

## 1999 ASSEMBLY BILL 737

February 10, 2000 – Introduced by Representatives ALBERS, MUSSER, OWENS, AINSWORTH and SKINDRUD, cosponsored by Senators HUELSMAN, WELCH and SCHULTZ. Referred to Committee on Conservation and Land Use.

1     **AN ACT to amend** 60.65 (3) and 62.23 (7) (e) 1.; and **to create** 59.694 (11) and  
2           66.038 of the statutes; **relating to:** requiring a city, village, town or county to  
3           develop a procedure to mitigate the effects on landowners of certain zoning or  
4           land use decisions.

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### *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 ordinance. A "use" variance grants permission for a use that 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 four 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.

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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.

This bill requires political subdivisions (cities, villages, towns or counties) to develop a procedure to mitigate the effects on landowners of certain zoning or land use decisions. Under the bill, a political subdivision is required to create within six months of the bill’s effective date a zoning mitigation committee (ZMC), which may be part of the political subdivision’s governing body or a separate committee. If a landowner believes that an action taken by a political subdivision’s governing body places an inordinate burden on the landowner, the landowner may file a mitigation request with the ZMC no later than one year after the action takes effect.

The bill defines “action” to be any zoning or land use ordinance, regulation or resolution of a political subdivision or a denial of a building permit, special exception or variance. An “inordinate burden” is defined as an action that directly restricts or limits a landowner’s use of, or ability to develop, the landowner’s real property such that the landowner can make little or no reasonable use of the real property, other than recreational use.

A ZMC must meet within 30 days after receiving a mitigation request, and must decide within 90 days of receiving the request whether a landowner is subject to an inordinate burden. Before reaching its decision, the ZMC must hold at least one public hearing on the mitigation request at which the landowner, the governing body responsible for the action that led to the request and any other interested party may appear. The factors that a ZMC is required to use in reaching its decision include the following:

1. The history of the development and the use of the real property.
2. The history of environmental protection, land use controls and other regulations that applied to the property.
3. The current land use restrictions, ordinances, regulations and resolutions that apply to each parcel of the property.
4. The reasonable expectations of the landowner for developing or using the property.
5. The public purpose to be achieved by the action, the nature and magnitude of the problem addressed by the action and whether alternate actions could achieve the public purpose.
6. The uses, density or development that could occur on the property under the current land use plans, regulations and ordinances.
7. Whether the assessed value of the real property declined in the current year compared to the previous year and if so, whether the decline is directly attributable to the action that caused the landowner to file the mitigation request.

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If a ZMC finds that the landowner is subject to an inordinate burden, the political subdivision's governing body is required to mitigate in one of the following ways:

1. Enact or amend a zoning ordinance or regulation which allows the landowner to use or develop the property that is subject to the mitigation request.
2. Grant a special exception or variance which allows the landowner to proceed with the use or development of the property that is subject to the mitigation request.
3. Enter into a written development agreement with the landowner.
4. Enter into an agreement with the landowner to compensate the landowner for the inordinate burden.

If a ZMC finds that the landowner is subject to an inordinate burden or if a ZMC finds that the landowner is not subject to an inordinate burden, the landowner, a taxpayer who resides in the political subdivision or the governing body of the political subdivision may appeal the ZMC's decision to the circuit court.

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

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

1           **SECTION 1.** 59.694 (11) of the statutes is created to read:

2           59.694 (11) REQUIRED TO ACT. If directed to do so by the county board under s.  
3           66.038 (4), the board of adjustment shall grant a special exception or variance under  
4           this section to comply with the procedure described in s. 66.038 (4) (b).

5           **SECTION 2.** 60.65 (3) of the statutes is amended to read:

6           60.65 (3) POWERS AND DUTIES. The town board may authorize the board of  
7           adjustment to, in appropriate cases and subject to appropriate conditions and  
8           safeguards, permit special exceptions to the terms of the zoning ordinance under s.  
9           60.61 consistent with the ordinance's general purpose and intent and with applicable  
10          provisions of the ordinance. This subsection does not preclude the granting of special  
11          exceptions by the town zoning committee designated under s. 60.61 (4) or the town  
12          board, in accordance with regulations and restrictions adopted under s. 60.61. The  
13          town board, under s. 66.038 (4), may also require the board of adjustment to grant

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1 a special exception or variance under this section to comply with the procedure  
2 described in s. 66.038 (4) (b).

3 **SECTION 3.** 62.23 (7) (e) 1. of the statutes is amended to read:

4 62.23 (7) (e) 1. The council which enacts zoning regulations pursuant to this  
5 section shall by ordinance provide for the appointment of a board of appeals, and  
6 shall provide in such regulations that said board of appeals may, in appropriate cases  
7 and subject to appropriate conditions and safeguards, make special exceptions to the  
8 terms of the ordinance in harmony with its general purpose and intent and in  
9 accordance with general or specific rules therein contained. Nothing in this  
10 subdivision shall preclude the granting of special exceptions by the city plan  
11 commission or the common council in accordance with the zoning regulations  
12 adopted pursuant to this section which were in effect on July 7, 1973 or adopted after  
13 that date. The council, under s. 66.038 (4), may also require the board of appeals to  
14 grant a special exception or variance under this subsection to comply with the  
15 procedure described in s. 66.038 (4) (b).

16 **SECTION 4.** 66.038 of the statutes is created to read:

17 **66.038 Zoning mitigation. (1) DEFINITIONS.** In this section:

18 (a) “Action” means any zoning or land use ordinance that is enacted or  
19 regulation or resolution that is adopted, or building permit that is denied, by a  
20 political subdivision under s. 59.69, 60.61, 60.62, 61.35 or 62.23; or any denial of a  
21 special exception or variance to a zoning ordinance by a board of appeals under s.  
22 62.23 (7) (e) or by a board of adjustment under s. 59.694 or 60.65.

23 (b) “Chief executive officer” means the mayor or city manager of a city, the  
24 village president of a village, the town board chairperson of a town or the county

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1 executive of a county or, if the county does not have a county executive, the  
2 chairperson of the county board of supervisors.

3 (c) “Governing body” means the body in which the legislative powers of a  
4 political subdivision are vested.

5 (d) “Inordinate burden” means an action that directly restricts or limits a  
6 landowner’s use of, or ability to develop, the landowner’s real property such that the  
7 landowner can make little or no reasonable use of the real property, other than  
8 recreational use.

9 (e) “Landowner” means the owner of record of a parcel of land or the purchaser  
10 of land under a land contract who has the right to occupy and the right to use the land,  
11 except that “landowner” does not include any unit of government.

12 (f) “Parcel” means an identified section, fractional section or government lot.

13 (g) “Political subdivision” means a city, village, town or county.

14 (h) “Real property” means land and improvements on the land.

15 **(2) ZONING MITIGATION COMMITTEE.** (a) *Designation, creation.* Not later than the  
16 first day of the 6th month beginning after publication .... [revisor inserts date], a  
17 political subdivision shall designate a zoning mitigation committee. The zoning  
18 mitigation committee shall be an existing or newly created committee of the political  
19 subdivision’s governing body or a separate committee, other than a board of  
20 adjustment or appeals under s. 59.694, 60.65 or 62.23 (7) (e), that is not part of the  
21 political subdivision’s governing body.

22 (b) *Committee membership.* If the zoning mitigation committee designated  
23 under par. (a) is a separate committee, it shall consist of 5 members who shall be  
24 appointed by the chief executive officer of the political subdivision, subject to  
25 confirmation of the governing body. Members shall serve for 2– year terms and may

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1 be reappointed, except that 3 of the initial appointees shall serve for one-year terms.

2 A member may be removed during his or her term by the chief executive officer for  
3 just cause. A member shall receive compensation at a rate set by the governing body.

4 A member of the governing body may be appointed by the chief executive officer to  
5 the zoning mitigation committee.

6 (c) *Committee officers, procedures.* If the zoning mitigation committee  
7 designated under par. (a) is a newly created committee, the chief executive officer of  
8 the political subdivision shall select the chairperson of the committee, and the  
9 committee shall elect from among its members a vice chairperson and secretary. The  
10 committee shall determine its own rules of operation. All expenses of the committee  
11 shall be paid by the political subdivision.

12 **(3) MITIGATION REQUEST PROCEDURES, LIMITATIONS.** (a) If a landowner believes  
13 that an action taken by a governing body places an inordinate burden on the  
14 landowner, the landowner may file a mitigation request with the zoning mitigation  
15 committee under sub. (2) not later than one year after the effective date of the action.

16 (b) No request for mitigation may be made under par. (a), or maintained once  
17 filed, if the political subdivision makes a written offer to purchase the landowner's  
18 real property, which the landowner believes is subject to an inordinate burden, at the  
19 current appraised value of the real property.

20 (c) The zoning mitigation committee may require the landowner to provide  
21 information or documentation, such as appraisals of the landowner's real property  
22 or appraisals that demonstrate the real property's loss of value that may be  
23 attributable to an action, that supports the landowner's mitigation request relating  
24 to the inordinate burden.

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1           **(4) PROCEDURES.** (a) *Committee meetings.* The zoning mitigation committee  
2 shall meet within 30 days after receiving a mitigation request under sub. (3) and  
3 shall decide, not later than 90 days after receiving a mitigation request, whether a  
4 landowner is subject to an inordinate burden. In reaching its decision, the zoning  
5 mitigation committee shall use the criteria described under par. (b). The committee  
6 may reach its decision only after holding at least one public hearing on the mitigation  
7 request at which the landowner, the governing body responsible for the action that  
8 led to the filing of the mitigation request and any other interested party may appear.  
9 No public hearing may be held under this paragraph unless a class 1 notice under  
10 ch. 985 is published at least 7 days before the scheduled hearing. The committee  
11 shall forward its decision, in writing, to the governing body and to the landowner.

12           (b) *Mitigation criteria.* In determining whether an inordinate burden is placed  
13 on a landowner, a zoning mitigation committee shall consider at least all of the  
14 following factors:

15           1. The history of the development and the use of the real property; whether the  
16 real property has been subdivided and, if so, how, when and to whom it was sold;  
17 whether plats were filed or recorded; and whether sewer, water, electricity or other  
18 infrastructure was added to the property.

19           2. The history of environmental protection, land use controls and other  
20 regulations that applied to the real property, including how and when the property  
21 was classified, the nature of restrictions on density or development that applied to  
22 the property and what changes in classifications applied to the real property.

23           3. The current land use restrictions and zoning ordinances, regulations and  
24 resolutions that apply to each parcel of the landowner's real property.

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1           4. The reasonable expectations of the landowner for developing or using the  
2 property at the time the landowner acquired the property, or immediately before the  
3 effective date of the action that led the landowner to file a mitigation request,  
4 whichever is later.

5           5. The public purpose to be achieved by the action, including the nature and  
6 magnitude of the problem addressed by the action; whether the action is necessary  
7 to achieve the public purpose; and whether an alternate action could achieve the  
8 public purpose and permit reduced restrictions on the use, density or development  
9 potential of the real property.

10          6. The uses, density or development that may occur on the real property under  
11 land use plans and zoning ordinances, regulations or resolutions that are currently  
12 in effect in the political subdivision.

13          7. Actions that apply to similar real property that restrict the use, density and  
14 development potential of such similar real property.

15          8. Whether the assessed value of the real property declined in the current year  
16 compared to the immediately preceding year and, if so, whether the decline, in the  
17 opinion of the assessor of the taxation district in which the real property is located,  
18 is directly attributable to the action that caused the landowner to file the request for  
19 mitigation.

20          9. Any other information from any source that the committee considers  
21 relevant.

22           (c) *Committee decisions.* 1. If the zoning mitigation committee decides that the  
23 landowner is subject to an inordinate burden, the governing body shall mitigate the  
24 inordinate burden by instituting one or more of the mitigation remedies under sub.

25 (5). The landowner, a taxpayer who resides in the political subdivision or the



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1 governing body of the political subdivision may appeal the committee's decision to  
2 the circuit court within 60 days after a written copy of the decision is forwarded to  
3 the governing body under sub. (4) (a).

4 2. a. If the zoning mitigation committee decides that the landowner is not  
5 subject to an inordinate burden, the landowner, a taxpayer who resides in the  
6 political subdivision or the governing body of the political subdivision may appeal the  
7 committee's decision to the circuit court within 60 days after a written copy of the  
8 decision is forwarded to the governing body under sub. (4) (a).

9 b. If an appeal is filed under subd. 2. a., the zoning mitigation committee shall  
10 send the court certified copies of all documents used by the committee in reaching  
11 its decision and a copy of its written decision. If the court believes it is necessary to  
12 do so to properly resolve the issue, the court may take evidence, or appoint a referee  
13 to take evidence and report findings of fact and conclusions of law as it directs, which  
14 shall constitute a part of the proceedings upon which the determination of the court  
15 shall be made. The court may reverse or affirm, wholly or partly, or may modify, the  
16 decision of the zoning mitigation committee.

17 c. Costs shall not be allowed against the zoning mitigation committee unless  
18 it appears to the court that the committee acted with gross negligence or in bad faith,  
19 or with malice, in making its decision.

20 d. All issues in any proceedings under this subdivision shall have preference  
21 over all other civil actions and proceedings.

22 **(5) MITIGATION REMEDIES.** If the zoning mitigation committee makes the  
23 determination described in sub. (4) (c) 1., or if the circuit court reverses or modifies  
24 the committee's decision under sub. (4) (c) 2., the governing body shall institute one  
25 or more of the following mitigation remedies:

