

# Area Variances, Part II – Supreme Court Further Defines Proper Standards

By Tom Larson

For the second time within two months, the Wisconsin Supreme Court issued an opinion involving the appropriate standards that local boards of adjustment must apply when granting “area” variances. In its most recent pronouncement, the Supreme Court, in State v. Waushara County Bd. of Adjustment (2004 WI 56), followed in the footsteps of its earlier decision (Ziervogel v. Washington County Bd. of Adjustment, 2004 WI 23) and re-emphasized the importance of having a flexible standard for area variances so that local boards of adjustment may properly exercise their discretion to grant area variances to deserving property owners.

## Background

Over the last several years, the law relating to “area variances” has been unclear. “Area variances” are changes to the dimensional requirements in a zoning ordinance such as height, setback, and lot size. Confusion has resulted from the decisions in three different Supreme Court cases dealing with area variances: Snyder v. Waukesha County Zoning Bd. of Adjustment (1976), State v. Kenosha County Bd. of Adjustment (1998) and State v. Outagamie County Bd. of Adjustment (2001). Each decision seemed to create different legal standards for granting area variances. The Supreme Court agreed to hear and decide the two recent area variance -- Ziervogel and Waushara County – to clarify the correct legal standard that a board of adjustment should apply when evaluating requests for area variances. Recognizing the importance of area variances to property owners across the state, the Wisconsin REALTORS® Association filed amicus briefs in both cases.

In the Ziervogel case decided on March 19, 2004, the Supreme Court declared that the appropriate standard for determining “unnecessary hardship” for area variances is “whether the compliance with the area zoning restrictions would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” This was a very important ruling for property owners who were previously required to prove they had “no reasonable use” of their property in order to qualify as a hardship case and receive a variance. Before the Ziervogel decision, variances had been virtually impossible to obtain regardless of the merits of the variance request.

In the Waushara County case, the Supreme Court further clarified for property owners and local officials how the “unnecessary hardship” test established in Ziervogel should be applied in area variance cases. . The court considered the discretionary role of the board of adjustment and the context in which the board must determine “unnecessary hardship.”

## State v. Waushara County Bd. of Adjustment

The Waushara County case involved a variance request for a non-conforming structure on Silver Lake in Waushara County. The property owners wanted to convert a seasonal residence into their primary residence to enjoy during retirement. Since 1989, the owners applied for and received a number of variances to construct improvements to their nonconforming residence. In 2000, the owners applied for a building permit to construct an addition to the living room and a porch extension. They were denied the permit pursuant to a county ordinance that limited the cumulative value of all improvements to the home to 50 percent of the home's equalized value. The property owners then requested and received a variance from the board of adjustment, which concluded that enforcing the exact terms of the zoning ordinance would result in an unnecessary hardship. At the request of the DNR, the state filed for review in circuit court, which reversed the board's decision. The court of appeals upheld the circuit court ruling.

In a 4-2 decision, the Supreme Court reversed the decision of the court of appeals and held that a board of adjustment, in evaluating whether to grant an area variance, should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists. The court reconciled the prior variance cases, finding that each decision had recognized that the purpose of the zoning ordinance should be considered when determining whether a variance requested should be granted.

In addition, the court stated that the zoning boards of adjustment must be afforded flexibility so that they can properly exercise the discretion granted to them by the legislature. More importantly, the court held that a zoning board of adjustment's decision to issue a variance is presumed to be correct and valid. Thus, a court can overrule a board's decision only when the decision is unreasonable or irrational.

### **Impact on Property Owners**

Both area variance cases decided by the Supreme Court this year represent important victories for property owners. First, a flexible standard was re-established for area variances, making it easier for property owners to obtain variances from zoning regulations in order to improve or expand their homes. Second, the discretion and legal authority of local boards of adjustment that will make it more difficult to challenge their factual determinations. As a result, variances will hopefully once again be an effective land use tool for boards of adjustment to use to balance the individual rights of property owners with the public rights of the community.

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