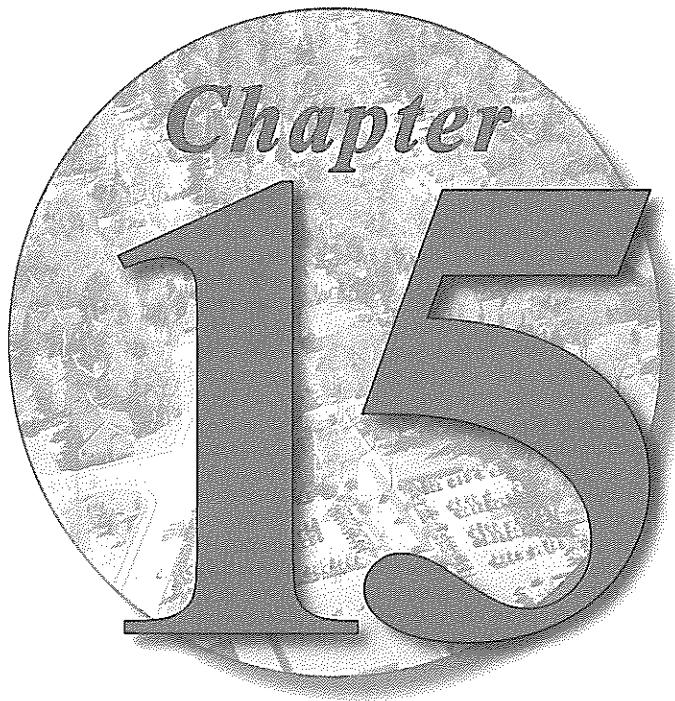


# Variances



Whereas permitted and conditional uses allow a property to be used in a way expressly listed in the ordinance, a variance allows a property to be used in a manner forbidden by the zoning ordinance.<sup>140</sup> Two types of zoning variances are generally recognized: **Area variances** provide an increment of relief (normally small) from a physical dimensional restriction such as a building height or setback.<sup>141</sup> **Use variances** permit a landowner to put a property to an otherwise prohibited use.<sup>142</sup> Though not specifically restricted by statute or case law,<sup>143</sup> use variances are problematic for reasons discussed on page 102. Variance decisions related to zoning are always heard by the zoning board of adjustment or appeals.

<sup>140</sup> *Fabyan v. Waukesha County Bd. of Adjustment*, 2001 WI App 162, 246 Wis. 2d 851, 632 N.W.2d 116

<sup>141</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

<sup>142</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

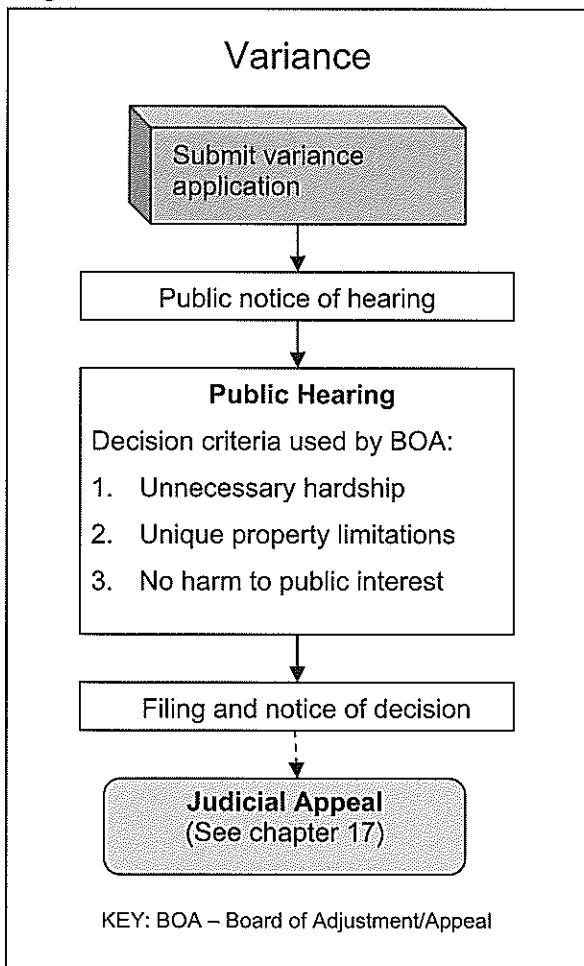
<sup>143</sup> In the past, it was doubtful that zoning boards of adjustment in Wisconsin had the authority to grant use variances [see *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 154, 133 N.W.2d 795 (1965)]. Now, the Supreme Court has determined that boards of adjustment do have the authority to issue use variances [see *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514].

## What are the criteria for granting a variance?

To qualify for a variance, an applicant has the burden of proof to demonstrate that all three criteria defined in state statutes and outlined below are met.<sup>144</sup>

- Unnecessary hardship
- Unique property limitations
- No harm to public interests

**Figure 24: Variance Process**



Local ordinances and case law may also specify additional requirements. The zoning department can assist a petitioner in identifying how these criteria are met by providing clear application materials that describe the process for requesting a variance and the standards for approval (see the sample application form in Appendix D).

### 1. Unnecessary Hardship

The Wisconsin Supreme Court distinguishes between area and use variances when applying the unnecessary hardship test:

For a **use variance**, unnecessary hardship exists only if the property owner shows that they would have no reasonable use of the property without a variance.<sup>145</sup> What constitutes *reasonable use* of a property is a pivotal question that the board must answer on a case-by-case basis. If the property currently supports a reasonable use, the hardship test is not met and a variance may not be granted. If a variance is required to allow reasonable use of a property, only that variance which is essential to support reasonable use may be granted and no more. A proposed use may be *reasonable* when it:

<sup>144</sup> *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d at 420, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d at 254, 469 N.W.2d 831 (1991).

<sup>145</sup> *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 413-414, 577 N.W.2d 813 (1998).

- does not conflict with uses on adjacent properties or in the neighborhood,
- does not alter the basic nature of the site (e.g., conversion of wetland to upland),
- does not result in harm to public interests, and
- does not require multiple or extreme variances.

For an **area variance**, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose (leaving the property owner without any use that is permitted for the property) or would render conformity with such restrictions “unnecessarily burdensome.”<sup>146</sup> To determine whether this standard is met, zoning boards should consider the purpose of the zoning ordinance in question (see the appendix for information about the purposes of shoreland and floodplain zoning), its effects on the property, and the short-term, long-term, and cumulative effects of granting the variance.<sup>147</sup>

Courts state that “unnecessarily burdensome” may be interpreted in different ways depending on the purposes of the zoning law from which the variance is being sought. For example, the purpose of a shoreland district to *protect water quality, fish, and wildlife habitat and natural scenic beauty for all navigable waters in Wisconsin* would be interpreted differently from the purpose of a residential district to *protect the character of established residential neighborhoods*. In light of increased focus on the purposes of a zoning restriction, zoning staff and zoning boards have a greater responsibility to explain and clarify the purposes behind dimensional zoning requirements.

## 2. Hardship Due to Unique Property Limitations

Unnecessary hardship must be due to unique physical limitations of the property, such as steep slopes or wetlands that prevent compliance with the ordinance.<sup>148</sup> The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances.<sup>149</sup> Property limitations that prevent ordinance compliance and are common to a number of properties

<sup>146</sup> *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d at 475, 247 N.W.2d 98 (1976) (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972).

<sup>147</sup> *State ex rel. Zier vogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

<sup>148</sup> *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 105-6, 588 N.W.2d 662 (Ct. App. 1998); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 410, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 255-56, 469 N.W.2d 831 (1991); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478, 247 N.W.2d 98 (1976)

<sup>149</sup> *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98

should be addressed by amending the ordinance.<sup>150</sup> For example, an ordinance may, in some cases, be amended to provide reduced setbacks for a subdivision that predates the current ordinance and where lots are not deep enough to accommodate current standards.

### 3. No Harm to Public Interests

A variance may not be granted which results in harm to public interests.<sup>151</sup> In applying this test, the zoning board should review the purpose statement of the ordinance and related statutes in order to identify public interests. These interests are listed as objectives in the purpose statement of an ordinance and may include:

- Promoting and maintaining public health, safety, and welfare
- Protecting water quality
- Protecting fish and wildlife habitat
- Maintaining natural scenic beauty
- Minimizing property damages
- Ensuring efficient public facilities and utilities
- Requiring eventual compliance for nonconforming uses, structures, and lots
- Any other public interest issues

In light of public interests, zoning boards must consider the short-term and long-term impacts of the proposal and the cumulative impacts of similar projects on the interests of the neighbors, the community, and even the state.<sup>152</sup> Review should focus on the general public interest, rather than the narrow interests or impacts on neighbors, patrons or residents in the vicinity of the project.

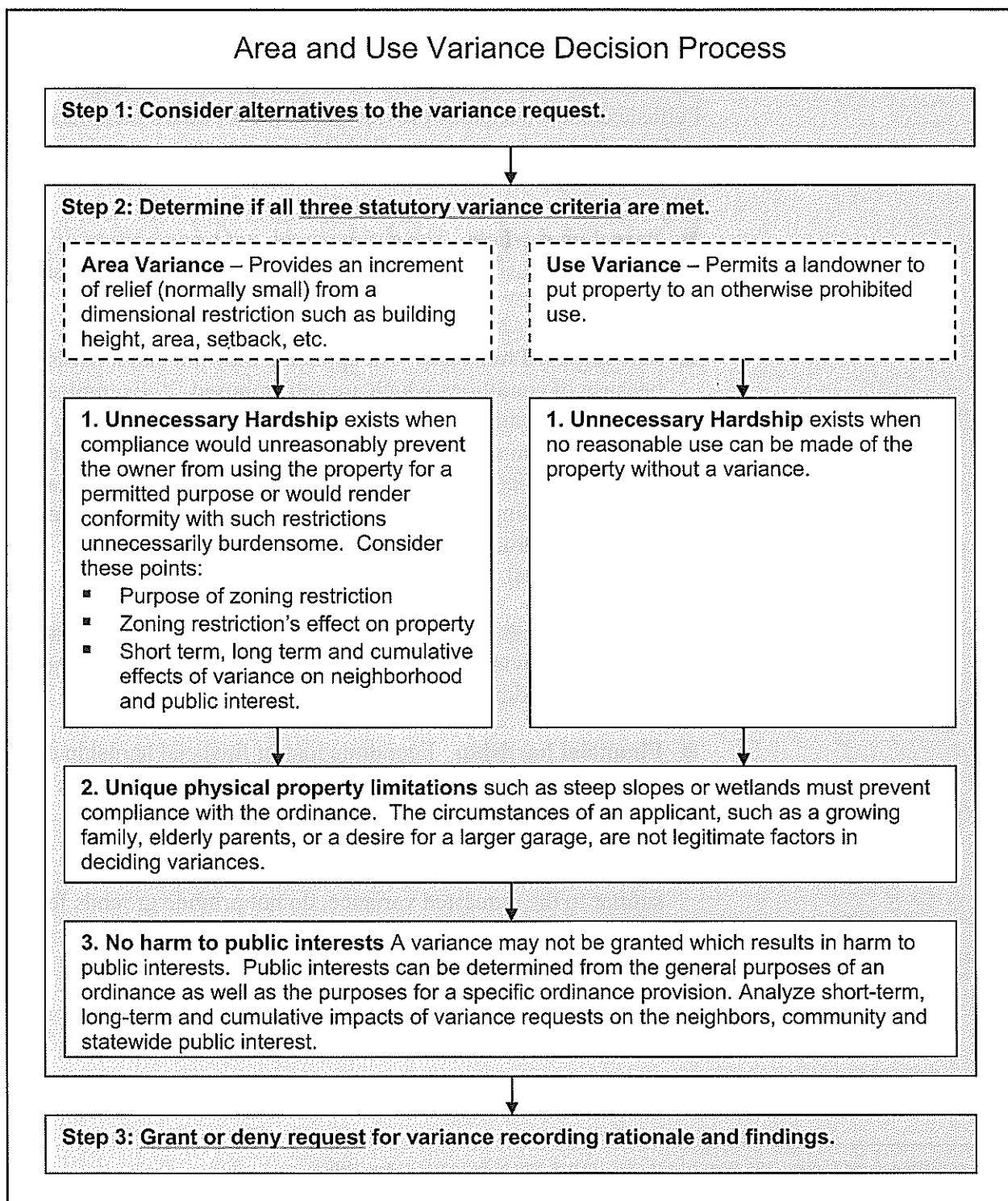
The flow chart in Figure 25 summarizes the standards for area variances and use variances. Application forms and decision forms reflecting these standards are included in *Appendix D*.

<sup>150</sup> *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 256,469 N.W.2d 831 (1991); *State v. Winnebago County*, 196 Wis. 2d 836, 846, 540 N.W.2d 6 (Ct. App. 1995)

<sup>151</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 846-47, 540 N.W.2d 6 (Ct. App. 1995); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 407-8, 577 N.W.2d 813 (1998)

<sup>152</sup> *State ex rel. Zier vogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Figure 25: Area and Use Variance Decision Process



### Additional Standards

Few areas of land use law are as extensively litigated as the standards necessary to qualify for a variance. The rich case law concerning variances provides these additional guiding principles that a zoning board should rely on in their decision-making. Published court decisions provide guidance for board members and are cited in the endnotes. Websites for accessing case law are provided in *Appendix B*.

- **Parcel-as-a-whole.** The entire parcel, not just a portion of the parcel, must be considered when applying the unnecessary hardship test.<sup>153</sup>
- **Self-imposed hardship.** An applicant may not claim hardship because of conditions which are self-imposed.<sup>154</sup> Examples include excavating a pond on a vacant lot and then arguing that there is no suitable location for a home; claiming hardship for a substandard lot after selling off portions that would have allowed building in compliance; and claiming hardship after starting construction without required permits or during a pending appeal.
- **Circumstances of applicant.** Circumstances of an applicant such as a growing family or desire for a larger garage are not a factor in deciding variances.<sup>155</sup>
- **Financial hardship.** Economic loss or financial hardship do not justify a variance.<sup>156</sup> The test is not whether a variance would maximize economic value of a property.
- **Nearby violations.** Nearby ordinance violations, even if similar to the requested variance, do not provide grounds for granting a variance.<sup>157</sup>
- **Objections from neighbors.** A lack of objections from neighbors does not provide a basis for granting a variance.<sup>158</sup>

<sup>153</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 n.8, 540 N.W.2d 6 (Ct. App. 1995)

<sup>154</sup> *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 154, 163, 133 N.W.2d 795 (1965); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976).

<sup>155</sup> *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98 (1976)

<sup>156</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45, 540 N.W.2d 6 (Ct. App. 1995); *State v. Ozaukee County Bd. of Adjustment*, 152 Wis. 2d 552, 563, 449 N.W.2d 47 (Ct. App. 1989).

<sup>157</sup> *Von Elm v. Bd. of Appeals of Hempstead*, 258 A.D. 989, 17 N.Y.S.2d 548 (N.Y. App. Div. 1940)

<sup>158</sup> *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991)

- **Variance to meet code.** Variances to allow a structure to be brought into compliance with building code requirements have been upheld by the courts.<sup>159</sup>

## Are there any limits on granting a variance?

### ***Minimum variance allowed***

The board may grant only the minimum variance needed.<sup>160</sup> For a use variance, the minimum variance would allow reasonable use, whereas for an area variance, the minimum variance would relieve unnecessary burdens. For example, if a petitioner requests a variance of 30 feet from setback requirements, but the zoning board finds that a 10-foot setback reduction would not be unnecessarily burdensome, the board should only authorize a variance for the 10-foot setback reduction.

### ***Conditions on development***

The board may impose conditions on development (mitigation measures) to eliminate or substantially reduce adverse impacts of a project under consideration for a variance. Conditions may relate to project design, construction activities, or operation of a facility<sup>161</sup> and must address and be commensurate with project impacts (*review the essential nexus and rough proportionality tests in Chapter 14*).

### ***Specific relief granted***

A variance grants only the specific relief requested (as described in the application and plans for the project) and as modified by any conditions imposed by the zoning board. The variance applies only for the current project and not for any subsequent construction on the lot. Referring to Figure 26 on the next page, if the landowner has received a variance to build the garage, they may only build the screen porch if they receive an additional variance specifically for the screen porch.

### ***Variances do not create nonconforming structures***

If a variance is granted to build or expand a structure, it does not give that structure nonconforming structure status. This relates to the previous point that variances only provide specific relief. In

**Nonconforming Structure** – A building or other structure, lawfully existing prior to the passage of a zoning ordinance or ordinance amendment, which fails to comply with current dimensional standards of the ordinances.

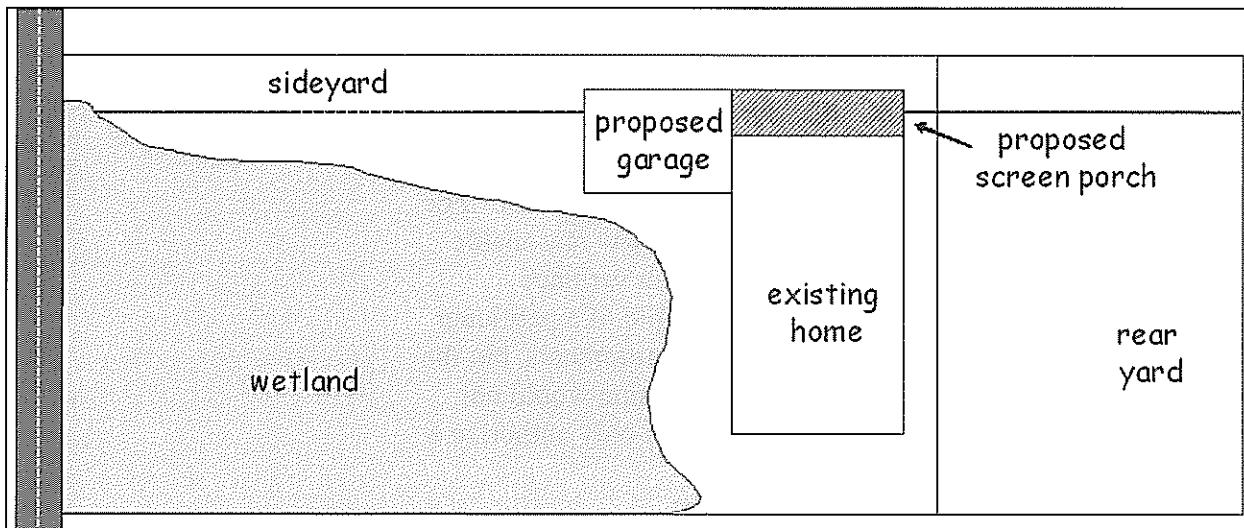
<sup>159</sup> *Thalhofer v. Patri*, 240 Wis. 404, 3 N.W.2d 761 (1942); see also *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 419-420, 577 N.W.2d 813 (1998).

<sup>160</sup> Anderson, Robert M. *American Law of Zoning* 3d, (1986) Vol. 3, s. 20.86, pp. 624-5

<sup>161</sup> Anderson, Robert M. *American Law of Zoning* 3d, (1986) Vol. 3, ss. 2070 and 20.71, pp. 587-95

**Figure 26: A Variance Grants Specific Relief**

If the landowner has received a variance to build the garage, they may only build the screen porch if they receive an additional variance specifically for the screen porch.



contrast, nonconforming structures may be assured a limited extent of future expansion in some ordinances.

***Variance transfers with the property***

Because a property rather than its owner must qualify for a variance to be granted (unique property limitations test), a variance transfers with the property to subsequent owners.<sup>162</sup>

**Are multiple variances allowed?**

***Multiple variances for a single project***

In some cases, a single project may require more than one variance to provide reasonable use of a property. The 3-step test should be applied to each variance request in determining whether relief can be granted by the zoning board.

***Sequential variances***

In other cases, original development of a property may have been authorized by variance(s). The owner later requests an additional variance. Generally, the later request should be denied since, in granting the original variance, the zoning board was required to determine that a variance was essential to provide reasonable use of the property or that not granting the (area) variance would have been unreasonably burdensome in light of the ordinance purpose. The board cannot subsequently find the opposite unless there

<sup>162</sup> *Goldberg v. Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 523-24, 340 N.W.2d 558 (Ct. App. 1983)

have been significant changes on the property or on neighboring properties. A later variance could also be granted if the written purpose of the zoning designation for which an area variance was sought significantly changed, thereby allowing the variance to qualify under the unreasonably burdensome standard.

### What is the process for appealing a variance decision?

A variance decision may be appealed to circuit court by any aggrieved person, taxpayer, officer or body of the municipality within 30 days of filing of the decision in the office of the board.<sup>163</sup> (See *Chapter 17 Judicial Appeal of Zoning Board Decisions*.)

### Why are the standards for area variances different from those of use variances?

The law treats area and use variances differently because they “serve distinct purposes,” “affect property rights in distinct ways,” and “affect public and private interests differently.” According to the *Ziervogel* decision, the adverse impacts of an area variance are thought to be less than those of a use variance. Furthermore, the “no reasonable use” standard associated with use variances leaves zoning boards “with almost no flexibility” and eliminates the statutory discretion of zoning boards to decide variances.

**Figure 27: Land Division Variances... Creatures of a Different Color**

So far our discussion has focused only on zoning variances. As zoning boards may be asked to decide land division variances (including subdivision ordinances), here are a few salient points:

- Subdivision variances are not the same as zoning variances.
- There is no Wisconsin law addressing land division variances.
- A local unit of government may allow variances to locally-determined land division standards. In this case they must determine the process and standards, and should include them in the land division or subdivision ordinance.
- Local units of government may choose to not allow land division variances.
- A local unit of government is not allowed to provide a variance to a state-mandated standard.
- Due process, including a hearing with public notice is required for land division variances.

<sup>163</sup> Wis. Stat. § 59.694 (10)

## AREA VARIANCES AND USE VARIANCES

### What is the difference between an area variance and a use variance?

It may not always be easy to determine if an applicant is seeking an area variance or a use variance. It is arguable that a large deviation from a dimensional standard, or multiple deviations from several dimensional standards on the same lot, may constitute a use variance instead of an area variance. For example, allowing significantly reduced setbacks could have the same effect as changing the zoning from one residential zoning district that requires significant setbacks and open space to a second residential zoning district that has minimal setbacks and open space.

Based on majority opinions of the Wisconsin Supreme Court,<sup>164</sup> it appears that, in order to draw the line between area variances and use variances, zoning boards should consider the degree of deviation from each dimensional standard for which a variance is sought in order to determine if the requested variance would “permit wholesale deviation from the way in which land in the [specific] zone is used.”<sup>165</sup> A proactive community seeking to consistently differentiate between area variances and use variances could adopt an ordinance provision similar to the following:

Unless the board of adjustment finds that a property cannot be used for any permitted purpose, area variances shall not be granted that allow for greater than a \_\_\_% (or \_\_\_ foot) deviation in area, setback, height or density requirements specified in the ordinance.

### Why are use variances discouraged?

Wisconsin Statutes do not specifically prohibit use variances. However, courts recognize that they are difficult to justify because they may undermine ordinance objectives and change the character of the neighborhood.<sup>166</sup> Some Wisconsin communities prohibit use variances in their ordinances. There are a number of practical reasons why they are not advisable:

- **Unnecessary hardship must be established in order to qualify for a variance.**

This means that without the variance, none of the uses allowed as permitted or conditional uses in the current zoning district are feasible for the property. This circumstance is highly unlikely.

- **Many applications for use variances are in fact administrative appeals.**

Often the zoning board is asked to determine whether a proposed use is included within the meaning of a particular permitted or conditional use or whether it is sufficiently distinct as to exclude it from the ordinance language. Such a decision is not a use variance but an appeal of the administrator’s interpretation of ordinance text.

- **Zoning amendments are a more comprehensive approach than use variances.**

When making map or text amendments to the zoning ordinance, elected officials consider the larger land area to avoid piecemeal decisions that may lead to conflict between adjacent incompatible uses and may undermine neighborhoods and the goals established for them in land use plans and ordinances. Towns also have meaningful input (veto power) on zoning amendments to general zoning ordinances.

<sup>164</sup> *State ex rel. Zier vogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

<sup>165</sup> *State ex rel. Zier vogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

<sup>166</sup> *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 412 fn. 10, 577 N.W.2d 813 (1998); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 473, 247 N.W.2d 98 (1976).