1999 DRAFTING REQUEST

Bill

Received: **02/12/1999**

Received By: **shoveme**

Wanted: **As time permits**

Identical to LRB:

For: **Tony Staskunas (608) 266-0620**

By/Representing: **Adrienne**

This file may be shown to any legislator: **NO**

Drafter: **shoveme**

May Contact:

Alt. Drafters:

Subject: **Munis - miscellaneous**
Counties

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Authority of local governments to grant zoning variances

Instructions:

See Attached. Reverse State Sup. Ct. decision in "Huntoon" case

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	shoveme 06/16/1999	jgeller 06/18/1999		_____ _____			S&L
/1			mclark 06/18/1999	_____ _____	lrb_docadmin 06/18/1999	lrb_docadmin 10/04/1999	

FE Sent For:

<END>

LRB-2207

1999 DRAFTING REQUEST

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dee 59.694(7)(c)

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See Attached. Reverse State Sup. Ct. decision in "Huntoon" case

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	shoveme	1 6/18 jg	mrc 6/18	mrc/km 6/18			

FE Sent For:

<END>

Shovers, Marc

From: Ramirez, Adrienne
Sent: Tuesday, February 09, 1999 9:57 AM
To: Shovers, Marc
Subject: Bill Draft Request

Marc -

Rep. Staskunas would like to draft legislation relating to the authority of local governments to grant zoning variances. I will send over an article from the Milwaukee Journal Sentinel pertaining to the zoning problem. Apparently, the State Supreme Court made a ruling that variances can only be approved only if an owner has no other reasonable use for the land.

If you have any questions after you receive the information, please feel free to call me. Thank you for your assistance.

Adrienne Ramirez
Office of Rep. Staskunas
6-0620

MEMO

****

TO: Adrienne

FROM: Tony

RE: Granting of Zoning Variances

DATE: 02-04-99

****

Enclosed please find a copy of a Milwaukee Journal Sentinel article from January 31, 1999. This article details a recent Supreme Court decision which appears to greatly restrict the authority of local governments to grant zoning variances. The Supreme Court decision states that "Variances should not be granted if an owner has other options that allow for reasonable use of the land."

Apparently, a separate Appellate Court decision imposed a more rigid standard, "That a variance should be granted only when the owner has no other use of the property."

Under these very strict standards, even if all of the neighbors approve of the variance and the city and/or local unit of government would like to approve the variance, they are apparently prevented from approving the variance.

I would like to have a bill drafted which effectively reverses the holding of the Supreme Court in the Huntoon case and reverses the decision of the Appellate Court in the unnamed case and restores, very clearly, the authority and responsibility for granting variances to local zoning codes to local municipal governments and their zoning boards of appeals.

Jan. 31, 1999

Ruling on lakefront deck casts a wide net

Strict stance on zoning hits homeowners hard

By MARK ROHDE
of the Journal Sentinel staff

Janet Huntoon of rural Kenosha County may have to tear down the $8,000 deck she built for her home. Instead of having a spacious setting to enjoy her lake view, she was told she can have a 3-foot-wide porch.

Tom Steinbach is forbidden to build an oversized shed on his Germantown lot to house his antique farm equipment. Instead, he must leave the [illegible] parked in the yard and [illegible] the elements.

A recent state Supreme Court ruling has plunged these two homeowners and potentially countless others into a legal whirlpool over the authority local governments have in granting zoning variances.

Many homes were built before modern-day zoning codes were enacted or farmland subdivided, and it long has been standard practice for local governments to approve additions that violate setback and other zoning requirements as long as neighbors don't object and the addition is indeed an improvement.

The Supreme Court, however, ruled that variances should not be granted if an owner has other options that allow for "reasonable" use of the land. In a separate case, an appeals court imposed a more rigid standard — that a variance should be granted only when the owner has no other use of the property.

It was Huntoon's zoning appeal that prompted the Supreme Court decision on "reasonable" use.

When she retired as building inspector and zoning administrator for the Town of Salem, Huntoon moved into a home built by her grandmother nearly 85 years ago.

The tiny front porch facing the lake was the first remodeling project, she said. As a former town employee, she made sure to get the necessary approvals before adding the 14-by-23-foot deck.

Although the new deck intruded 15 feet into the 75-foot setback from the lake that is required by the state, she didn't think she would have any problems. There were other houses or porches closer to the shoreline.

She got the county's approval and built the deck. Then the state Department of Natural Resources, which must be notified every time a variance of lakeshore setback is granted, challenged the Kenosha County Board of Adjustments' decision to allow the deck.

The variance was upheld in circuit and appellate courts. Then, two years after the deck was built, the Supreme Court

Please see **ZONING** *page 5*

Zoning/Ruling cracks down on variances

From page 1

issued its decision.

"When I heard, I asked, 'Now what?'" Huntoon said. "If it comes down, who's going to reimburse me for all the money I spent? What am I supposed to do for a front porch?"

Huntoon said she was told that she could not even replace the 4-foot porch that had been there in the first place. The maximum width of a new porch can be only 3 feet, and any steps must lead off to the side.

The Huntoon decision led the League of Wisconsin Municipalities to issue a warning.

"If zoning boards of appeal properly apply the 'reasonable' use standard, there will be very few variances granted around the state," Curt Witzynski, the legal counsel for the League of Wisconsin Municipalities, said in an article. Those words have sent many municipalities scurrying to their lawyers in the hope that he was wrong.

But a different legal opinion appears unlikely.

Whitefish Bay Village Attorney William H. Pagels said: "This obviously will be a standard that applicants will not be able to meet or will have extreme difficulty in meeting. If you strictly follow the Kenosha case, you will probably grant no or extremely few variances."

Milwaukee's Board of Zoning Appeals, one of the busiest in the country with 700 and 800 cases a year, has asked the city attorney to review the recent court rulings and address the board within 60 days.

Craig Zetley, the board chairman and an attorney, said he doesn't believe that the zoning board will be put out of business, but he added that it "must work within the law as interpreted by the Supreme Court."

In older communities like Milwaukee, zoning and the more common, fairly simple codes were established long after most neighborhoods. Many properties fell automatically out of compliance.

The City of Milwaukee is in the midst of revising its zoning code, and the court decision could have a substantial impact on that, Zetley said.

In Germantown, where Steinbach was denied permission to build his oversized shed, Planning Director Sig Straumanis says his community's Board of Zoning Appeals is practically out of business.

"Our board hasn't granted a variance since May," Straumanis said. "We usually get maybe 20 or 30 applications a year, and well over half are usually approved. But we can't anymore. The word has gotten around, and we aren't even seeing many applications recently."

Steinbach wanted to build a 16-by-22-foot shed on his 1.5-acre property for his antique farm equipment. The village zoning ordinance set the maximum size at 12 by 16 feet.

His neighbors had no objections. The shed would be surrounded by woods and could not be seen from the road.

"If it's aesthetics they are concerned about, I'd say that having the farm equipment in a shed while I'm working on it would be far less unsightly than having it in the yard," Steinbach said. "But I can't keep it in the [illegible]."

[illegible] communities are taking a [illegible] position. Waukesha officials say the court ruling will have no impact on how they do business.

"The board of appeals in Waukesha tends to be somewhat lenient," said Michael Hoeft, Waukesha's director of planning. "They have to vote how they feel."

The city has 20 to 100 requests for variances every year and some 75% are granted, Hoeft said.

"The court decision gives them (the Board of Zoning Appeals) more ammunition if they want to enforce the code," Hoeft said.

Witzynski, the attorney for the League of Wisconsin Municipalities, said communities may choose to ignore the ruling when it comes to granting variances, but he said that could prove dangerous.

"Let's say a variance is granted and neighbors appeal the decision to the circuit court," Witzynski said. "The granting of the variance would then be likely to be thrown out (by the court). It would be too bad if the work had already have been started or completed. The property owner could be out a lot of money."

William O'Connor, a lawyer who filed a friend of the court brief in the Huntoon case on behalf of the Wisconsin Association of Lake Property Owners, however, doesn't believe that variances will be impossible to get, even when shoreline protection is an issue.

For example, he said, a zoning case is pending in which the owner of an 18,000-square-foot lot created decades ago, cannot build on the lot. State law has set a minimum of 20,000 square feet for a lakefront lot to be developed.

"It would seem that that would be a situation where a variance would be appropriate," O'Connor said. "The owner would have no other reasonable use of the land without a variance."

O'Connor said that shoreline rules are good for everyone, including lake property owners. Balancing the rights of property owners against the public is necessary, he said.

"What the court did was remind the board what the law has been for more than 30 years," he said. "You have to draw the line somewhere."

Municipal officials say they are exploring a number of options that would allow greater flexibility, everything from revamping zoning codes to lobbying the Legislature for relief.

Huntoon is making no effort to tear down the deck that started all the fuss. "No one has told me what I have to do yet."

State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET
P. O. BOX 2037
MADISON, WI 53701-2037

STEPHEN R. MILLER
CHIEF

LEGAL SECTION (608) 266-3561
LEGAL FAX (608) 264-8522

REFERENCE SECTION. (608) 266-0341
REFERENCE FAX. (608) 266-5648

May 26, 1999

MEMORANDUM

To: Representative Tony Staskunas

From: Marc E. Shovers

Subject: Unnecessary hardship and zoning variances: *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396 (1998).

I have prepared this memo to explain the recent state Supreme Court decision, *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396 (1998). In this case, Kenosha County resident Ms. Janet Huntoon desired a variance of the county shoreland setback requirement to build a deck on her home on Hooker Lake. Generally, under Kenosha County's shoreland zoning ordinance and the Wisconsin Administrative Code, a structure that is adjacent to a body of water must have a minimum 75 foot setback from the water. The proposed deck would result in a 64 foot setback. *Id.* at 401.

The Department of Natural Resources opposed the variance, asserting that Huntoon could not meet the statutory requirement of unnecessary hardship and that constructing the deck would be contrary to the purpose of the shoreland zoning statutes and against the public interest. *Id.* at 401. The Kenosha County Board of Adjustment (Board) found that a denial of the variance would result in an "unnecessary hardship" and granted Ms. Huntoon a variance. The state brought suit to reverse the Board's decision, claiming that the Board proceeded on an improper theory of law and that its decision was not supported by the evidence, but the circuit court and court of appeals approved the Board's action. *Id.* at 405. The state Supreme Court, however, found that the Board used an improper legal standard in granting the variance and reversed the decision of the court of appeals.

According to the state Supreme Court, shoreland zoning ordinances, which include setback requirements, have been enacted for a number of important reasons. "Wisconsin has a long history of protecting its water resources . . . which depend on wetlands for their proper survival." *Id.* at 406, citation omitted. The purposes of shoreland zoning ordinances are to "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty." *Id.* It is within the context of these purposes of shoreland zoning ordinances that an application for a variance must be viewed. See *Id.* at 421.

Both Kenosha County's shoreland zoning ordinance and the state shoreland zoning statute require that an applicant for a variance show "unnecessary hardship" and demonstrate "special conditions" that justify the granting of a variance. *Id.* at 408–409. The county's definition of

"unnecessary hardship" includes a requirement that "no feasible use can be made of the property" before a variance may be granted. State statutes do not define "unnecessary hardship" but under case law, the term means that without a variance, the property owner will have "no reasonable use of the property." *Id.* at 411 and 413.

One of the key questions in the case is, in determining whether a variance should be granted, must a board of adjustment and the courts first look to the purposes of shoreland zoning ordinances and then at the applicant's request, or should a reviewing body look at an applicant's request primarily in terms of the burden on the applicant? *Id.* at 413. The state took the former view and the Board took the latter.

Based on its ordinance, the Board granted the variance for four reasons, as described on page 415 of the opinion. 1) Other structures on Hooker Lake have shorter setbacks, and it would be unduly burdensome to deny Huntoon something that other property owners enjoy. 2) The Board assumed Huntoon would suffer a loss of value if her variance request were denied. 3) The Board determined that Huntoon's property had a unique limitation because of the steep slope from her house to the lake, and that the steep slope was dangerous. 4) The Board concluded that the public interest is served when citizens are permitted a reasonable use of their property that is not harmful to the public.

Although the county and state define "unnecessary hardship" in a similar fashion, the "fundamental difference between the parties' definitions of the unnecessary hardship standard is the extent to which those definitions incorporate the purpose of the shoreland zoning regulations — to enforce a uniform setback that preserves the public's interest in shoreland and the navigable waters of the state." *Id.* at 413. The problem with the Board's decision is that it did not take into account the purposes of its own ordinance or the purposes of the state statute. "[W]hether a particular hardship is unnecessary or unreasonable is judged against the purpose of the zoning law." *Id.* at 412–413. "[T]he purpose of the zoning regulations, including uniformity, should not be lost in determination of whether to grant a variance." *Id.* at 413. "When the record before the Board demonstrates that the property owner would have reasonable use of his or her property without the variance, the purpose of the statute takes precedence and the variance request should be denied." *Id.* at 414.

The Supreme Court dismissed the Board's four reasons for granting the variance on pages 416 to 421 of the opinion:

1) The Board claimed that other people have shorter setbacks. The court agreed with the state's view that evidence of such "neighborhood character" is not part of the statutory or ordinance tests. Besides, the court noted, the factual record in the case contained no evidence that other property owners had shorter setbacks than Huntoon. Allowing "a variance based on 'eyeballing' yardage in neighboring parcels would lead to piecemeal, if not wholesale, exceptions to shoreland zoning ordinances." *Id.* at 417 to 418.

2) The Board believe that Huntoon would suffer a loss of value if denied a variance. Again, the court found that there was no substantial evidence in the record showing that Huntoon would suffer a loss of value; neither Huntoon nor her representative ever raised the issue. In addition, the Kenosha County ordinance "specifically prohibits granting variances where the primary reason is one of more profitable use of the property or other economic reasons." *Id.* at 418. The court also cited a previous appeals court case for the proposition that "the proper test is not whether a variance would maximize the economic value of the property, but whether a feasible use is possible without the variance. *Id.* at 413. In effect, the Board's second reason is really an issue of Huntoon's "personal convenience."

3) The Board found that Huntoon's property is unique because of the steep slope toward the lake, which is dangerous. The court stated that Huntoon presented no evidence that her property presented a safety hazard in the absence of a variance. The consideration of safety by the Board "ignores the fact that the applicant has the burden of proof on all essential elements of his or her right to relief." *Id.* at 420. The court also noted that no evidence was presented to show that the effect of erosion on Huntoon's land, combined with the slope, resulted in a unique situation that prevents Huntoon from enjoying a reasonable use of her property.

4) The Board claimed that the public interest is served when citizens are allowed to use their land in a way that does not harm the public. The court dismissed this reason because it ignores the fact that Huntoon has a reasonable use of the property without the variance; her house and property have been used as a residence for over 60 years. The biggest problem with the Board's fourth reason is that it "appears to approve of *any of a number of reasonable uses*, so long as it does not cause harm to the public. The Board's statement is too accommodating. . . . One of the purposes of zoning laws is that variances should be granted sparingly." *Id.* at 421, [emphasis in original].

To summarize, the state Supreme Court held that the legislature, charged with protecting the public interest, has determined that variance requests will be considered in light of the purposes of the shoreland protection statutes. *Id.* Consequently, when a person applies for a variance, a reviewing body must *first* consider the purpose of a shoreland zoning ordinance, which is to "protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands." *Id.* at 406, citation omitted. After considering the purpose of the ordinance, a variance should be granted rarely: "only when the applicant has demonstrated that he or she will have no reasonable use of the property, in the absence of a variance, is an unnecessary hardship present." *Id.* at 421. Because the Board did not look to the purpose of the shoreland zoning ordinance first, it applied the wrong legal standard in granting Huntoon a variance. Furthermore, Huntoon had a reasonable use of her property without the variance, and the Board lacked substantial evidence on which to base its conclusion of unnecessary hardship.

Please let me know if you have any further questions about this issue.

5/26/99 Meeting w/ Rep. Stas Kunas

STATE OF WISCONSIN / LEGISLATIVE REFERENCE BUREAU – LEGAL SECTION
(608–266–3561)

LRB-2207

goal - give some flexibility, back to local board

tweak stat to allow more weight given to applicants' wishes

Consider the effect of the ord & the effect on the applicant - more of a balancing test - - not just first looks at purposes of the ord. & stops there

State of Wisconsin
1999 – 2000 LEGISLATURE

LRB–2207/1
MES...

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

AN ACT ...; **relating to:** changing the standards under which certain zoning variances may be granted by a local board of adjustment or appeals.

Analysis by the Legislative Reference Bureau

Under current law, a city, village, town that is authorized to exercise village powers (municipality) or county is authorized to enact zoning ordinances that regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards and other open spaces, the density of population and the location and use of buildings, structures and land for various purposes.

A municipality's board of appeals or a county's board of adjustment is authorized under current law to hear and decide appeals that allege that there is an error in the enforcement of a zoning ordinance, to hear and decide special exceptions to the terms of a zoning ordinance and to authorize a variance from the terms of a zoning ordinances. A "use" variance grants permission for a use which is not permitted by the zoning ordinance and an "area" variance relaxes restrictions on dimensions, such as setback, frontage, height, bulk, density and area. To grant a variance, a board of appeals or board of adjustment must find 4 things:

1. The variance will not be contrary to the public interest.
2. Substantial justice will be done by granting the variance.
3. The variance is needed so that the spirit of the ordinance is observed.
4. Due to special conditions, a literal enforcement of the provisions of the zoning ordinance will result in unnecessary hardship.

Although the term "unnecessary hardship" is not defined in the statutes, a recent decision of the Wisconsin Supreme Court, *State v. Kenosha County Board of*

Adjustment, 218 Wis. 2d 396, 398 (1998), held that the legal standard of unnecessary hardship requires that the property owner demonstrate that without the variance, he or she has no reasonable use of the property.

Under this bill, a property owner may establish "unnecessary hardship" by demonstrating that strict compliance with an area zoning ordinance would unreasonably prevent the property owner from using the property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 (END)

LFB:.....Olin – Local zoning ordinances, variances; unnecessary hardship

FOR 1999–01 BUDGET — NOT READY FOR INTRODUCTION

LFB AMENDMENT

TO 1999 ASSEMBLY BILL 133 AND 1999 SENATE BILL 45

At the locations indicated, amend the bill as follows:

1. Page 793, line 14: after that line insert:

"**SECTION 1580g.** 59.694 (7) (c) of the statutes is amended to read:

59.694 **(7)** (c) To authorize upon appeal in specific cases variances from the terms of the 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. Except in cases where a property owner requests a variance from an ordinance enacted under s. 59.692, or adopted or reinstated by the department of natural resources under s. 59.692 (7), or a conservancy zoning ordinance, a property owner may establish "unnecessary hardship", as that term is used in this paragraph, by demonstrating that strict

compliance with an area zoning ordinance would unreasonably prevent the property owner from using the property owner's property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome.".

2. Page 797, line 19: after that line insert:

SECTION 1591g. 62.23 (7) (e) 7. of the statutes is amended to read:

62.23 **(7)** (e) 7. The board of appeals shall have the following powers: To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto; to hear and decide special exception to the terms of the ordinance upon which such board is required to pass under such ordinance; to authorize upon appeal in specific cases such variance from the terms of the ordinance as 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 practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. The board may permit in appropriate cases, and subject to appropriate conditions and safeguards in harmony with the general purpose and intent of the ordinance, a building or premises to be erected or used for such public utility purposes in any location which is reasonably necessary for the public convenience and welfare. Except in cases where a property owner requests a variance from an ordinance enacted under s. 59.692, 61.351 or 62.231, or adopted by the department of natural resources under s. 61.351 (6) or 62.231 (6), or from a conservancy zoning ordinance, a property owner may establish "unnecessary hardship", as that term is used in this subdivision, by demonstrating that strict compliance with an area

zoning ordinance would unreasonably prevent the property owner from using the property owner's property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome".

(END)

SUBMITTAL FORM

LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

Date: 6/18/99

To: Representative Staskunas

Relating to LRB drafting number: LRB-2207

Topic
Authority of local governments to grant zoning variances

Subject(s)
Munis - miscellaneous, Counties

1. **JACKET** the draft for introduction _____ in the **Senate** ____ or the **Assembly** ✓ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.
   A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.
   If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Marc E. Shovers, Senior Legislative Attorney
Telephone: (608) 266-0129