

**Abstract:** Professionals in the land-use arena have awaited a court decision to overturn the burdensome aspect of prior case law concerning “area variances.” The case has arrived.

As a result of a recent ruling, business owners and individuals have greater opportunities to obtain area variances for land use.

## Wisconsin Supreme Court Decision Returns “Reasonable Use” Standard to Variances

By John Thiel

Businesses and individuals starting building or remodeling projects that require an “area” variance may be pleased to learn that a recent state Supreme Court decision has made it easier to receive such a variance.

On March 19, 2004, the Wisconsin Supreme Court issued a decision (*Ziervogel v. Washington County Bd. of Adjustment*) that reinstated prior favorable case law concerning area variances. *Ziervogel* involved a setback question regarding property on a lake in the Town of West Bend, Washington County, Wisconsin. The landowner wanted to construct an addition to a summer home and convert the home to a year-round residence. A county ordinance prohibited any expansion of an existing structure within 50 feet of the high-water mark. The home had a setback of 26 feet from the high water mark of the lake. Accordingly, the owner requested a variance from the Washington County Adjustment Board to permit the remodeling within the 50-foot setback. The variance was denied and the owner sought review by the circuit court and the court of appeals. Both courts upheld the denial of the variance; however, the Wisconsin Supreme Court ultimately reversed the decisions.

When a parcel of real estate has unique geometric characteristics that are not self-created, in order to obtain approval for a variance landowners petition boards of adjustment for relief from dimensional restrictions of zoning rules. For example, a landowner may own a triangular lot in an area of a city designated as a residential zone classification (that is, the “use” is residential). If the zoning code requires a 20-foot side yard setback (“area” dimension) and, in designing a normal house, it only would be possible to build with a 10-foot side yard setback, it would be appropriate to request an area variance.

Under prior controlling case law, *State v. Kenosha County Bd. of Adjustment*, an area variance could be legally issued *only* if the denial of the variance would result in no use of the real estate. This was an extremely high burden for a landowner to meet as one could generally describe some type of use for any parcel of real estate.

The Wisconsin Department of Natural Resources (WDNR) has been an advocate for the “no reasonable use rule” as area variances often come into play on zoning matters involving waterfront setbacks—uses within 75 feet of waterways and lakes—in Wisconsin. The WDNR appears to have a standing policy to challenge any variance granted for a use within a waterfront setback.

### Area v. Use Variances

*Ziervogel* overrules *Kenosha County* as it applied the no reasonable use rule to area variances. However, the no reasonable use rule of *Kenosha County* still applies to “use” variances. A use variance is a situation in which a landowner

**Wisconsin Supreme Court Decision Returns to Prior “Area Variance” Case Law (continued)**

requests a variance to conduct a use that is not otherwise allowed within the zoning classification. For example, a landowner would request a use variance if a section of a city was zoned for commercial use, residences were not allowed and the landowner wished to build a residence. Under *Kenosha County*, the use variance would be denied because the land could still be used for commercial purposes.

“...individuals with property adjacent to a lake or waterway now have a greater chance of success when requesting setback variances.”

purpose or would render conformity with such restrictions unnecessarily burdensome.”

The *Snyder* standard allows for more advocacy on behalf of landowners and returns a greater level of discretion to the members of a Board of Adjustment. Now both businesses and individuals have expanded opportunities when embarking on building or remodeling projects that require an “area” variance. Area variances are not limited to water front property. Almost any lot suitable for a building will have setback restrictions.

The Supreme Court remanded the *Ziervogel* case back to the Washington County Board of Adjustment, where it will be analyzed under the legal standard of *Snyder v. Waukesha County Zoning Bd. Of Adjustment* (1976), which is: “whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted

For more information about how this ruling may affect you or your business, please contact John Thiel (jthiel@gklaw.com) at (920) 831-6342 or any member of Godfrey & Kahn’s Real Estate Team. ♦

**Paul Dombrowski Joins Real Estate Team**

Godfrey & Kahn is pleased to announce the addition of Paul J. Dombrowski to the firm. Dombrowski is a shareholder member of the real estate practice group in the firm’s Madison office, LaFollette Godfrey & Kahn. His statewide practice and experience, built over the past 12 years, has established him as one of Wisconsin’s leading real estate attorneys and enhances the capabilities of the firm’s 22-member real estate team.

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