

## WISCONSIN SUPREME COURT CHANGES ITS MIND ON ZONING VARIANCE

While professional designers don't have law degrees, they become familiar with major legal rules as a result of having to prepare and apply agreements between owners, engineers, architects, prime contractors, subcontractors and vendors. When their work efforts become the subject of litigation, they become familiar with legal issues that arise when forming and applying agreements for real estate improvements. They learn that decisional law emanates from the Wisconsin Court of Appeals and the Wisconsin Supreme Court, and they and their attorneys generally regard those decisions as fairly stable expressions of the law. They would not usually expect a Wisconsin Supreme Court decision to be issued and then discarded within a few years by a subsequent Wisconsin Supreme Court, but that is precisely what happened in *State v. Outagamie County Board of Adjustment*, 2001 Wis. 78, 628 N.W.2d 376 (Wis. 2001).

In *State v. Outagamie County Board of Adjustment*, homeowners applied for a building permit to add a sun porch to their home and they sought a variance under the Outagamie County Zoning Ordinance relating to shore land/flood plain/wetland to permit it. The property was located in an area that was subject to 100-year floods.

In 1980 the owners had applied and received a conditional use permit to permit them to place fill in a mobile home on their property, which they knew was in the flood fringe district. The county required the placement of fill so that the mobile home would be at the proper elevation. In 1984 they applied for and received a second building permit to replace the mobile home with a permanent single family home. The building inspector issued a building permit but did not advise the owners that they needed to obtain a zoning permit, and they did not do so.

Relying upon the building permit, in 1984 the owners constructed a three-bedroom ranch home with a basement and attached garage. The basement was 3.7 feet below the 100-year flood elevation and 5.7 feet below the flood protection elevation, in violation of the ordinance and the Wisconsin Administrative Code relating to the 100-year flood elevation.

In 1995, the owners applied for a third building permit to add a sun porch. The Outagamie County Zoning Administrator denied their request because their home did not meet the flood protection elevation requirements as a result of the basement floor violation. The zoning administrator informed the owners that without a variance they could not obtain a building permit to add the sun porch. The owners applied to the Outagamie County Board of Adjustment for an "after the fact" variance for their non-conforming basement floor. The DNR opposed the application, arguing that the owner's home was an illegal structure, but the owners argued and the zoning administrator conceded that there were other homes in the area with basements below the regional flood elevation that had been built before the ordinance was in place, there had been no history of flooding in the area, and that the sun porch itself would comply with the ordinance because it would be constructed on fill above flood protection elevation. There was no community opposition to the variance.

The Board of Adjustment granted the application for a variance finding that the hardship experienced by the owners and caused by the town building inspector not requiring the issuance of a zoning permit was sufficient to justify the grant of a variance. The State of Wisconsin sought a judicial review of the Board of Adjustment's decision. Before the court, DNR argued that §NR116.13(2), Wis. Ad. Code, prohibited any variances for flood elevation deviations. The circuit court rejected DNR's argument and affirmed the Board. The State appealed and while the appeal was pending the Wisconsin Supreme Court held in *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998) that there was no difference between area and use variances and either type required the establishment of "hardship" defined as "no reasonable use of the property without a variance." Obviously, the owners in Outagamie County could not meet that test. Before the Wisconsin Supreme Court's decision in Kenosha County, area variances had been governed by a different standard, i.e., "unnecessarily burdensome," but as a result of the court's decision in Kenosha County, the "unnecessarily burdensome" standard had been abolished.

In deciding the *State v. Outagamie County Board of Adjustment* case, the Wisconsin Supreme Court

reversed itself and voted to overrule *State v. Kenosha County Board of Adjustment* decided 3 years earlier. The court noted that the Kenosha County case had been decided by it unanimously, and ordinarily the court would adhere to the principle of stare decisis, noting that the respect for precedent promotes the evenhanded, predictable and consistent development of legal principles and fosters reliance on judicial decisions. Nonetheless, the court concluded that it had made a mistake in Kenosha County in failing to continue the distinction between use and area variances and that Kenosha County mistakenly merged the two together. Further, the court felt that since the Kenosha County case had been decided no more than three years ago, there was not much danger that there had been a substantial reliance upon it that would make it inequitable, harmful or disruptive to the people of the State of Wisconsin to repudiate it.

In distinguishing between use and area variances, the court noted that Wisconsin law had always treated use variances differently from area variances because of the different purposes underlying them. In a previous decision, the court had held that a use variance is one that permits a use other than that prescribed by the zoning ordinance, while an area variance has no relationship to a change of use. The court further noted that the general rule throughout the United States recognizes a distinction in the level of hardship required to justify area and use variances. The court concluded that in most states, courts will approve an area variance upon a lesser showing by the applicant than is required to sustain a use variance. The more difficult standard for use variances under the "hardship" rule required a showing that there was no use to which the land could be put. The standard under the less burdensome unnecessary hardship rule for area variances involved the question of whether compliance with the particular area restriction would unreasonably prevent the owner from using the property for a permitted use or be unnecessarily burdensome. The court noted that in Wisconsin the distinction between area and use variances had remained intact until the Kenosha County case had been decided.

The court concluded that obtaining an area variance because of unnecessary hardship is the recognized and approved legal device by which the basic constitutional right of property is reconciled with the paramount right of government to protect by zoning the public health, safety, morals and welfare. The court also concluded that the hardship for a use variance, a hardship that equates with a lack of a reasonable return or destruction of all beneficial use of the property, although having constitutional overtones, was necessary in order to protect the public's interest in zoning laws regulating use. Thus, the court held that the prime justification for requiring less of an applicant for an area variance than is required for a use variance deserved continuing recognition in Wisconsin since an area variance does not threaten adjacent land with the establishment of an incompatible use or to subject a neighborhood to a change in its essential character. The area variance required a lesser standard because it is assumed that adequate protection of the neighborhood can be effected without the imposition of such stringent limitations.

However, the court warned that area variances should not be automatic or easy to obtain. In overruling the Kenosha County case, the court clarified that the previous recognition of two different standards for determining whether an area variance or a use variance should be granted was consistent with longstanding principles of law, and that the granting of an area variance still required the applicant to prove unnecessary hardship and that the burden of proof is heavy and that the reasons for granting a variance must be substantial.

The Outagamie County case is enlightening both as to the doctrine of *stare decisis* and as to the meaning and use of area variances.

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