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January 15, 2018

Renee Lauber, DCTA Planner
Dane County Towns Association
1252 Morrison Court
Madison, WI 53703

Re: Zoning Board of Appeals
New Statutory Variance Standards

Dear Ms. Lauber:

2017 Wisconsin Act 67 known as the "Landowners Bill of Rights" imposed a number of preemptions on municipal regulation of land use. I have written separately concerning the changes that affect conditional use permits. In this letter I will describe the changed standards that apply to the Zoning Board Appeals. I will describe the new standards and offer several carefully considered recommendations as follows:

I. NEW STANDARDS

The new laws do the following:

1. The Act creates a new definition of "area variance," and of "use variance:"

> ***a. In this subdivision, "area variance" means a modification to a dimensional, physical, or locational requirement such as a setback, frontage, height, bulk, or density restriction for a structure that is granted by the board of appeals under this paragraph. In this subdivision, "use variance" means an authorization by the board of appeals under this paragraph for the use of land for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance.***
> (§62.23(7)(e) 7. a., Wis. Stats.)

Note that this essentially codifies a distinction that currently exists in case law surrounding this issue. In the case of *State ex rel. Ziervogel v. Washington County,* 269 Wis. 2nd 549 (2004), the Wisconsin Supreme Court described a use variance as "a use variance is one that permits a use other than that prescribed by the zoning ordinance in a particular district," which definition is very similar to the new definition in the State statute. In the same case, the Court referred to

area variances as applying to "area, set backs, frontage, height, bulk or density," which also closely follows the new statutory terms.

2. The new law creates the following standard for granting a variance:

> ***d. A property owner bears the burden of proving "unnecessary hardship," as that term is used in this subdivision, for an area variance, by demonstrating that strict compliance with a zoning ordinance would unreasonably prevent the property owner from using the property owner's property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome or, for a use variance, by demonstrating that strict compliance with a zoning ordinance would leave the property owner with no reasonable use of the property in the absence of a variance. In all circumstances, a property owner bears the burden of proving that the unnecessary hardship is based on conditions unique to the property, rather than considerations personal to the property owner, and that the unnecessary hardship was not created by the property owner.***

This description is also largely consistent with the decision of the Wisconsin Supreme Court, in the *Ziervogel v. Washington County* decision noted above, which quoted from an earlier case of *Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis. 2nd 468 (1976). In that case the Court described the applicable standard as follows:

> When considering an area variance, the question of whether unnecessary hardship or practical difficulty exists is best explained as "whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome."

The standard for use variances was established by an earlier decision of *State v. Kenosha County Board of Adjustment*, 218 Wis. 2nd 396 (1998), in which the Court said, "We conclude 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," and this standard was confined to use variance issues by the Wisconsin Supreme Court in *Ziervogel:*

> Restricting the availability of variances to those property owners who would have no reasonable use of their property without a variance may be justifiable in use variance cases, given the purpose of uses zoning and the substantial effect of use variances on neighborhood character. But applying the same strict no reasonable use standard to area variance obligations is unjustifiable.

The new legislation appears to codify existing case law in the regulation of area and use variances, therefore.

II. RECOMMENDATIONS

1. Code Amendments. You may need to update your zoning code to comply with these new laws. In particular, consider the following issues:

    a. *Variance Standards*. If your zoning code recites a specific standard that must be met for the grant of a variance, that standard will likely need to be updated as a result of these new laws.

    b. *Distinction between area and use variances*. If your code currently does not distinguish between area variances and use variances, your code should be amended to address the two issues separately.

    c. *Treatment of use variances*. Many municipalities have taken the position over the years that use variances are prohibited and they have adopted code provisions that specifically include that statement. It is more difficult to take that position now, in light of these new laws. The statute specifically defines use variances and provides a specific standard that must be met in order to grant a use variance. A Court would likely conclude that you are preempted from having a blanket prohibition on use variances. I recommend that you consider removing any such prohibition from your code.

    Remember that it still will be very difficult for any use variance to be granted. The standard is very high, requiring a property owner to demonstrate that they have "no reasonable use of the property" in the absence of a variance. This is not easy, as the Wisconsin Supreme Court notes in the *Ziervogel* decision:

    > Almost all variance applicants – certainly all applicants who are putting their property to some use at the time of the application – will flunk the "no reasonable use" test, divesting the Board of any real discretion.

    Even though the standard is very high, the legislature apparently intends to give property owners the right to try to make such a case.

2. Board of Appeals Practices. This legislation clarifies and codifies standards that have long been best practices as a result of case law. This therefore will serve as a reminder and will underscore the need in every case for the Zoning Board of Appeals to consider the following:

    a. The Board of Appeals must determine whether a variance request is seeking an area variance or seeking a use variance. This is not always a simple matter. For example, the issue was not clear in the case of *James C. Rule v. Iowa County Board of Adjustment,* 324 Wis. 2nd 584 (2010), unpublished, in

which the Court of Appeals found that a 500-foot offset requirement for quarries was a use variance issue.

b. The Board of Appeals will need to be aware of the standard that applies for the grant of a variance, and this will differ depending on the conclusion of the foregoing.

c. The Board of Appeals must require the property owner to bear the burden of proof.

d. Any variance granted must be due to conditions unique to the property rather than considerations personal to the property owner.

e. The variance cannot be granted if the hardship was created by the property owner.

I recommend that you distribute a copy of this correspondence to the members of your Zoning Board of Appeals. If you should have any questions or concerns regarding these matters, please do not hesitate to contact me.

Yours very truly,

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Eric J. Larson

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