

1999 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB523)

Received: **02/16/2000**

Received By: **shoveme**

Wanted: **As time permits**

Identical to LRB:

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

By/Representing: **Rep. Staskunas**

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

Drafter: **shoveme**

May Contact:

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Subject: **Munis - miscellaneous
Counties**

Extra Copies: **PG**

Pre Topic:

No specific pre topic given

Topic:

Zoning variances; determination of hardship

Instructions:

See attached. Incorporate WLCS 0229/1 and LRB a1236/1 into a sub

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	shoveme 02/16/2000	chanaman 02/16/2000	hhagen 02/16/2000	_____	lrb_docadmin 02/16/2000	lrb_docadmin 02/16/2000	

FE Sent For:

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1/?	shoveme	cm# /1	Mholio	M KF 2/16			
11 WES							
FE Sent For:		2/16					

<END>

Post-It® Fax Note	7671	Date	2/16	# of pages	3
To	Marc Shavers	From	Adrienne		
Co./Dept.	LRB	Co./Dept.	Rep Staskunas		
Phone #		Phone #	6-0620		
Fax #	4-8522	Fax #			



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701-2536
 Telephone: (608) 266-1304
 Fax: (608) 266-3830
 Email: leg.council@legis.state.wi.us

DATE: January 21, 2000
 TO: REPRESENTATIVE
 FROM: Mark C. Patronsky, Senior Staff Attorney
 SUBJECT: Legislation Regarding Zoning Variances

Attached to this memorandum is a copy of WLCS: 0229/1, relating to changing the statutory standards under which certain zoning variances may be granted by a local board of adjustment (county or town) or appeals (city or village). The bill draft is a substitute amendment to 1999 Assembly Bill 523, introduced by Representative Staskunas. The attached draft is the result of discussions that I have had with your aide, Scott Southworth, regarding Assembly Bill 523.

Assembly Bill 523 is a legislative response to recent supreme court and court of appeals decisions regarding zoning variances. The current statutes, in ss. 59.694 (7) (c) and 62.23 (7) (e) 7., Stats., require the applicant for a variance to show "unnecessary hardship" resulting from the application of the zoning ordinance to the applicant's property, in order for the board of adjustment or appeals to grant a variance. The statutes do not contain a definition of "unnecessary hardship." The Wisconsin Supreme Court recently determined the meaning of "unnecessary hardship" in *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

The court in *State v. Kenosha* "clarified" its prior definition, which established that "unnecessary hardship" is a situation where:

... [C]ompliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. [*Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis. 2d 468, 475, 247 N.W.2d 98, 102 (1976); citing Rathkopf. *The Law of Zoning and Planning*, 45-28 (3rd ed. 1972).]

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In *State v. Kenosha*, the supreme court reaffirmed the quoted language from *Snyder* and held that unnecessary hardship is present if there is no reasonable use of the property without a variance and, even if there is a reasonable use of the property, the decision to grant a variance is governed by the purpose of the ordinance.

Assembly Bill 523 adds a definition of "unnecessary hardship" to the zoning variance provisions in current ss. 59.694 (7) (c) and 62.23 (7) (e) 7., Stats. The definition in the bill is nearly identical to the language of the supreme court's definition in *Snyder*.

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. [1999 Assembly Bill 523, page 2, lines 6 to 10.]

2 { The bill drafting file maintained by the Legislative Reference Bureau (LRB) contains a simple statement that Assembly Bill 523 is intended to reverse the holding of *State v. Kenosha*. However, the bill does not indicate how the Legislature intends the new statutory standard for granting a zoning variance to differ from the supreme court's definition.

The attached bill draft, WLCS: 0229/1, is an attempt to provide a more explicit standard for granting a zoning variance. However, you should note that WLCS: 0229/1 represents one way to address this issue. There are likely to be other ways to draft a standard for a zoning variance. In the attached bill draft, WLCS: 0229/1, the following points should be noted:

- The draft gives the board of adjustment or appeals discretionary authority to grant variances based on the standard in the bill. Assembly Bill 523 is drafted so as to provide a property owner with a right to a variance if the conditions are met.
- The draft preserves the board's authority to consider the public interest in determining whether to grant a variance. Assembly Bill 523 appears to eliminate consideration of the public interest.
- The draft allows the board to grant a variance *solely* due to the effect of the zoning ordinance on the property owner, without regard to any other purposes of the ordinance. There is not a corresponding provision in Assembly Bill 523. This provision makes it clear that the bill is modifying the court's interpretation of the current statute by allowing the board to consider only the effect on the property owner, without being bound by any other purpose of the ordinance.

If I can provide further information on this subject or assistance in redrafting WLCS: 0229/1, please feel free to contact me. If WLCS: 0229/1 meets your needs, it should be submitted to the LRB for drafting.

MCP:jmm:tlu:rv:ksm;tlu

Attachment

Variances

WLCS: 0229/1

MCP:tlujal;ksm;wu

01/12/2000

TO: MARK SMOUERS

**ASSEMBLY SUBSTITUTE AMENDMENT ,
TO 1999 ASSEMBLY BILL 523**

1 **AN ACT** to renumber and amend 62.23 (7) (e) 7.; to amend 62.23 (7) (e) 8.; and to
2 create 59.694 (7) (cm) and 62.23 (7) (e) 7r. of the statutes; relating to: changing the
3 standards under which certain zoning variances may be granted by a local board of
4 adjustment or appeals.

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

5 **SECTION 1.** 59.694 (7) (cm) of the statutes is created to read:

6 59.694 (7) (cm) Notwithstanding par. (c), to authorize upon appeal in specific cases
7 involving area provisions of a zoning ordinance, variances from the terms of the ordinance that
8 will not be contrary to the public interest, solely on the grounds that strict compliance with the
9 area provisions of the zoning ordinance would either unreasonably prevent the property owner
10 from using the property owner's property for a permitted purpose or render conformity with
11 the zoning ordinance unnecessarily burdensome. The board may make the order, requirement,
12 decision or determination under this paragraph without regard to any other purpose of the
13 ordinance.

14 **SECTION 2.** 62.23 (7) (e) 7. of the statutes is renumbered 62.23 (7) (e) 7c. and amended
15 to read:

16 62.23 (7) (e) 7c. The board of appeals ~~shall have the following powers: To~~ may hear
17 and decide appeals where it is alleged there is error in any order, requirement, decision or

01/12/2000

- 2 -

WLCS: 0229/1

1 determination made by an administrative official in the enforcement of this section or of any
2 ordinance adopted pursuant thereto; ~~to.~~

3 7g. The board of appeals may hear and decide special exception to the terms of the
4 ordinance upon which such board is required to pass under such ordinance; ~~to.~~

5 7n. The board of appeals may authorize upon appeal in specific cases such variance
6 from the terms of the ordinance as will not be contrary to the public interest, where, owing to
7 special conditions, a literal enforcement of the provisions of the ordinance will result in
8 practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be
9 observed, public safety and welfare secured, and substantial justice done.

10 7w. The board of appeals may permit in appropriate cases, and subject to appropriate
11 conditions and safeguards in harmony with the general purpose and intent of the ordinance,
12 a building or premises to be erected or used for such public utility purposes in any location
13 which is reasonably necessary for the public convenience and welfare.

14 SECTION 3. 62.23 (7) (e) 7r. of the statutes is created to read:

15 62.23 (7) (e) 7r. The board of appeals may authorize upon appeal in specific cases
16 involving area provisions of a zoning ordinance, variances from the terms of the ordinance that
17 will not be contrary to the public interest, solely on the grounds that strict compliance with the
18 area provisions of the zoning ordinance would either unreasonably prevent the property owner
19 from using the property owner's property for a permitted purpose or render conformity with
20 the zoning ordinance unnecessarily burdensome. The board may make the order, requirement,
21 decision or determination under this subdivision without regard to any other purpose of the
22 ordinance.

23 SECTION 4. 62.23 (7) (e) 8. of the statutes is amended to read:



State of Wisconsin
1999 - 2000 LEGISLATURE

LRBs03097/
MES.....

cmf
RMR

~~PRELIMINARY DRAFT NOT READY FOR INTRODUCTION~~

ASSEMBLY SUBSTITUTE AMENDMENT,

TO 1999 ASSEMBLY BILL 523

WANTED
Thurs

gen

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

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

3
4

SECTION 1. 59.69 (7) (cm) of the statutes is created to read:

7

5 59.69 (7) (cm) Notwithstanding par. (c), to authorize upon appeal in specific
6 cases involving area provisions of a zoning ordinance, variances from the terms of the
7 ordinance that will not be contrary to the public interest, solely on the grounds that
8 strict compliance with the area provisions of the zoning ordinance would either
9 unreasonably prevent the property owner from using the property owner's property
10 for a permitted purpose or would render conformity with the zoning ordinance
11 unnecessarily burdensome. The board may make the order, requirement, decision
or determination under this paragraph without regard to any other purpose of the

1 ordinance. A variance that may be granted under this paragraph may only be
 2 granted for an area other than an area to which an ordinance that relates to zoning
 3 in wetlands, shorelands or floodplains, that is enacted or adopted under s. 59.692,
 4 61.351, 62.231 or 87.30, applies.

5 SECTION 2. 62.23 (7) (e) 7. of the statutes is renumbered 62.23 (7) (e) 7. (intro.)
 6 and amended to read:

7 62.23 (7) (e) 7. (intro.) The board of appeals shall have the following powers:
 8 To hear may do all of the following:

9 a. Hear and decide appeals where it is alleged there is error in any order,
 10 requirement, decision or determination made by an administrative official in the
 11 enforcement of this section or of any ordinance adopted pursuant thereto; ~~to hear~~

*WPD -
is there
an
extra
space?*

12 b. Hear and decide special exception to the terms of the ordinance upon which
 13 such board is required to pass under such ordinance; ~~to authorize~~.

14 c. Authorize upon appeal in specific cases such variance from the terms of the
 15 ordinance as will not be contrary to the public interest, where, owing to special
 16 conditions, a literal enforcement of the provisions of the ordinance will result in
 17 practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall
 18 be observed, public safety and welfare secured, and substantial justice done. ~~The~~

plan space

19 board ~~may permit~~

20 d. Permit in appropriate cases, and subject to appropriate conditions and
 21 safeguards in harmony with the general purpose and intent of the ordinance, a
 22 building or premises to be erected or used for such public utility purposes in any
 23 location which is reasonably necessary for the public convenience and welfare.

24 History: 1973 c. 60, 1975 c. 281; 1977 c. 205, 1979 c. 221, 355; 1981 c. 289, 341, 354, 374; 1983 a. 49, 410, 1985 a. 136 ss. 7 to 9, 10; 1985 a. 187, 225, 281, 316; 1987
 a. 161, 395; 1989 a. 201; 1991 a. 255, 316; 1993 a. 27, 184, 301, 327, 400, 446, 471, 490, 491, 1995 a. 27 ss. 9126 (19), 9130 (4); 1995 a. 225; 1997 a. 3, 35, 246, 1999 a. 9.
 SECTION 3. 62.23 (7) (e) 7m. of the statutes is created to read:

1 62.23 (7) (e) 7m. The board of appeals may authorize upon appeal in specific
 2 cases involving area provisions of a zoning ordinance, variances from the terms of the
 3 ordinance that will not be contrary to the public interest, solely on the grounds that
 4 strict compliance with the area provisions of the zoning ordinance would either
 5 unreasonably prevent the property owner from using the property owner's property
 6 for a permitted purpose or would render conformity with the zoning ordinance
 7 unnecessarily burdensome. The board may make the order, requirement, decision
 8 or determination under this subdivision without regard to any other purpose of the
 9 ordinance. A variance that may be granted under this subdivision may only be
 10 granted for an area other than an area to which an ordinance that relates to zoning
 11 in wetlands, shorelands or floodplains, that is enacted or adopted under s. 59.692,
 12 61.351, 62.231 or 87.30 applies.

13 **SECTION 4.** 62.23 (7) (e) 8. of the statutes is amended to read:

14 62.23 (7) (e) 8. In exercising the above-mentioned powers such under subs. 7.
 15 and ^{7m} the board of appeals may, in conformity with the provisions of such ~~section~~
 16 those subdivisions, reverse or affirm, wholly or partly, or may modify the order,
 17 requirement, decision or determination appealed from, and may make such order,
 18 requirement, decision or determination as ought to be made, and to that end shall
 19 have all the powers of the officer from whom the appeal is taken, and may issue or
 20 direct the issue of a permit.

History: 1973 c. 60; 1975 c. 281; 1977 c. 205; 1979 c. 221, 355; 1981 c. 289, 341, 354, 374; 1983 a. 49, 410; 1985 a. 136 ss. 7 to 9, 10; 1985 a. 187, 225, 281, 316; 1987 a. 161, 395; 1989 a. 201; 1991 a. 255, 316; 1993 a. 27, 184, 301, 327, 400, 446, 471, 490, 491; 1995 a. 27 ss. 9126 (19), 9130 (4), 1995 a. 225; 1997 a. 3, 35, 246; 1999 a. 9.

(END)