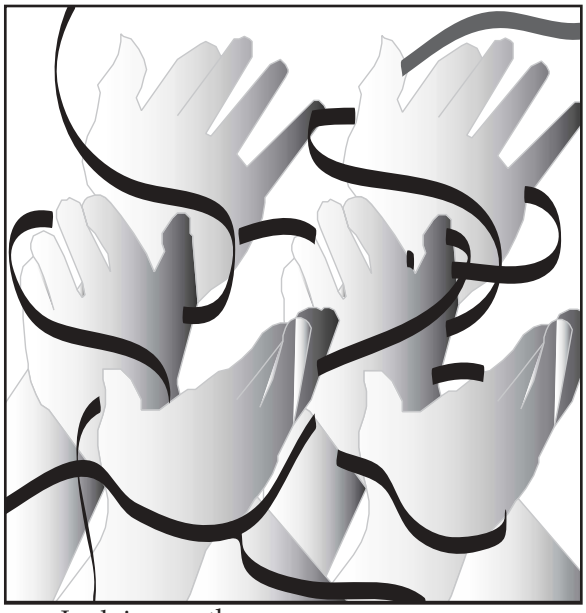

An important dispute has been brewing within the Wisconsin Supreme Court over the nature and scope of the rights of private property owners.

The crux of the issue is what rule should govern the granting of variances from zoning laws. Variances are the means by which property owners are granted exceptions to following the literal requirements of zoning laws. In doing so, these variances help to correct, on a case-by-case basis, unnecessarily unjust effects of general zoning requirements.

Two cases decided by the state's high court in recent years have fleshed out highly divergent, yet equally fervent, opinions of the court's justices on this question. Even after a vigorous denunciation of the present rule by three of the court's seven justices in last year's case of *State v. Outagamie County Board of Adjustment*,[1] a majority of the court remains adherent to a rule established in 1998 in *State v. Kenosha County Board of Adjustment*.[2] This rule essentially denies local boards of adjustments/appeals the ability to grant *any* zoning variance unless a property has *no other reasonable use* without the granting of the variance.

Under state statutes, zoning variances are said to be available only if "unnecessary hardship" would result to the property owner if the variance is denied. According to the court in *Kenosha County*, "the legal standard of unnecessary hardship requires that the property owner demonstrate that without a variance, he or she has no reasonable use of the property."[3] According to the Wisconsin Realtors Association, "In some areas of the state, this standard has been interpreted to mean that if a person can still walk on the land or fish from the shore, they still have a reasonable use of their property and thus are not entitled to a variance."[4] The court claimed to have ducked the question of whether there are any differences in the "unnecessary hardship" analysis between types of variances sought.[5] However, for reasons discussed at length below, the court's decision implicitly found that there are no differences and that all variances should be treated equally.

Given this incredibly onerous standard, zoning variances allowed since the *Kenosha County* decision have nearly disappeared in

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many Wisconsin communities.[6] What has been gained is little more than rigid adherence to all zoning restrictions, many of which create arbitrary legal boundaries on property rights. What has been lost is the commonsensical notion that, in the context of zoning laws, a balance should exist between the interests of private property owners and the public interests served by any particular zoning law.

What is an "Unnecessary Hardship"?

In *Kenosha County* and *Outagamie County*, the state Supreme Court has attempted to enunciate the standard that should apply to Wisconsin's governing statute on zoning variances.[7] Under this statute, a specific variance to a zoning order can be permitted by a County Adjustment Board, and thereby enjoyed by the private property owner seeking the variance, only if an "unnecessary hardship" would result without issuance of the exception. The complete language of the provision reads:

> The board of adjustment shall have [the power to] authorize upon appeal in specific cases variances from the terms of the [zoning] ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

A parallel statute exists regarding City Boards of Zoning Appeals, which are the entities empowered to grant variances from similar city or village zoning ordinances passed by local planning commissions.[8] The primary issue is determining what is meant by "unnecessary hardship." More specifically, the question is whether this language applies differently depending on whether a variance is classified as a "use" or an "area" variance.

Generally, a *use variance* is one that alters the essential character of the use to which a property is applied. A simple example is when a region of a community is designated by zoning laws as for residential purposes; if someone seeks to transform a lot on that property into a commercial business, such a variance would be a use variance. By contrast, an *area variance* deals with particular dimensional restrictions that, while desirable in the view of some public policy, are often arbitrary on the margins.[9] For example, consider a zoning law stating that any building on a property must be set back from the street by one-hundred feet. If a property owner sought to build a house that started ninety-eight feet from the street, then such a change, if allowed, would not alter the character of how the property is used (it still is a residential house); it merely marginally affects some dimensional nature of a building on the property. As such it would be an area variance.

To be sure, the distinction between a use variance and an area variance is not always clear. Chief Justice Abrahamson emphatically argued this point in her dissent in the *Outagamie* case, in which she characterized such distinctions as "artificial labels." Justice Sykes's lead opinion in the case also recognized that a use variance might on occasion be disguised as an area variance. However, Justice Sykes also correctly noted that a distinction must be maintained because the purposes of the two types of variances are vastly different — creating uniformity of property use in the one case, while causing uniformity of lot and building size in the other. In most cases, therefore, the argument that an area variance is really a use variance, or vice versa, is one that requires substantial semantic dexterity to be given credence.

The grounds for the current debate were created by the Supreme Court's 1998 decision in *State v. Kenosha County*. The case involved Janet Huntoon, a property owner on Hooker Lake in Kenosha County, who was about to move into a house on lakefront property that her grandfather built in 1936. Huntoon wished to build a modestly sized deck adjacent to the house, a feature common to most homes on the lake. She eventually discovered that a zoning variance must be obtained for her to lawfully construct the deck since it would extend eleven feet within the allowed 75-foot setback requirement for all structures on property

adjacent to the lake. Huntoon petitioned the Kenosha County Board of Adjustment for a variance to allow construction which, after a public hearing, was granted. The Wisconsin Department of Natural Resources (DNR) opposed the variance, stating in a rather conclusory fashion that Huntoon did not meet the "unnecessary hardship" requirement and that the variance conflicted with the public interest of shoreland zoning variances.

The Wisconsin Court of Appeals agreed with the local Board and Ms. Huntoon. It concluded that, while an area variance and a use variance each require "unnecessary hardship," an "unnecessarily burdensome" test should apply for an area variance while the test for a use variance is a stricter "no feasible use" test.[10] Shunning this application of the law, a unanimous Wisconsin Supreme Court ruled that, for all variances, "the legal standard of unnecessary hardship requires that the property owner demonstrate that without a variance, he or she has no reasonable use of the property," and "when the property owner would have a reasonable use of his or her property, the purpose of the zoning statute takes precedence and the variance request should be denied."[11] Since the Board applied the wrong legal standard, the court concluded that no variance should be allowed to Huntoon.

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Oddly enough, the *Kenosha County* case garnered little dissention within the court or amongst the public, probably because its decision was unanimous and it dealt with shoreland setbacks that are applicable only to properties abutting waterways. Then came the saga of the Warning family from Outagamie County, as fought out in the courts in the case of *State v. Outagamie County*. In 1984 the Warning family built a small home on their property according to a county-issued building permit. Unfortunately, the permit allowed the basement of the house to be built a few feet below flood elevation levels permitted by state laws and county zoning ordinances. No effect came of this error until 1994, when the Warnings sought to build a small sun porch and therefore requested an "after the fact" variance pertaining to their non-conforming basement depth. While the porch itself would not violate any zoning law, a building permit allowing the construction of a porch connected to a "nonconforming" structure could not be obtained without a variance recognizing the basement violation. Once again the DNR opposed the variance, arguing in part that its power superceded the Board of Adjustment's discretion. Nevertheless, the Board granted the variance, which was upheld upon review in the circuit court. The Wisconsin Court of Appeals begrudgingly reversed and denied the variance — a result the court described as "distasteful" — based solely upon the *Kenosha County* rule it felt compelled to follow as precedent.[12] The case was then granted review by the Wisconsin Supreme Court.

In the three-year interim between *Kenosha County* and *Outagamie County*, the composition of the court had significantly changed — significant, at least, in terms of how the court would come to view the issue of zoning variances in the state. Having left the court were Justices Geske and Steinmetz, while entering the court were Justices Prosser and Sykes.[13] The latter two, along with Justice Bablitch, have come to form a set of justices, currently in the minority, who view the *Kenosha County* decision with genuine disdain. Under their view, as expressed by Justice Sykes's lead opinion in *Outagamie County*, the *Kenosha County* rule is Draconian and effectively eliminates the ability of local boards of adjustment

from issuing *any type* of zoning variance. As a result, property owners are denied the ability to reasonably alter their property in any way that even minimally violates a zoning restriction. The Sykes bloc maintains that the standard established in *Kenosha County* is wrong as a matter of law and policy, and that a correct, traditional understanding of the law does not compel a denial of a variance in the Warnings' case. Instead, a distinction should be maintained between area and use variances since the public interest and purposes served by each type of variance are manifestly different. Accordingly, area variances may be obtained if a zoning restriction is unnecessarily burdensome to a particular property owner, so long as the public interest is not sacrificed.

Another set of justices includes Chief Justice Abrahamson and Justice Bradley, who adamantly maintain that there is no distinction within state law between area and use variances and, as such, they should be treated the same — ergo, *Kenosha County* was and still is correct, in all of its glory. While much of Chief Justice Abrahamson's dissent focused on her view that the DNR's authority would be wrongfully undermined by allowing local boards of adjustment to grant variances to state floodplain laws, she also vigorously defended the *Kenosha County* rule.

The final set of justices, composed of Justice Crooks and Wilcox, responds by essentially saying, "what's all the fuss about?" These justices read *Kenosha County's* "no reasonable use" evaluation as being inextricably tied to consideration of the purpose of the zoning restriction at issue with any variance. According to Justice Crook's opinion, "because area variances do not involve great changes in the character of neighborhoods as do use variances, the purpose of the zoning ordinance may not be so likely undermined by an area variance as it might be by a use variance." In other words, despite *Kenosha County's* apparent establishment of a bright-line rule, these two justices maintain that "county boards of adjustment have some very real flexibility in granting variances." From this reasoning followed the curious result that, while Justices Crooks and Wilcox were unwilling to overrule *Kenosha County's* blanket "no reasonable use" rule, they still voted along with the Sykes bloc to assert that the Outagamie Board of Adjustment's decision with respect to the Warnings' variance was proper. What makes this conclusion even more odd is that the Outagamie Board did not even formally consider the purpose of the ordinance at issue — the seeming *sine qua non* of the test according to Justices Crooks and Wilcox.

There is one thing that all seven justices in *Outagamie County* did agree on, which is that no variance, whether area or use, may be issued if against the public interest. The law as written plainly demands this result, but of course the "public interest" remains a nebulous concept. In sum, however, as interpreted by a majority of the state Supreme Court, the "no reasonable use" standard technically remains the law of Wisconsin regarding zoning variances.

Properly Protecting Private Property and the Public Interest

Why have there developed such confused and divergent interpretations of the authority to grant zoning variances? Moreover, which interpretation is more desirable? For the reasons discussed below, it appears that the more practical and fair result calls for an interpretation of unnecessary hardship that abandons the *Kenosha County* rule and which conforms to the system advocated by Justice Sykes in *Outagamie County*. Such a system would strike a proper balance between property interests and the public interest that provides reasonable allowances for variances that do not meaningfully subvert the public interest.

The *Outagamie* dissent's reading of the law is certainly not an unprincipled interpretation of the law and it more truly follows the precedent of *Kenosha County*. But the troubling aspect of the dissent's interpretation of the law is how it worked to disallow the Warning family's variance.

Consider the following: the Warnings' sun porch, by itself, would not have violated a sin-

gle law; the basement had existed peacefully for 11 years; and the basement would continue to exist at its barely nonconforming depth *with or without the sun porch.* If a variance could not be allowed in this context, given the *de min - imus* nature of the violation, then what possible circumstance exists where any variance would be justified in light of a zoning law's purpose? What zoning law exists that both renders a particular piece of property unusable in any reasonable sense yet, at the same time, would permit a variance from that restriction which would still not be contrary to purpose of the very law making the property unusable?

To better answer which rule should govern, one needs to take a step back and recognize the nature of zoning laws. The policies behind zoning laws squarely pit two competing interests against each other. The first interest is that of individual property owners who are directly affected by a zoning restriction. Private property rights remain at the heart of American life and culture. When the Smith family buys or builds a home, they generally expect that they will have the right to use and modify their property.

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But this right is not without limit. The Smith family's rights to control their property is weighed against the public interest as embodied in zoning restrictions. Such laws are enacted for a variety of reasons, including environmental protection, public safety, abatement of nuisances, or other general "quality of life" considerations. Zoning ordinances keep toxic waste dumps from being located one dodge-ball's-throw away from elementary schools, and keep residential property owners from building houses that completely encroach upon their neighbors' lots. Overall, the public interest in zoning laws derives from the government finding that certain uses of certain properties tend to be incompatible with the achievement of certain public goals.

As we see, there are a lot of particular "certains" in this analysis, largely because zoning ordinances, by their very nature, deal with generalities. As a result, the threshold measures of whether the ordinance is met (such as, for example, the required distance between where a structure begins and the location of a shoreline) are necessarily somewhat arbitrary. For example, what is the principled or practical difference between a seventy-foot versus seventy-five-foot setback? Little. Therefore, in attempting to reach the delicate balance between private property rights and community standards in the limited use of certain properties, there is an implicit recognition that neither interest should *per se* trump the other.[14] Lost by those supporting the new, anti-variance policy is a basic understanding that the merit of particular zoning policies is not axiomatic. In other words, simply because a zoning restriction limits certain uses of property does not mean that, in all cases, the wisdom of that restriction is sound, much less necessary to accomplish the policy the restriction is meant to serve.

This is exactly why the concept of area variances was adopted, and why it worked effectively in Wisconsin until 1998. The *Kenosha County* rule completely ignores this understanding. Instead, the *Kenosha County* decision effectively states that any variation from a zoning law, no matter how insignificant, is *per se* against the public interest, and therefore automatically disallowable.

Evidencing a proper understanding of area zoning laws, by contrast, policy-makers have fittingly allowed for the granting of variances to the mandates of these imperfect zoning

laws. These variances enable property owners to petition their local boards of adjustment/appeals to, at these boards' discretion, grant exceptions to those property owners so that they may alter their property in some minor way that may not conform with the letter of the law, yet is still reasonable, unharmful, and not materially against the public interest of the zoning restriction at issue. Few other areas of the law go through the whole rigmarole of establishing board of adjustments expressly to allow exceptions to a law if for a sensible cause. Why? Precisely because the underlying merit of zoning laws, especially when they pertain to marginal infractions, is not inherently strong in particular cases. Reasonable accommodations to particularly burdened individual property owners, as defined by a public body composed of representatives of those persons most affected by the zoning exception, frequently do not seriously undermine the public purpose or effect of a zoning law.

Those favoring the bright-line rule of *Kenosha County* also argue that it is simply too difficult to distinguish between when a certain variance is a use versus an area variance. Even assuming this difficulty of application is true, which is doubtful, why is this particular bright line, one illuminating so distant from the side of securing reasonable private property rights, the correct line? Why not have the line applying to all variances be that which is offered by Justice Sykes for area variances – the unnecessarily burdensome test. The reason why not is that neither bright-line rule correctly ascribes meaning to the modifier "unnecessary" in the term "unnecessary hardship" for all cases. The term itself suggests a fact-specific inquiry of balancing the purpose of the law with the effect on a particular property owner. *Kenosha County's* rule gets half of the equation correct by claiming that the purpose of zoning laws must be looked at when determining unnecessary hardship. But it completely fails to recognize that zoning laws can cause unnecessary hardship in situations even where the owner has some reasonable use of the property.

Finally, some will respond that the allowance of case-by-case exceptions to zoning laws subverts the entire reason governments have uniform zoning standards. However, the uniformity characteristic of zoning laws is not the controlling purpose of zoning laws. In fact, uniformity is merely a means to the ends of the public welfare goals sought by zoning restrictions. Take for example the roadside setback scenario used earlier. It is true that even a "dimensional" variance allowing a house to be built five feet from a road, when the property is zoned to have a minimum of a one-hundred-foot setback, would almost certainly be against the public interest of the zoning restriction. This is an example where a facially "area" variance would, in effect, be like a use variance with respect to its negative impact on the public. At the same time, however, a zoning restriction mandating *all* houses on these properties be five feet from the roadside would be equally bereft of public value if the result would harm the public welfare. Uniformity is no cure to the damaging practical effect of a zoning law. Therefore, it is difficult to see how, from a public interest perspective, the uniformity associated with zoning laws is either a sufficient or necessary condition for achieving the public interest.

In sum, use variances should be presumed to be unreasonable because an alteration of the property's use, so as to completely deviate from the legislatively determined character of the property, would rarely adhere to the purpose and public interest of the zoning restriction. Conversely, however, area variances should, at a minimum, carry no such presumption. Better yet, area variances should carry a presumption that the variance is reasonable, at least when the community board *in the community actually affected by* the area variance acquiesces. To otherwise maintain that there are *no* differences between area and use variances is simply an exercise in cognitive dissonance.

Where To Go From Here?

With any hope, the rule of *Kenosha County* will be an ephemeral one. Yet courts are often loath to admit they were wrong and overturn a

unanimous decision, especially one from just a few years earlier. The Wisconsin Legislature could readily step in, define what is meant by unnecessary hardship, and delineate the difference between area and use variances in a manner similar to that recommended by the Sykes bloc in *Outagamie*. A bill to do precisely this was introduced in the Assembly during the 2001-02 session.[15] Such a move may not eliminate all disputes over the lawfulness of granting zoning variances, but it would go a long way toward doing so and fending off the precariously close death of all zoning variances in the state. Until either the legislature or the courts definitively addresses the matter, private property rights in Wisconsin will remain in jeopardy.

Notes

1. 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376 (2001).

2. 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

3. 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

4. Tom Larson, "Wisconsin Supreme Court Wrestles with Variance Standard," Wisconsin REALTOR® —Land Use Forum, Vol. 17 No. 4 (Jan. 2001), *available at* < http://www.wra.org/government/land_use/wr_articles/wr0101_land_use.htm>.

5. *Id.* at 412 n.10.

6. *Wisconsin State Journal*, "It's Hard to Get House Project OK; Standards for Zoning Variances Have Gotten Stricter All Over the State," Aug. 27, 2001, D3.

7. Wis. Stat. §59.694(7)(c) (1999-2000).

8. Wis. Stat. §62.23(7)(e).

9. Justice Sykes's lead opinion in Outagamie County described the difference as follows:

> This distinction between use and area variances is well-recognized:
>
> A use variance is one that permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of a zoning ordinance.
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> 2001 WI 78, at ¶34 (quoting 3 E.C. Yokley, Zoning Law and Practice § 21-6 (4th ed. 1979)).

10. State v. Kenosha County Board of Adjustment, 212 Wis. 2d 310, 569 N.W.2d 54 (Ct. App. 1997).

11. State v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

12. 222 Wis.2d 220; 587 N.W.2d 215 (Ct. App. 1998).

13. In fact, the effect of this change was so profound that it caused the court to hear arguments in the *Outagamie* case during *two* subsequent terms, a rare occurrence, since the first time the case was heard the court could not reach any decision. *See* Larson, *supra* note 4.

14. To be sure, valid laws and regulations issued by governments do necessarily trump private interests, but they do so by virtue of being passed through the legitimate channels of government procedure, not necessarily by reason that a world that those laws engender is superior to one without such laws. For in the absence of laws limiting these private interests, the private interests will govern with as much legitimacy. In other words, governmental silence on an action is assent to that action, perhaps not in moral terms, but in legal terms. By allowing the granting of variances, the government has essentially stated "we believe these limitations on property are in the public interest, but we are not confident such a result is always the case."

15. 2001 A.B. 395.