

JUDGING *ZIERVOGEL*: THE TWISTED PATH OF RECENT ZONING VARIANCE DECISIONS IN WISCONSIN

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I. INTRODUCTION

Zoning variances are notoriously badly administered. Granted by locally appointed independent administrative boards called zoning boards of adjustment or sometimes zoning boards of appeals, commonly referred to as “ZBAs,”¹ variances were originally intended to be available only under a very narrow set of circumstances—where an owner was unable to make any economically valuable use of his property under the current zoning restrictions because of some peculiar

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1. The Wisconsin zoning enabling statute for counties, WIS. STAT. § 59.694 (2005–2006), refers to ZBAs for counties as zoning “board[s] of adjustment.” The parallel provision in the enabling statute for cities and villages refers to them as zoning “board[s] of appeals.” *Id.* § 62.23(7)(e). The disparity in terms is the result of the different origins of these two distinct state statutes.

Most state zoning enabling laws in this country are patterned after the Standard State Zoning Enabling Act, first circulated in draft form by the United States Department of Commerce in 1922 and then formally proposed in 1926. *See* U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT 3 (1926) (Explanatory Notes in General). The Standard Act refers to these bodies as zoning “board[s] of adjustment.” *Id.* § 7. Wisconsin’s first zoning enabling act for counties was adopted in 1923. Act of July 12, 1923, ch. 388, 1923 Wis. Sess. Laws 666. It did not include a provision for a zoning board of adjustment. The statute was amended in 1927 and followed the Standard Act very closely, including the provision for the creation of a zoning “board of adjustment.” Act of July 18, 1927, ch. 408, 1927 Wis. Sess. Laws 502. The county enabling statute has been modified many times since 1927 but still includes the original language from 1927 that permitted the creation of boards of adjustment.

Until 1941, the enabling statute for cities limited the function of zoning boards of appeals to hearing appeals from decisions of zoning administrators. The early provision did not include the power to grant variances or special exceptions as did the Standard Act and the Wisconsin enabling statute for counties. Act of July 14, 1921, ch. 590, §§ 104–107, 1921 Wis. Sess. Laws 1118, 1137–38. Consequently, the boards were called zoning “board[s] of appeals.” *Id.* When the statute was amended in 1941 to include the full range of powers ordinarily conferred on these boards, the original name was nonetheless retained. Act of June 3, 1941, ch. 203, 1941 Wis. Sess. Laws 252.

condition of the property not shared by any other parcels in his contiguous zone, and where the variance, were it granted, would not frustrate the policies reflected in the legislative body's choice of the particular zone for the particular area.² If Homer's property, for instance, alone among the other properties in his neighborhood of similarly zoned parcels, was home to a wetland that left inadequate room for development within the prescribed setbacks, Homer might be entitled to a variance from the setback requirements provided that the variance did not interfere with the goals of the zone.

On the other hand, if granting the variance compromised the local legislative body's plan for the area embodied in the zone, or if a number of parcels within the zone were affected in the same way by wetlands, then any remedy for the inability of the owner to develop the property belonged to the legislature. The legislative body could then make a more comprehensive policy decision about the appropriateness of the zone or some other remedy for Homer. The strategy reflects the traditional and sound understanding of the appropriate and distinctive roles of appointed local administrative boards and locally elected legislative, policy-making bodies.

But this is not how local ZBAs typically operate. More commonly, as reflected in a recent survey of actual variance practices in Wisconsin by Mr. Wald Klimczyk, ZBAs disregard the requirement that the property suffer some unique physical disparity within the neighborhood, regard the hardship requirement as simply relative to the desire of the owner, and grant variances when, in the opinion of the board, the requested variance would not seriously compromise the character of the neighborhood.³ The liberality of ZBAs is reflected in the very large number of variances they regularly grant relative to the extraordinary nature of the remedy. The Klimczyk survey of variance decisions in a sample of cities, villages, and towns in Wisconsin during the roughly two-year period beginning May 28, 1998, showed that ten of the forty-seven responding municipalities, or roughly 21%, granted 100% of the applications submitted for variances.⁴ Roughly 25% of municipalities granted between 80% and 99% of the applications received; 30% granted between 60% and 79% of applications; and only 23% of

2. See *infra* Part II for a thorough examination of the provisions of the Wisconsin zoning enabling act that permits variances and defines the conditions for their approval.

3. Wald Klimczyk, *Variances of Zoning Code Requirements: Current Practices by Wisconsin Cities, Towns & Villages* (June 2000) (unpublished manuscript, on file with the author) (prepared for presentation to the League of Wisconsin Municipalities Institute).

4. *Id.* at Attachment A.

municipalities granted fewer than 60% of applications (up from only one municipality in the preceding two-and-one-half-year period).⁵

The absolute numbers of variances compared to the number of households within the municipalities is also surprisingly large. For example, during the roughly four-year period from January 1996 through March 2000, Sheboygan, a relatively small city of only fourteen square miles and 20,779 households,⁶ granted 256 variances out of 292 applications submitted.⁷ Green Bay, with forty-four square miles and 41,591 households,⁸ granted 605 variances out of 716 applications submitted.⁹ It strains credulity that the owners of 605 parcels of land in Green Bay in just a single four-year period discovered that their parcels suffered unique physical features that, under the prevailing zoning restrictions, prevented those owners from using their land in any economically beneficial way. The survey does not report the nature of the variances sought, whether for dimensions or uses, or any of the facts for these cases, though it does suggest that the vast majority are for dimension variances.¹⁰ If the reported Wisconsin Supreme Court decisions are any indication, however, as we will see, it is likely that most of these variances were sought to expand uses that were already well-established, undermining any claim that the parcels could not be put to some economically beneficial use.

Even more revealing than the numbers is the summary of Wisconsin variance law by the survey's author, a municipal lawyer in Wisconsin. In his own description of Wisconsin variance law, he omitted, without comment, the defining requirement of the variance, that the property be burdened by a unique condition.¹¹ Summarizing the proceedings of

5. *Id.*

6. U.S. Census Bureau, State & County QuickFacts, Sheboygan (city), Wisconsin, <http://quickfacts.census.gov/qfd/states/55/5572975.html> (last visited Oct. 10, 2007). Information about populations and households is drawn from the most recent U.S. Census completed in 2000 and reported at <http://www.census.gov/>.

7. Klimczyk, *supra* note 3, at Attachment A.

8. U.S. Census Bureau, State & County QuickFacts, Green Bay (city), Wisconsin, <http://quickfacts.census.gov/qfd/states/55/5531000.html> (last visited Oct. 10, 2007).

9. Klimczyk, *supra* note 3, at Attachment A.

10. *Id.* at 12 ("Area variances are by far the most common form of variance requested and granted.").

11. Though the author quotes in its entirety the provision of the enabling statute for cities, villages, and towns concerning variances, his own summary of the law says only the following:

Four findings by a ZBA upon which variances can be granted are mandated by statute: (1) The finding of an unnecessary hardship resulting

ZBAs submitted for the survey and comments by other municipal attorneys, Klimczyk also reports that “[m]ost ZBA’s find only ‘necessity’ or ‘hardship’ and then grant the variance,”¹² “[m]ost ZBA’s base area variance grants on fairness and appropriateness rationale,”¹³ and “[m]ost ZBA’s simply make a finding that granting the variance is in the best interest of the community and of necessity to the property owner/applicant.”¹⁴ Indeed, the survey recounts what it refers to as “Wald’s Statewide Rule of Four,” which it claims “permeates all Wisconsin cities[,] towns[,] and villages”:

If four or more persons appear at the ZBA variance hearing in person or in writing objecting to the application, then the variance is always denied. The objectors don’t have to be neighbors. They can live across town. There were only one or two exceptions to this rule in 85 communities over four years¹⁵

On the other hand, having fewer than four people appear at the hearing and object to the variance does not guarantee that the variance will be granted. As the survey concludes, “If three or fewer objectors appear at a ZBA variance application hearing, there is no rhyme or reason whether a variance application is or is not granted.”¹⁶

What is perhaps most fascinating about the widespread rogue practices of ZBAs is that they have persisted despite the fact that the Wisconsin Supreme Court, at least until recently, when called upon to review decisions by ZBAs, has consistently followed the traditional, very restrictive understanding of variance law.¹⁷ The disparity between firm judicial decisions and the practices of ZBAs may be explained in part by the lack of challenges to variance decisions by ZBAs, which is

from the literal enforcement of the ordinance; (2) A variance is required so that the spirit of the zoning code can be observed; (3) Substantial justice would be served by granting the variance; and (4) Granting of the variance would not be contrary to the public interests.

Id. at 8.

12. *Id.* at 12.

13. *Id.*

14. *Id.* at 13.

15. *Id.*

16. *Id.*

17. See, e.g., *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976).

likely explained in part by “Wald’s Statewide Rule of Four” described above. It is worth observing that all of the supreme court decisions discussed in this essay involved challenges by the state’s Department of Natural Resources (DNR) to decisions by county ZBAs involving variances from shoreland setbacks required under state law. None were challenged by neighbors.

One is tempted to conclude that if no one challenges the variance decisions of ZBAs, then perhaps there is nothing amiss in the liberality of ZBAs permitting property owners to do as they propose. Property owners are being permitted to develop their property as they wish and apparently no one feels harmed. Under those circumstances, to insist that an owner abide by the limitations of the zoning ordinance borders on arbitrariness.¹⁸ Moreover, so long as the courts are available to correct those decisions by ZBAs that someone does care enough to challenge, including challenges by the DNR involving established statewide policies originating with the state legislature, perhaps the balance of public and private interests is not being too ill-served.

Two recent decisions by the Wisconsin Supreme Court, however, seriously undermine even this minimum protection of neighboring uses and statewide policies and appear to throw the court’s weight solidly behind the widespread rogue practices of ZBAs. *State ex rel. Ziervogel v. Washington County Board of Adjustment*,¹⁹ decided in March of 2004, and *State v. Waushara County Board of Adjustment*,²⁰ decided just two months later in May of 2004, addressed the same issue—the proper interpretation of the terms “unnecessary hardship” in the variance provision of the zoning enabling legislation for counties,²¹ in particular as applied in the context of applications for dimension variances.²² Both decisions came to roughly the same conclusion, that “unnecessary hardship” means something different and less demanding for dimension variances than for use variances.²³ In itself, the decision to lower the standard for dimension variances is significant; it moved the test of

18. Even this conclusion may be deceptive. After all, it demands no small investment to pursue a lawsuit challenging any governmental decision. Without a careful empirical survey of the attitudes of neighbors and their reasons for not objecting, it is difficult to draw any reliable conclusions about how well neighbors receive the decisions of ZBAs.

19. 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401.

20. 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

21. WIS. STAT. § 59.694(7)(c) (1999–2000).

22. *Waushara County*, 2004 WI 56, ¶ 2, 271 Wis. 2d 547, ¶ 2, 679 N.W.2d 514, ¶ 2; *Ziervogel*, 2004 WI 23, ¶¶ 2–3, 269 Wis. 2d 549, ¶¶ 2–3, 676 N.W.2d 401, ¶¶ 2–3.

23. *Waushara County*, 2004 WI 56, ¶ 2, 271 Wis. 2d 547, ¶ 2, 679 N.W.2d 514, ¶ 2; *Ziervogel*, 2004 WI 23, ¶¶ 4–5, 269 Wis. 2d 549, ¶¶ 4–5, 676 N.W.2d 401, ¶¶ 4–5.

hardship from an objective standard of no economic use to a standard that is relative to the owner's desires. The test then becomes something of a balance between the owner's desires and the impact of those desires, in the opinion of the ZBA, on the surrounding neighborhood. As Justice Sykes declared for the majority in *Ziervogel*, one of the several essential purposes served by variance procedure in zoning law is "to provide a procedure by which the public interest in zoning compliance can be balanced against the private interests of property owners in individual cases."²⁴ Both decisions arrive at that conclusion by insisting that the enabling statutes were intended to delegate to the ZBAs substantial discretion in granting variances and that the more demanding notion of hardship would constrict that discretion to almost zero.²⁵

But the decisions may well stand for much more. Even if the standard of hardship is liberalized for dimension variances, variances would remain an extraordinary remedy so long as the uniqueness requirement is honored, that is, so long as variances are seen as a remedy that is limited to properties that are in some way physically different from the other properties, and it is the difference that prevents the owner from developing the property to the extent the owner desires. Even though the court referred to the uniqueness requirement in both decisions,²⁶ there are many reasons to believe, as we will see in Part IV, that the uniqueness requirement is no longer a significant aspect of the test for a variance. If that is the case, then the variance has been transformed from an extraordinary remedy for a very limited problem to an opportunity for any landowner in just about any situation to have a local board give the landowner permission to stretch the bounds of zoning law as defined by the municipality's legislature. Thus, the court will have thrown its weight behind the rogue practices of ZBAs and at the same time will have virtually eliminated any corrective role for the courts. After all, if the decision comes down to the ZBA weighing the loss to the owner against the loss to the community, what is there for a court to do that does not essentially duplicate the discretion supposedly left by the legislature to the agency?

The reasoning in each opinion is somewhat different, and the

24. *Ziervogel*, 2004 WI 23, ¶ 17, 269 Wis. 2d 549, ¶ 17, 676 N.W.2d 401, ¶ 17.

25. *Waushara County*, 2004 WI 56, ¶ 2, 271 Wis. 2d 547, ¶ 2, 679 N.W.2d 514, ¶ 2; *Ziervogel*, 2004 WI 23, ¶ 2, 269 Wis. 2d 549, ¶ 2, 676 N.W.2d 401, ¶ 2.

26. *Waushara County*, 2004 WI 56, ¶ 6 n.8, 271 Wis. 2d 547, ¶ 6 n.8, 679 N.W.2d 514, ¶ 6 n.8; *Ziervogel*, 2004 WI 23, ¶ 7, 269 Wis. 2d 549, ¶ 7, 676 N.W.2d 401, ¶ 7.

standards they prescribe may also differ slightly. Both decisions, however, begin with the *ipse dixit*, not derived from any analysis of the text of the statute, that the state enabling statute intended to grant ZBAs substantial discretion.²⁷ Both decisions thus share in the failure to ground the change in law in any analysis of or insight into the text of the variance provision of the county enabling statute. The court in both opinions similarly fails to engage in any adequate analysis of the court's own prior decisions in this area. The authors of the opinions, Justice Sykes in *Ziervogel* and Justice Crooks in *Waushara County*, claim to be returning to a root precedent from 1976, *Snyder v. Waukesha County Zoning Board of Adjustment*.²⁸ *Ziervogel*, the first and perhaps the more radical of the two opinions, claimed, without analysis, that *Snyder* established distinct definitions of "hardship" for dimensions and use variances.²⁹ That distinction was abandoned, however, according to the court, in one of its more recent decisions in 1998, *State v. Kenosha County Board of Adjustment*.³⁰ That accusation is far from accurate, and one is left ultimately with the strong impression that both decisions are driven by ideological commitments rather than methodological rigor or any objective insight into the statute that the court was interpreting. The decisions are not only bad zoning law, badly interpreting the state enabling statute for counties, they also seriously distort the intended and legitimate role of zoning boards of appeals and the legislative bodies of counties, not to mention the court's own role in interpreting statutory law and monitoring agencies.

My purpose in this article is to revisit the variance provision of the state zoning enabling statute for counties in light of its place in the larger statutory scheme and in light of Wisconsin case law up to the decisions in *Ziervogel* and *Waushara County*. Part II examines the variance provision in its larger statutory context. Part III considers the case law leading up to *Ziervogel* and *Waushara County*. Part IV dissects the various problems with the decisions in those two cases. Part V takes up an issue that was present in both *Ziervogel* and *Waushara County* but not thoroughly addressed: the availability of variances from the statutory restrictions on pre-existing, nonconforming uses. Part VI addresses the parallel variance provision in the enabling statute for

27. *Ziervogel*, 2004 WI 23, ¶ 2, 269 Wis. 2d 549, ¶ 2, 676 N.W.2d 401, ¶ 2; *Waushara County*, 2004 WI 56, ¶ 2, 271 Wis. 2d 547, ¶ 2, 679 N.W.2d 514, ¶ 2.

28. 74 Wis. 2d 468, 247 N.W.2d 98 (1976).

29. *Ziervogel*, 2004 WI 23, ¶ 3, 269 Wis. 2d 549, ¶ 3, 676 N.W.2d 401, ¶ 3.

30. 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

cities.³¹ The variance provision for cities differs from the provision for counties precisely by including two different terms for the degree of hardship that would permit a variance.

II. VARIANCE LAW IN ITS STATUTORY CONTEXT

The power of municipal governments to adopt zoning ordinances is either a dimension of their home rule powers, granted by article XI, section 3(1) of the Wisconsin Constitution, or delegated to them by the state legislature pursuant to specific enabling legislation. Regardless of the source of the power, the enabling legislation also elaborately regulates the way in which municipal governments exercise the power to zone.³² The Wisconsin enabling statute for counties, like the distinct statute for cities and villages, is closely patterned after the Standard State Zoning Enabling Act first published in draft form by the U.S. Department of Commerce in 1922 and then in its final version in 1926. The Standard Zoning Enabling Act, even in its draft form, quickly became the model for virtually all zoning enabling legislation across the country.³³

Among other things, the state enabling statute for counties permits counties to create local zoning boards of adjustment with well-defined powers, including the power to grant variances.³⁴ The extraordinary nature of variances and the limited scope of the discretion of ZBAs to grant variances are evident in the first instance from the very narrow language of the provision in the enabling statute that provides for the possibility of variances. That conclusion is doubly and triply reinforced, first, by the nature of the other powers of the ZBA and then by the role anticipated by the statute for the legislative body.

The variance provision for counties is codified at section 59.694(7)(c) of the Wisconsin Statutes. That provision reads in its entirety:

(7) Powers of board. The board of adjustment shall have all of the following powers:

31. WIS. STAT. § 62.23(7)(e)7 (2005–2006).

32. This is so in Wisconsin because the Wisconsin Constitution gives to the legislature the power to regulate the exercise of home rule powers for the sake of uniformity. Wisconsin Constitution article XI, section 3(1) reads: “Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.”

33. See generally DANIEL R. MANDELKER, LAND USE LAW § 4.15 (5th ed. 2003).

34. WIS. STAT. § 59.694(7)(c) (2005–2006).

....

(c) To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.³⁵

This provision, drawn directly from the Standard State Zoning Enabling Act,³⁶ is somewhat prolix. The adjective “unnecessary” that appears to condition the hardship requirement is repetitive of the condition that the variance not be contrary to the public interest. The necessity of the hardship is relative to the public interest in the strict enforcement of the provisions of the ordinance. The entire last clause of the provision, “that the spirit of the ordinance shall be observed and substantial justice done,” adds nothing to the conditions for the grant of the variance and seems to be merely an explanation for the inclusion of the variance—to do justice in the circumstances described, when possible, without compromising the goals of the zoning restrictions for the larger area in which the parcel is located.³⁷

Stripped of its redundancies, the provision permits variances when the following three conditions are present:

- i. The property possesses features not shared by other properties in its contiguous zone (“special conditions”).
- ii. Because of the special conditions, it is hard for the owner to develop the property consistent with the restrictions of its zone.
- iii. Granting the variance would not be contrary to the public interest as reflected in the restrictions for the

35. *Id.*

36. See U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 7 (1926).

37. This is not the only prolixity in the Standard Act and the Wisconsin statute. Both provide for the possibilities of special exceptions in two different places. Compare WIS. STAT. § 59.694(1) (“[T]he board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance”) with WIS. STAT. § 59.694(7)(b) (The board of adjustment has the power “[t]o hear and decide special exceptions to the terms of the ordinance upon which the board is required to pass under such ordinance.”).

zone.³⁸

The Standard Act provides substantial general comments and more detailed comments on many of its provisions.³⁹ It provides no comments, however, on the variance provision. Nonetheless, courts around the country have converged on a common understanding of these three conditions, a common understanding that was shared by the Wisconsin Supreme Court, as we will see in the next section.⁴⁰

The first two requirements are the defining conditions of the variance. The remedy is available to relieve the hardship that occurs when one parcel of land within its contiguous zone is different from the other parcels and the difference prevents the property from being developed within the restrictions of the zone. Differences that make it hard to develop land can be geological, hydrological, or topographical. Less likely, the difference can be the result of being on the margins of the zone and bordered by other uses that make the permitted uses under the zone inappropriate for the parcel. Individual parcels can be uniquely affected because zones tend to be fairly large, from a few acres up to a number of square miles in area. Within a contiguous zone, therefore, one parcel may have slopes, water, or exposed escarpment that might make it difficult or impossible to erect any useful structures and stay within the setbacks. A particular parcel may also be too small to permit development within the dimension requirements. That can happen when the parcel was subdivided before the zoning ordinance was adopted, with its minimum lot size requirements, and the parcel is much smaller than all of the other parcels in the zone that were assumed to characterize the area.

38. See WIS. STAT. § 59.694(7)(c). One of the early decisions interpreting this language, regarded as a classic decision by the treatise writers, is *Otto v. Steinhilber*, 24 N.E.2d 851 (N.Y. 1939). In that decision, the New York Court of Appeals summarized the three requirements:

Before the Board may . . . grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Id. at 853.

39. See generally U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926).

40. See generally MANDELKER, *supra* note 33, § 6.44.

From the very beginning, the threshold for a remediable hardship has been the same as the extreme limit for a regulatory taking: no economically beneficial use. Though the Standard Act offers no comment defining “hardship,” it has to be born in mind that the final version of the Standard Act was published only four years after the U.S. Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon*,⁴¹ the Court’s landmark decision in which it held for the first time that a land use regulation could amount to a taking governed by the takings clause of the Fifth Amendment to the U.S. Constitution.⁴² *Pennsylvania Coal* involved a challenge to Pennsylvania’s Kohler Act, which prohibited coal companies from mining coal in any way that would cause a subsidence of the surface.⁴³ The Court held that the Act amounted to a taking because it “destroy[ed] previously existing rights of property and contract.”⁴⁴ It found that “[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”⁴⁵

While clearly addressed to the regulatory takings problem, the

41. 260 U.S. 393 (1922).

42. *Id.* at 415. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

43. 260 U.S. at 412–13.

44. *Id.* at 413.

45. *Id.* at 414. In the years following *Pennsylvania Coal*, the Court gave the doctrine of regulatory takings only the most amorphous shape, much as it did with a number of other doctrines during that period. It refused to articulate bright-line rules and instead judged every case ad hoc and largely intuitively based upon the weight it assigned to a number of factors favoring both the property owner and the community. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central*, which is in many respects the last gasp of the intuitive approach, Justice Brennan, writing for the majority, explained, “[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” *Id.* at 124. Soon after its decision in *Penn Central*, the Court introduced two per se taking rules. The first applied to regulations that required an owner to tolerate a permanent physical invasion of his or her property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The second applied to regulations that so restricted the use of property that the regulation destroyed the entire economic value of the property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Footnote eight in *Lucas* kept alive the *Penn Central* approach for regulations that diminished the value of property without destroying the entire economic value. *Id.* at 1019 n.8. However, Justice Scalia’s opinion for the majority made it clear that the old ad hoc balancing test was no longer a balancing test. *Id.* at 1031. The public’s interest in the regulation was corralled into a nuisance exception: a regulation that diminished the value of property to the threshold for a taking was nonetheless not a taking if it did no more than duplicate the result of applying the traditional rules for private or public nuisances. *Id.* at 1029.

variance provision is not intended to be a complete remedy nor the sole remedy. Implicit in the conditions for the variance is the possibility that even if the restrictions for the zone destroy the entire economic value of the parcel, the owner still might not be entitled to a variance. That can happen if there are other properties that share the same physical features that create the hardship or if the ZBA determines that granting the variance would compromise the legislature's policy goals for the wider area reflected in the legislature's choice of zone. In either event, the more appropriate remedy is before the municipal legislative body. If there are more than a small number of parcels sharing the same disabling physical feature, that circumstance would suggest a problem with the choice of the particular zone for that area, a problem that would be more comprehensively and more appropriately addressed, consistent with the principles of separation of powers, by the municipality's legislative branch. One of the hallmarks of zoning is comprehensive planning. Indeed, one of the conditions for any zoning ordinance is that it be "in accordance with a comprehensive plan."⁴⁶ ZBAs are not in the position to craft comprehensive solutions to wider problems. They have jurisdiction over only the parcel immediately before them, and, as quasi-judicial bodies, they are appropriately denied the policy-making authority exercised by legislative bodies.

The unique importance of the legislative bodies is further underscored by the procedures and expertise available to legislative bodies that are denied to mere ZBAs. The remedy for multiple homeowners or for a homeowner whose desired use would conflict with the neighborhood would involve an amendment to the zoning ordinance. Before a municipal legislature can amend its ordinance, the application for the amendment first must be studied by the municipality's planning commission or zoning agency, which will then submit its study and recommendation to the legislature.⁴⁷ Planning commissions and zoning agencies, unlike ZBAs, tend to be composed of professional planners, architects, and engineers, or have such professionals on their staffs. The involvement of planning commissions and zoning agencies with professional staffs promotes informed deliberations about matters requiring the creation or fine tuning of policy.

Thus, the uniqueness requirement and the requirement that the

46. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (1926); WIS. STAT. §§ 59.69(3), 62.23(7)(c) (2005–2006).

47. See WIS. STAT. §§ 59.69(5), 62.23(1), 62.23(7)(d)(2).

variance not compromise the public policy reflected in the zone serve to limit the remedy to circumstances that can appropriately be addressed by an independent agency staffed by unelected, often amateur citizen volunteers. This function of the zoning conditions, to sort out problems appropriate for limited quasi-judicial judgments from those best left to the policy-making branch, clearly indicates a very limited role and limited determination by the ZBAs.

Indeed, to even speak of the ZBAs having “discretion” would appear to overstate their responsibilities. ZBAs under the provision are required to make findings, and if they find that the three conditions are satisfied, then, and only then, may they grant a variance.⁴⁸ If the conditions are satisfied, owners are entitled to the variance. If the conditions are not satisfied, the appropriate remedy is with the legislative body. There is little room in this scheme for the ZBAs to exercise discretion. The discretion belongs to the legislative body.

The tightly circumscribed character of the determination to be made by ZBAs with regard to variances is underscored by viewing it within the context of the two other equally limited powers of the ZBA. The first duty given to ZBAs is to grant special exceptions to the terms of the ordinance. The provision providing for that power twice in the same sentence iterates that the power is to be exercised subject to guidance provided by the legislative body. It reads:

The county board may provide for the appointment of a board of adjustment, and in the regulations . . . may provide that the board of adjustment may, *in appropriate cases and subject to appropriate conditions and safeguards*, make special exceptions to the terms of the ordinance in harmony with its general purpose and *intent and in accordance with general or specific rules therein contained*.⁴⁹

Special exceptions often take the form of conditional uses. These are a second category of uses provided for by the legislature in the textual description of each zone. The first category of uses within each zone consists of the uses that owners may make of property within the zone without having to obtain any prior approval by any governmental

48. WIS. STAT. § 59.694(7)(c) (2005–2006).

49. *Id.* § 59.694(1) (emphasis added).

agency.⁵⁰ The second category is comprised of the conditional uses the owner might make if the ZBA finds that the use will meet, in the words of the statute, the “general or specific rules” or conditions established by the legislature in the ordinance.⁵¹ The inclusion of conditional uses for a zone reflects the decision that the conditional use, under appropriate conditions, could be compatible with the uses permitted in the zone as a matter of right. For instance, in the most restrictive residential zone permitted in the City of Milwaukee, the RS-1 zone, the uses permitted as a matter of right are single-family residences.⁵² But under conditions set out in the ordinance, the ZBA may also permit family day care homes, adult family homes, and day care centers.⁵³ The conditions for a family day care home include, for instance, that the operator “reside in the dwelling unit.”⁵⁴

Some communities do not permit any conditional uses and limit special exceptions to the dimension limitations for a zone. In the Village of Whitefish Bay, for instance, the zoning ordinance provides for no special uses unless explicitly permitted in a particular provision.⁵⁵ The only provisions that allow special exceptions are dimension limitations.⁵⁶

The careful provision in the enabling statute for special exceptions “subject to appropriate conditions and safeguards” and “in accordance with general or specific rules” set out in the ordinance by the legislature,⁵⁷ and the precise way in which these special exceptions are created in ordinances, would appear to be patently at odds with the idea that ZBAs might have additional and substantial discretion under the variance provision to provide relief from the strictures of the ordinance

50. The owner very likely will have to obtain a building permit for a new improvement on the property, and the application for the building permit will be reviewed by the municipality’s city engineer or building staff, and perhaps by an architectural review committee. Those reviews focus on the plans for the improvement and their adequacy under the municipality’s building codes and design guidelines. The owner does not need permission for the use.

51. WIS. STAT. § 59.694(1).

52. MILWAUKEE, WIS., CODE OF ORDINANCES: BUILDING AND ZONING CODE § 295-503 (2007).

53. *Id.*

54. *Id.* at § 295-503-2e.

55. See WHITEFISH BAY, WIS., ZONING CODE § 16.20(3)(a) (2007) (“The Board of Appeals, pursuant to Wis. Stats. [§] 62.23(7)(e) and after appropriate notice and hearing, may grant a special exception to a requirement imposed by the Zoning Code, when the section of the Zoning Code which imposes such requirement expressly allows for special exceptions.”).

56. *Id.* § 16.20(3)(d).

57. WIS. STAT. § 62.23(7)(e)1 (2005–2006).

whenever the ZBA felt that the owner's desires would not be dissonant with the neighborhood. If a ZBA had that kind of discretion under the variance provision, the special use provision would hardly seem to be at all necessary; it would be subsumed within the variance power. The most reasonable inference to be drawn from the special exception provisions, therefore, has to be that the power of ZBAs under the variance provision is limited to the extraordinary circumstances described in that provision.

The third power of ZBAs under the enabling statutes is the power "[t]o hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination made by an administrative official in the enforcement" of the ordinance.⁵⁸ The power to correct "errors" suggests that there is a standard in the ordinance for determining when an administrative official of the municipality has made a correct determination or has fallen into error. That standard consists of the specifications for the various zones set out by the legislative body in the definitions of the zones. Once again, this power, just like the other powers given to ZBAs, suggests a quasi-judicial function at best.⁵⁹ The ZBAs, in exercising each of their responsibilities, are to make findings of fact, or perhaps findings of mixed law and fact, according to standards established by the legislature, and, based on their findings, are to grant or deny applications submitted by property owners. There is nothing in the provisions of the enabling statute defining these functions that suggests that ZBAs were intended to have broad discretion.

Thus, ZBAs are denied broad discretion in part because of their status as unelected agencies as well as their limited jurisdiction.

58. WIS. STAT. § 59.694(7)(a) (2005–2006); see also U.S. DEPT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 7(a) (1926); WIS. STAT. § 62.23(7)(e) (2005–2006).

59. *But see* *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228, 698 N.W.2d 701. This decision, handed down a year after *Ziervogel* and *Waushara County*, further advances the court's misunderstanding of the limited role of ZBAs in the scheme of land use regulation. In *Osterhues*, the court held that ZBAs, under their power to hear appeals from the decisions of administrators, could go beyond correcting merely legal errors and could in addition correct *equitable* errors, thus further underscoring the court's view of ZBAs as *übertribunals* of justice in land use affairs. *Id.* ¶ 43, 282 Wis. 2d 228, ¶ 43, 698 N.W.2d 701, ¶ 43. It is not at all clear what principles are to guide the equitable decisions of ZBAs in this role. Most importantly, granting ZBAs essentially unbounded equitable powers is inconsistent with the statutory descriptions of the more specific remedies of variances and special uses, both of which are circumscribed by exacting conditions.

III. THE JUDICIAL ROOTS OF WISCONSIN VARIANCE LAW: *SNYDER* AND *KENOSHA COUNTY*

Justice Sykes, writing for the majority in *Ziervogel*, claimed to be returning Wisconsin variance law to its roots—to a bifurcated standard established in the court’s 1976 decision in *Snyder v. Waukesha County Zoning Board of Adjustment*.⁶⁰ She also insisted that the court erroneously departed from that root in its more recent decision in 1998 in *State v. Kenosha County Board of Adjustment*.⁶¹ Even a superficial reading of *Snyder*, however, reveals that *Snyder* rejected a lesser standard for dimension variances and insisted that the sole standard for both use and dimension variances was the traditional “no economically beneficial use.”⁶² Thus, *Kenosha County*, far from perverting the established standard, merely followed *Snyder* in refusing to make the hardship standard for dimension variances relative to the desires of an owner.

A. *Snyder v. Waukesha County Board of Adjustment*

The issue in *Snyder* and the court’s immediate approach to the issue alone demonstrate that the court was unwilling to adopt a lesser standard for dimension variances. The plaintiff in *Snyder* had been denied a variance by the Waukesha County Zoning Board for a porch because the porch would only “increase the nonconformity of an already nonconforming structure.”⁶³ The plaintiff relied on the fact that the county ordinance authorized variances for either “practical difficulties or unnecessary hardships” and argued therefore that his request for an area variance be granted under the lesser standard of practical difficulty.⁶⁴

The court noted, however, that contrary to the language of the county’s ordinance, the state enabling statute for counties established

60. *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶¶ 25–29, 269 Wis. 2d 549, ¶¶ 25–29, 676 N.W.2d 401, ¶¶ 25–29 (citing *Snyder v. Waukesha County Bd. of Adjustment*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976)).

61. *Id.* ¶¶ 27–30, 269 Wis. 2d 549, ¶¶ 27–30, 676 N.W.2d 401, ¶¶ 27–30 (citing *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998)).

62. *See Snyder*, 74 Wis. 2d at 474, 247 N.W.2d at 102.

63. *Id.* at 475, 247 N.W.2d at 102.

64. *Id.* at 472, 247 N.W.2d at 101. The Waukesha County Shoreland and Floodland Protection Ordinance uses both “practical difficulties” and “unnecessary hardship,” *id.* at 472, 247 N.W.2d at 101 (quoting WAUKESHA COUNTY, WIS., SHORELAND AND FLOODLAND PROTECTION ORDINANCE § 17.03(1)(c)), where the enabling statute for counties, as we have seen, uses only the term “unnecessary hardship.”

only the single standard of unnecessary hardship.⁶⁵ The court observed, “Thus, because [the state enabling statute] does not include the element of practical difficulty while the ordinance does, a question arises as to the relevance of appellant’s arguments relating to claimed practical difficulty.”⁶⁶ The court resolved the problem, and avoided a conflict between the enabling statute and the county ordinance, by finding that the two terms meant the same thing.⁶⁷ “However,” the court said, “although the terms ‘unnecessary hardship’ and ‘practical difficulty’ are insusceptible to precise definition and are often stated disjunctively in zoning enactments, the authorities generally recognize that there is no practical difference between them.”⁶⁸ Consequently, the court held, “This conclusion permits the court to consider appellant’s claims of practical difficulty despite the fact that [the state enabling statute] empowering the board of adjustment to authorize variances, refers only to unnecessary hardship.”⁶⁹ Thus, Professor Daniel Mandelker, in his preeminent treatise on land use, accurately cites *Snyder* as among the paradigmatic examples of courts refusing to adopt two standards for hardship when the enabling statute refers only to the one standard of “unnecessary hardship.”⁷⁰

Turning to the definition of “unnecessary hardship,” and by implication “practical difficulty,” the court looked back to its own then relatively recent decision in *State ex rel. Markdale Corp. v. Board of Appeals of City of Milwaukee*⁷¹ in which it held that “[s]ince the main purpose of allowing variances is to prevent land from being rendered useless, ‘unnecessary hardship’ can best be defined as a situation where in the absence of a variance no feasible use can be made of the land.”⁷² Clearly, if “unnecessary hardship” and “practical difficulty” mean the same thing, and “unnecessary hardship” means “no feasible use,” then “practical difficulty” also means “no feasible use,” and there is no

65. *Id.* at 472, 247 N.W.2d at 101.

66. *Id.* at 472, 247 N.W.2d at 101.

67. *Id.* at 472, 247 N.W.2d at 101.

68. *Id.* at 472–73, 247 N.W.2d at 101 (citing 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 45-20 (3d ed. 1972)) (“The overlapping of the concepts of practical difficulty and undue hardship in so many factual situations and the lack of real reason for treating the two situations differently, has caused courts to treat the two terms as if they were synonymous.” (quoting 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 45-20 (3d ed. 1972))).

69. *Id.* at 474, 247 N.W.2d at 102.

70. MANDELKER, *supra* note 33, § 6.48 n.2.

71. 27 Wis. 2d 154, 133 N.W.2d 795 (1965).

72. *Id.* at 163, 133 N.W.2d at 799 (citation omitted) (quoted in *Snyder*, 74 Wis. 2d at 474, 247 N.W.2d at 102).

difference between the hardship standards for uses and dimensions.

The court also offered an acutely perceptive explanation for why some might mistakenly believe that the definition of hardship for dimension variances was easier to meet than the definition for uses. The error was the result of failing to recognize that the term “unnecessary hardship” is not a single concept or condition. In fact, the term mentions two distinct conditions: (i) hardship and (ii) the lack of any necessity for the hardship. As the court observed,

[T]he fact that area variances are considerably easier to obtain than use variances creates the impression that a minimal showing of difficulty will establish the element of practical difficulty and entitle the landowner to a variance. *However*, area variances are not more easily obtained because practical difficulties are something much less severe than unnecessary hardship, but because area variances do not involve great changes in the character of neighborhoods as do use variances. *This relates to what hardships or practical difficulties may be considered unnecessary or unreasonable in light of the purpose of the zoning law.*⁷³

In this passage, the court not only clarifies that “unnecessary hardship” is not a single blended condition, it also underscores its earlier holding that a minimal showing of difficulty is not sufficient to grant an area variance.

Perhaps the only place in the court’s opinion that might be read to have suggested a different standard for area variances is where it appears to offer a distinct articulation of a test for area variances. It says, following the discussion already related,

When considering an area variance, the question of whether unnecessary hardship or practical difficulty exists is best explained as “[w]hether 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.”⁷⁴

73. *Snyder*, 74 Wis. 2d at 473, 247 N.W.2d at 101–02 (emphasis added).

74. *Id.* at 474–75, 247 N.W.2d at 102 (quoting 2 RATHKOPF, THE LAW OF ZONING AND

If we eliminate the words “unreasonably” and “unnecessarily” in keeping with the court’s own admonition not to confuse the condition of necessity with the distinct condition of hardship, then this test does no more than reiterate that hardship means unable to use the property for a permitted purpose, or burdensome. It is only the appearance of the latter term, ambiguously stated in the alternative, that suggests that the test for area variances may be less than no economic use. However, the court had already flatly stated that the test for area variances was not less than the test for use variances.⁷⁵ In addition, if burdensomeness was less than “unable to use the property for a permitted purpose,” there would be no point in including the more severe term in the definition of the test for area variances because, presumably, no one would be required to meet it. Consequently, in the context of the discussion immediately preceding this passage, the term “burdensome” has to be read to mean the same thing as “unable to use the property for a permitted purpose,” and the appearance of both terms in the passage needs to be recognized for what it unquestionably is: just a bit of lawyer’s prolixity.

Even if the mention of “burdensomeness” had created an ambiguity, the ambiguity was surely put to rest by the court’s own treatment of the facts of the case. The plaintiff applied for a variance to be able to add a porch to his home on Lac La Belle in the town of Oconomowoc.⁷⁶ The porch would have encroached on the side offsets by at least seven feet, four inches and, including the intended roofline, at most by nine feet, four inches.⁷⁷ The court first emphasized that any hardship had to be the result of unique features of the property. It held: “[T]he offset

PLANNING 45-28 (3d ed. 1972)).

75. *Id.* at 473, 247 N.W.2d at 102.

76. *Id.* at 469, 247 N.W.2d at 100 (from the editor’s abstract).

77. *Id.* at 470–71, 247 N.W.2d at 100 (from the editor’s abstract). The facts are actually slightly more complicated. The town’s building inspector, as the result of a misunderstanding about the offsets, had mistakenly given the plaintiff verbal permission to build the porch. *Id.* at 470, 247 N.W.2d at 100 (from the editor’s abstract). The inspector caught the error only after the porch had been substantially completed and a neighbor complained about the encroachment. *Id.* at 470, 247 N.W.2d at 100 (from the editor’s abstract). Consequently, the plaintiff applied for a variance only after nearly completing the construction. *Id.* at 470, 247 N.W.2d at 100 (from the editor’s abstract). The plaintiff argued, among other things, that having to remove the porch would itself either constitute or contribute to the unnecessary hardship of having to meet the setbacks. *Id.* at 475, 247 N.W.2d at 102. Despite the waste, the court held the plaintiff to the standards of the ordinance because, the court found, any hardship caused by the construction was self-created. *See id.* at 476, 247 N.W.2d at 103. Even in the absence of the porch, the house was already a nonconforming structure. The existing nonconformity does not appear to have been a factor in the court’s decision.

requirement placed upon appellant's lot is not unique or peculiar to his property, for it applies equally to all lots of similar size. Because the restriction does not especially affect appellant's lot, it may not constitute hardship or difficulties which justify a variance."⁷⁸

Turning specifically to the application of the hardship threshold, the court described the plaintiff's expressed need as follows: "Appellant claims he needs this porch to enjoy lake living, to accommodate his expanded family, and to increase the value of his land."⁷⁹ Once again, the court reiterated that the standard for area variances is no less than the standard for use variances, and it then rejected the plaintiff's interests as altogether irrelevant: "Outside of New York," the court observed, "where a minimal showing of practical difficulties will justify an area variance, the authorities indicate that a showing of natural growth of a family and personal inconvenience do not constitute practical difficulties or unnecessary hardship which justify a variance."⁸⁰ Having concluded that there was no hardship, the court did not even consider whether the variance would be harmonious with the legislature's plan for the neighborhood. It concluded simply that "the evidence establishes that the appellant's claimed practical difficulty or hardship relied upon for granting the variance is . . . no more than personal inconvenience."⁸¹

It could not be much clearer that in both word and deed the court in *Snyder* rejected a unique and lesser standard for area variances that was relative to the owner's desires for his property. The test is the objective standard of no reasonable use, not the relative standard of the owner's desire. In both *Ziervogel* and *Waushara County*, the court neglected to read *Snyder* in any way approaching thoroughness. It did not acknowledge the telling issue in *Snyder*, and it did not revisit the court's analysis of the law or the court's relentless application of that law to the facts. In both recent decisions, the court did no more than to superficially quote *Snyder*'s reference to "burdensome" in addition to "unreasonably prevent the owner from using the property for a permitted purpose." As we have seen, that reference in the complete context of the discussion in *Snyder* is most accurately seen as no more than a trivial instance of lawyer's prolixity.

78. *Id.* at 477, 247 N.W.2d at 103 (citing ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 14.55, at 32 (1968); 8 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 25.167, at 543-45 (3d ed. 1965)).

79. *Id.* at 478, 247 N.W.2d at 104.

80. *Id.* at 478, 247 N.W.2d at 104.

81. *Id.* at 479, 247 N.W.2d at 104.

B. State v. Kenosha County Board of Adjustment

The court in *Ziervogel* insisted that its predecessors in 1998 in *State v. Kenosha County Board of Adjustment*⁸² had strayed from *Snyder*'s lesson that the standard of hardship for dimension variances demanded less of owners.⁸³ By insisting on a single standard for all variances, the court claimed, *Kenosha County* departed from reason and precedent.⁸⁴ Read in light of the foregoing discussion, however, *Kenosha County* appears to be solidly among the ranks of decisions in Wisconsin, exemplified by *Snyder*, and around the country, treating variances as they were intended—as extraordinary remedies for extraordinary circumstances. *Kenosha County*, contrary to the claim of the court in *Ziervogel*, is thus yet another illustration of the original understanding and intended operation of the variance provision.

The plaintiff in *Kenosha County* owned a house on Hooker Lake in the Town of Salem in Kenosha County.⁸⁵ She wanted to construct a deck off the front of the house extending towards the lake.⁸⁶ Under the county's zoning ordinance, the required setback from the lake was seventy-five feet, as demanded by the state's shoreland statute.⁸⁷ Without the porch, the house sat seventy-eight feet from the water, three feet farther than required by the setback.⁸⁸ The porch, however, would have caused the house to encroach on the setback by eleven feet.⁸⁹ In support of her application for a variance, the plaintiff testified merely that "a deck would update the house, make the house look more attractive, and be used for recreational purposes and a view of the lake."⁹⁰

Consistent with the rogue modus operandi of ZBAs reported in the Klimczyk survey,⁹¹ the ZBA for Kenosha County unanimously granted the application.⁹² In support of its decision, it offered findings that had nothing to do with the legal standards for variances. There was no

82. 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

83. State *ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶¶ 26–31, 269 Wis. 2d 549, ¶¶ 26–31, 676 N.W.2d 401, ¶¶ 26–31.

84. *Id.* ¶¶ 27, 31, 269 Wis. 2d 549, ¶¶ 27, 31, 676 N.W.2d 401, ¶¶ 27, 31.

85. 218 Wis. 2d at 399, 577 N.W.2d at 816.

86. *Id.* at 399, 577 N.W.2d at 816.

87. *Id.* at 400, 577 N.W.2d at 816.

88. *Id.* at 399, 577 N.W.2d at 816.

89. *See id.* at 399, 577 N.W.2d at 816.

90. *Id.* at 401, 577 N.W.2d at 817.

91. *See generally* Klimczyk, *supra* note 3.

92. *Kenosha County*, 218 Wis. 2d at 399, 577 N.W.2d at 817.

finding of a special condition of the property or, as required by *Snyder*, a finding of no reasonable use of the property absent the variance.⁹³ The ZBA merely found that other properties were even closer to the lake, that petitioner's request was modest, that homes built prior to the enactment were entitled to special considerations (especially homes on the lake for which owners paid higher taxes), and that to deny the request "would be confiscatory and unreasonable."⁹⁴ After a second hearing prompted by the DNR's appeal of the grant, the ZBA supplemented its finding.⁹⁵ The supplementary findings, however, were still far afield of the legal requirements. It found, for instance, that the property owner's "case would be *unnecessarily burdensome* because she would be denied a use that a great many other lakefront property owners do enjoy" and that the plaintiff faced unique conditions because her property sloped from the front of the house to the shoreline.⁹⁶ Without any supporting evidence in the record, the ZBA also opined that the deck would provide a safety barrier.⁹⁷

What is particularly interesting about *Kenosha County* is that the county's own ordinance explicitly demanded special conditions in two places and defined "unnecessary hardship" as "no reasonable use." In a set of guidelines addressed to the ZBA, the ordinance included: "[t]hat the existence of these special conditions will restrict the use of the land if the Ordinance is applied literally so as to render the land useless."⁹⁸ The definition of "unnecessary hardship" in the ordinance stated, "Unnecessary hardship is present only where, in the absence of a variance, no feasible use can be made of the property."⁹⁹ In granting the variance to the plaintiff, the Kenosha County ZBA disregarded not only the supreme court's decision in *Snyder*, it also demonstrated what we now know to be a typical ignorance or utter disregard of its own ordinance.

The Wisconsin Supreme Court, on the other hand, hewed closely to its earlier decision in *Snyder* as well as to one of its more recent

93. *Id.* at 404, 577 N.W.2d at 818.

94. *Id.* at 402, 577 N.W.2d at 817.

95. *Id.* at 402-05, 577 N.W.2d at 817-18.

96. *Id.* at 404, 577 N.W.2d at 818.

97. *Id.* at 404-05, 577 N.W.2d at 818.

98. *Id.* at 408, 577 N.W.2d at 819 (quoting KENOSHA COUNTY, WIS., GENERAL ZONING AND SHORELAND/FLOODPLAIN ZONING ORDINANCE § 12.36-13).

99. *Id.* at 409, 577 N.W.2d at 820 (quoting KENOSHA COUNTY, WIS., GENERAL ZONING AND SHORELAND/FLOODPLAIN ZONING ORDINANCE app. A).

intervening decisions, *Arndorfer v. Sauk County Board of Adjustment*.¹⁰⁰ Citing *Arndorfer*, the court first insisted that “[p]roof of unnecessary hardship includes the burden of proving ‘uniqueness.’”¹⁰¹ The limitation was “essential,” the court explained, again quoting *Arndorfer*, “to ‘prevent the purposes of the zoning regulations from being undermined by the granting of piecemeal exceptions to those regulations.’”¹⁰² The court recognized and honored the distinct and limited role of the local commission in contrast to the more comprehensive policy-making role of the legislature: “where the hardship imposed on the applicant’s land is shared by nearby land, relief should be addressed through the legislative, rather than administrative means.”¹⁰³ In *Kenosha County*, there was no evidence presented that the plaintiff’s property differed in any way from that of her neighbors. On the contrary, in granting the variance, the ZBA relied on the fact that many other properties already encroached on the setback.¹⁰⁴ The supreme court held that “[t]he fact that [the property owner’s] home and deck may be visually compatible with the character of other homes on Hooker Lake is not a factor for the Board to use in determining, in this specific case, whether [the property owner] has a reasonable use of her property without the deck.”¹⁰⁵

Though the lack of a special condition would have been sufficient to overturn the grant of the variance, the court also addressed the lack of the appropriate hardship. The court stated, “We agree that the State’s definition of unnecessary hardship—no reasonable use of the property without a variance—is compatible with the concerns we expressed in *Snyder*.”¹⁰⁶ The *Kenosha County* court also drew support from an intervening court of appeals decision, *State v. Winnebago County*,¹⁰⁷ which held that “the proper test is not whether a variance would

100. 162 Wis. 2d 246, 469 N.W.2d 831 (1991). *Arndorfer* is unique among the supreme court’s decisions in that the facts involved an application for a structural variance to permit the installation of holding tanks instead of some other sewage disposal system. *Id.* at 249, 469 N.W.2d at 832. The court’s discussion in *Arndorfer* is nonetheless a model of the traditional demand for unique conditions and hardship as threshold issues.

101. *Kenosha County*, 218 Wis. 2d at 410, 577 N.W.2d at 820 (citing *Arndorfer*, 162 Wis. 2d at 254, 469 N.W.2d at 834).

102. *Id.* at 413, 577 N.W.2d at 821 (quoting *Arndorfer*, 162 Wis. 2d at 255, 469 N.W.2d at 834).

103. *Id.* at 420, 577 N.W.2d at 824 (quoting *State v. Winnebago County*, 196 Wis. 2d 836, 846, 540 N.W.2d 6, 10 (Ct. App. 1995)).

104. *Id.* at 415, 577 N.W.2d at 822.

105. *Id.* at 417, 577 N.W.2d at 823.

106. *Id.* at 413, 577 N.W.2d at 821.

107. 196 Wis. 2d 836, 540 N.W.2d 6 (Ct. App. 1995).

maximize the economic value of the property, but whether a feasible use is possible without the variance.”¹⁰⁸ As to the plaintiff’s application and the ZBA’s findings, the court stated that “this court in *Winnebago* held that maximizing economic value of the property is not a proper test for determining unnecessary hardship.”¹⁰⁹ In language that might have been drawn directly from *Snyder*, the court concluded that, “[w]hile loss of economic value is not the sole reason why the Board granted the variance in this case, [the property owner’s] projected loss of value cannot be bootstrapped to a deck that is merely a personal convenience, and form a sufficient basis for a variance.”¹¹⁰ As in *Snyder* and decisions of the court of appeals following *Snyder*, the court distinguished true hardships from the mere frustration of the desires of the owner, the latter being no more than a “personal convenience.”¹¹¹

Far from being a radical departure from *Snyder*, *Kenosha County* was a virtual replay of *Snyder* right down to the porches for which the owners sought variances. Also implicit in the court’s broad research and reliance on precedent in *Kenosha County* is that *Kenosha County* was not even unique after *Snyder* in applying a very strict and single standard for hardship. *Kenosha County* relied on one of its own intervening decisions, *Arndorfer*, and on one opinion from the court of appeals, *Winnebago County*.

IV. THE ACTIVISM OF *ZIERVOGEL* AND *WAUSHARA COUNTY*

A. *An Ominous Foreshadowing*

In 2001, barely three years after *Kenosha County*, the court decided *State v. Outagamie County Board of Adjustment*.¹¹² *Outagamie County* foreshadowed the court’s decisions in *Ziervogel* and *Waushara County*, but it decisively failed to overturn the single standard for hardship only because the court splintered, with no opinion attracting a majority. Nonetheless, Justice Sykes, newly appointed to the court since *Kenosha County*, wrote the lead opinion that introduced the themes that would

108. *Kenosha County*, 218 Wis. 2d at 413, 577 N.W.2d at 822 (citing *Winnebago County*, 196 Wis. 2d at 846, 540 N.W.2d at 9).

109. *Id.* at 418–19, 577 N.W.2d at 824. The court was mistaken in referring to *Winnebago County* as one of its own decisions; *Winnebago County* was a decision of the court of appeals. *Winnebago County*, 196 Wis. 2d 836, 540 N.W.2d 6.

110. *Kenosha County*, 218 Wis. 2d at 419, 577 N.W.2d at 824.

111. *Id.* at 419, 577 N.W.2d at 824.

112. 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

later find majorities in *Ziervogel* and *Waushara County*.¹¹³ Justice Crooks's concurring opinion in *Outagamie County* is interesting if for no other reason than as a curious contrast to his later opinion for the majority in *Waushara County*.

Outagamie County involved a familiar set of facts: the homeowners wanted to build a sun porch.¹¹⁴ But in this case, they were stopped by the fact that their house was an illegal, nonconforming use; it was built in violation of an already existing regulation.¹¹⁵ The owners' property was in a flood fringe area under the applicable county shoreland-floodplain-wetland ordinance, which required that the first floor of a residential building located in such an area, including a basement, be two feet above the regional flood elevation.¹¹⁶ The owners' basement well exceeded the limit.¹¹⁷ The owners sought a variance for the basement after the county zoning administrator denied them a building permit for the porch because of the nonconforming basement.¹¹⁸ The county ZBA unanimously granted the owners a variance, which was upheld by the district court but reversed by the court of appeals based on *Kenosha County*.¹¹⁹

The supreme court split three ways. Justice Sykes, writing for herself and Justices Bablitch and Prosser, would have overturned *Kenosha County* and adopted a lesser standard of hardship for area variances.¹²⁰ Justice Crooks, writing for himself and Justice Wilcox, concurred in a part of Justice Sykes's opinion, which is not relevant here, but refused to overrule *Kenosha County* and refused to adopt a lower standard of hardship for area variances, though he offered an interpretation of *Snyder* that would have permitted ZBAs vastly more

113. How the court went from unanimously upholding the traditional understanding of variance law in *Kenosha County* to radically revising the law just three years later is explained by the usual mechanism—a change in membership. In 1998, the same year the court decided *Kenosha County*, Justice David Prosser replaced Justice Janine Geske, the author of the court's opinion in *Kenosha County*. One year later, Justice Diane Sykes replaced Justice Donald Steinmetz. Between the two appointments, it would appear that the appointment of Justice Sykes was the more decisive for the court's radical shift in its approach to variances. Justice Sykes wrote the plurality opinion in *Outagamie County* and the court's opinion in *Ziervogel*.

114. 2001 WI 78, ¶ 13, 244 Wis. 2d 613, ¶ 13, 628 N.W.2d 376, ¶ 13.

115. *Id.* ¶ 13, 244 Wis. 2d 613, ¶ 13, 628 N.W.2d 376, ¶ 13.

116. *Id.* ¶¶ 8–9, 244 Wis. 2d 613, ¶¶ 8–9, 628 N.W.2d 376, ¶¶ 8–9.

117. *Id.* ¶ 12, 244 Wis. 2d 613, ¶ 12, 628 N.W.2d 376, ¶ 12.

118. *Id.* ¶¶ 13–14, 244 Wis. 2d 613, ¶¶ 13–14, 628 N.W.2d 376, ¶¶ 13–14.

119. *Id.* ¶¶ 17–20, 244 Wis. 2d 613, ¶¶ 17–20, 628 N.W.2d 376, ¶¶ 17–20.

120. *Id.* ¶ 5, 244 Wis. 2d 613, ¶ 5, 628 N.W.2d 376, ¶ 5.

discretion than had ever been previously recognized.¹²¹ Justice Abrahamson dissented in an opinion joined by Justice Bradley.¹²²

1. Justice Sykes's Lead Opinion

Justice Sykes's opinion is the most interesting and complex. Though arguably it makes the greatest number of mistakes, the mistakes together nonetheless form a coherent philosophical picture. Justice Sykes first insisted that *Kenosha County* mistakenly departed from the rule in *Snyder*: "*Kenosha County* purported to be faithful to *Snyder* and to the rule of deference to the discretion of boards of adjustment, when indeed it was not."¹²³ *Snyder*, Justice Sykes claimed, had established a distinct and lower threshold of hardship for area variances: "our law has always treated use variances differently from area variances because of the different purposes underlying use and area zoning."¹²⁴ That claim is based, however, on a misreading of *Snyder*'s explanation for why some people might *mistakenly* think that the hardship standard for area variances is lower than the hardship standard for uses. Recall that *Snyder* first held that there was no difference between the terms "unnecessary hardship" and "practical difficulties" that appeared in the county ordinance that governed that case.¹²⁵ The court interpreted the two terms alike, in part to avoid a conflict with the state enabling statute that mentioned only the one term—"unnecessary hardship."¹²⁶ It then explained that some might have the *misperception* that there is a different standard for area variances because they fail to recognize that the term "unnecessary hardship" expresses two distinct standards: hardship and whether the hardship is necessary to serve the public ends reflected in the ordinance.¹²⁷ Though the standard of hardship might be identical for both uses and areas, area variances will be easier to obtain because they are seldom as dissonant with their neighbors as are use variances. Consequently, denying the variance will not be necessary as

121. *Id.* ¶¶ 71–80, 244 Wis. 2d 613, ¶¶ 71–80, 628 N.W.2d 376, ¶¶ 71–80 (Crooks, J., concurring).

122. *Id.* ¶¶ 119, 150, 244 Wis. 2d 613, ¶¶ 119, 150, 628 N.W.2d 376, ¶¶ 119, 150 (Abrahamson, C.J., dissenting).

123. *Id.* ¶ 32, 244 Wis. 2d 613, ¶ 32, 628 N.W.2d 376, ¶ 32 (majority opinion).

124. *Id.* ¶ 34, 244 Wis. 2d 613, ¶ 34, 628 N.W.2d 376, ¶ 34 (citing *Snyder v. Washington County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 473–75, 247 N.W.2d 98, 101–02 (1976)).

125. *Snyder*, 74 Wis. 2d at 473–75, 247 N.W.2d at 101–02.

126. *Id.* at 472, 247 N.W.2d at 101.

127. *Id.* at 473–74, 247 N.W.2d at 101–02.

often to protect the character of the neighborhood.¹²⁸

Justice Sykes made the precise error that the court in *Snyder* warned against; she treated “unnecessary hardship” as if it were a single concept.¹²⁹ That mistake then quite naturally led her to conceive of the test for “unnecessary hardship” as involving a balancing of the public interest against the burden of the regulation to the owners’ desires:

[B]ecause area variances do not generally change neighborhood character, “unnecessary hardship” in area variance cases is measured against a lower standard relating to the nature of the area restriction in question, that is, whether compliance with the particular area restriction would “unreasonably prevent the owner from using the property for a permitted purpose” or be “unnecessarily burdensome.”¹³⁰

The correct analysis under *Snyder* and every other Wisconsin decision prior to *Outagamie County* treats both uniqueness and hardship as threshold questions apart from necessity.¹³¹ The ZBA does not address the necessity of the hardship until it first determines that there are special conditions affecting the property that make it impossible for the owner to make any economically beneficial use of the property consistent with the land use ordinances. Only if the owner’s circumstance reaches the threshold is the ZBA authorized to consider whether enforcing the regulations that create the hardship is nonetheless necessary to achieve the public policy goals of the ordinance. *Snyder* itself is a perfect example of the methodology. Because the court in *Snyder* found that neither the threshold for uniqueness nor the threshold for hardship had been satisfied, it did not address the necessity of the nonexistent hardship.

Justice Sykes’s second error is more subtle, complex, and interesting, and is also undoubtedly the motivation for her decision. She misconceived the constitutional ends of the variance and the limited role of the ZBA in resolving potential constitutional issues and failed to

128. *Id.* at 473–74, 247 N.W.2d at 101–02.

129. *See Outagamie County*, 2001 WI 78, ¶ 38, 244 Wis. 2d 613, ¶ 38, 628 N.W.2d 376, ¶ 38.

130. *Id.* ¶ 38, 244 Wis. 2d 613, ¶ 38, 628 N.W.2d 376, ¶ 38 (quoting *Snyder*, 74 Wis. 2d at 475, 247 N.W.2d at 102).

131. *See, e.g., State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

acknowledge altogether the place of the municipal legislature in addressing circumstances that exceed the appropriately limited authority of an appointed board. In other words, she vastly overstated the constitutional issues and treated the ZBA as the sole governmental arm for relieving owners of burdens to constitutionally protected rights. Her conception of the variance is apparent in her statement of the issue. After first declaring that *Kenosha County* was an erroneous departure from the court's precedent, she said: "But more fundamentally, this case is about individual private property rights, the scope of the police power to regulate them through zoning, and the statutory authority of local boards to strike a balance between the two through variances."¹³²

In light of this conception of the function of variances, she quite naturally then regarded any stricter standard for area variances as an unwarranted contraction of the discretion of ZBAs to serve this important task of doing justice.¹³³ She said,

Kenosha County mistakenly merged the previously distinct standards for measuring "unnecessary hardship" in area and use variances This has robbed boards of adjustment of the discretion explicitly vested in them by the legislature as a hedge against the individual injustices that occasionally result from the application of otherwise inflexible zoning regulations.¹³⁴

Justice Sykes is surely correct that the variance provision is intended to serve the ends of justice and constitutional rights. But crucial questions still remain: which constitutionally protected rights, which concern of justice, and how is the variance provision intended to serve those ends? Just as Justice Sykes failed to offer any analysis of the

132. *Outagamie County*, 2001 WI 78, ¶ 7, 244 Wis. 2d 613, ¶ 7, 628 N.W.2d 376, ¶ 7. Justice Sykes repeats this theme many times in her discussion. See, e.g., *id.* ¶¶ 41–47, 244 Wis. 2d 613, ¶¶ 41–47, 628 N.W.2d 376, ¶¶ 41–47.

133. This leaves an interesting question: if the stakes are so high, why shouldn't the ZBA have similar discretion to do justice in cases of use variances? Justice Sykes's explanation hinges on what she perceives to be the distinct purposes of use restrictions as opposed to dimension regulations. See *id.* ¶ 38, 244 Wis. 2d 613, ¶ 38, 628 N.W.2d 376, ¶ 38 ("Thus, because variances from use restrictions have the potential to bring about greater changes in neighborhood character, 'unnecessary hardship' in use variance cases is measured against a higher standard . . ."). The distinction is not convincing, however. Presumably the greater impact of a use variance could simply and easily be accommodated within the test that Justice Sykes prescribes for area variances. Indeed, that is precisely the reason given by the *Snyder* court why use variances are harder to obtain than area variances.

134. *Id.* ¶ 32, 244 Wis. 2d 613, ¶ 32, 628 N.W.2d 376, ¶ 32.

explicit conditions set out for the variance in the enabling statute, she similarly failed to identify which constitutionally protected rights she was referring to. In her statement of the issue, she indiscriminately blended together unspecified issues of property rights with issues of the definition of the police power. That admixture suggests that she invoked something like a federal substantive due process right. Substantive due process is most fundamentally the right not to have one's liberty curtailed without a good reason. That would appear to be the idea reflected in Justice Sykes's understanding that a determination of unnecessary hardship requires a balance of the desires of the property owner against the needs of the community.

There are at least two serious problems with that vague invocation of substantive due process as an explanation for the creation of variances. In the first instance, the right that Justice Sykes built into the variance provision vastly exceeds the rights given under modern substantive due process and would delegate to a local, non-professional, volunteer administrative board discretion that even the federal judiciary has not claimed since the *Lochner*¹³⁵ Era. Modern substantive due process focuses quite narrowly on whether legislation is directed at an adequate purpose. The search for an adequate purpose is understood to be identical to the inquiry into whether, under state constitutional law, a statute is within the police power, a power defined by the ends that the legislature may pursue: the promotion of the health, welfare and safety of the people of the state.¹³⁶ For example, in the U.S. Supreme Court's classic zoning decision, *Village of Euclid v. Ambler Realty Co.*,¹³⁷ the Court said of the two constitutional doctrines,

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely . . . : Is the ordinance invalid, in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and

135. *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* still represents the high water mark of the Court's wholesale disregard of the fundamental principle of separation of powers, the limits of its own constitutional authority, and the policy-making role of the legislatures. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3 (7th ed. 2004).

136. See *State v. Redmon*, 134 Wis. 89, 106–08, 114 N.W.137, 140–41 (1907).

137. 272 U.S. 365 (1926).

confiscatory?”¹³⁸

Later in that opinion, addressing the reasons supporting zoning in general, the Court further clarified the inquiry: “the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹³⁹ Professor Mandelker summarizes the law of substantive due process in the context of land use regulations as follows:

Land use controls must satisfy the substantive limitations imposed on land use regulation by the due process clause. Courts interpret this clause to mean that land use controls must advance legitimate governmental interests that serve the public health, safety, morals, and general welfare. State zoning legislation restates these purposes as the guiding objectives in land use regulation, though the general welfare predominates in this litany of police power nouns. Whether land use regulation serves the general welfare is the major substantive due process question.¹⁴⁰

Nowhere in the Court’s modern decisions concerning substantive due process or in the treatises is it suggested that it would be appropriate for the courts to balance the public interest against the desires of a property owner.¹⁴¹

138. *Id.* at 386.

139. *Id.* at 395.

140. MANDELKER, *supra* note 33, § 2.39 (citation omitted).

141. In a number of early regulatory takings cases, the Court indicated that the burden of a land use regulation on a property owner was to be balanced against the public interest. The high water mark of that jurisprudence, as well as its last gasp, was the Court’s decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). That balancing aspect of the early doctrine reflected the Court’s failure to unravel the early substantive due process aspect of the Court’s seminal decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), from its discussion of the takings clause. See generally Robert Brauneis, “The Foundation of our ‘Regulatory Takings’ Jurisprudence”: *The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996).

Following *Penn Central*, the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), converted the public interest from a counterweight in a balance of public and private interests into a bright line nuisance exception. Under the nuisance exception, a regulation that would otherwise be deemed a taking because of its effect on the ability of an owner to use his property will not be deemed to be a taking if it does no more than duplicate

Beyond the precise focus of the doctrine on legitimate ends, the Supreme Court, honoring principles of separation of powers, insisted that the inquiry defer to the implicit determinations of the legislature that any challenged regulation does indeed serve a legitimate health, welfare, or safety need.¹⁴² As the Court indicated in the quote from *Euclid* above, the courts are to declare legislative acts invalid only if there is clear and convincing evidence demonstrating that the regulation is not directed at a legitimate end.¹⁴³ As Professor Mandelker observed, “Judicial review in substantive due process cases is deferential, and substantive due process objections to the purposes of land use regulations do not usually succeed.”¹⁴⁴ If the Court eschews balancing in the context of substantive due process out of a regard for its own limitations as a judicial, non-policy-making body and the constitutional policy-making role of the legislature, it would appear to be all the more perverse to interpret the variance provision to delegate that extreme of non-deference to legislative determinations to a mere local, amateur, non-elected, appointed volunteer board. Justice Sykes’s interpretation of the constitutional underpinnings of the variance procedure appears to create far more constitutional issues than it solves.

More fundamentally, however, there are other, less abstract reasons, and reasons focused more precisely on the language and history of the variance provision for rejecting Justice Sykes’s expansive vision of the rights protected by the variance provision and the proper role of ZBAs. As we already saw in Part II, there is nothing in the provisions of the state’s enabling act for counties that suggests that these boards were intended to exercise any but the most limited and guided authority. The variance provision itself limits the availability of variances to circumstances in which the property is burdened by a “special condition” and, as a result of the special condition, the owner is unable to develop the property consistent with the applicable regulations.¹⁴⁵ It is only if the owner demonstrates that these threshold conditions have been met that the ZBA is to consider whether granting the variance would detract from the public policy reflected in the regulation. In that context, the public interest is not a counterweight to be balanced against

the result that would have occurred under the state’s traditional rules of private or public nuisance. *Id.* at 1029. The theory is that the liberty to cause a nuisance was never part of an owner’s title, so denial of that liberty takes nothing. *See id.* at 1027.

142. *Euclid*, 272 U.S. at 395.

143. *Id.*

144. MANDELKER, *supra* note 33, § 2.39.

145. *See* WIS. STAT. § 59.694(7)(c) (2005–2006).

the owner's desires; it is yet another limitation or condition on the ability of the owner to obtain a variance.

This interpretation of the power of a ZBA is also consistent with the limitations on the other powers of the ZBA and their relationship to the determinations of the legislature. ZBAs are authorized to grant special exceptions, but only "in harmony with [an ordinance's] general purpose and intent and in accordance with general or specific rules therein contained."¹⁴⁶ We have seen that in some communities, special exceptions are limited to relief from area requirements.¹⁴⁷ The idea that the variance procedure is yet another opportunity for owners to avoid area requirements in the discretion of the ZBA would appear to be in direct conflict with the limitations prescribed for special uses.

The only other power of the ZBA is to hear appeals from the decisions of zoning administrators "where it is alleged there is error."¹⁴⁸ The very idea of "error" implies a standard against which a decision of an administrative official can be judged erroneous. This standard appears in the ordinances as determined by the legislative body of the municipality. All of these provisions demonstrate that ZBAs are to hew closely to legislative determinations. There is nothing in these provisions to suggest the expansive discretion that Justice Sykes contemplated for ZBAs that would allow them, case by case, to determine if the application of a regulation in a particular case is so weighty as to justify the frustration of an owner's desire for his property.

In addition, the constitutional right and the principle of justice served by variances is not substantive due process, even accurately understood; rather it is patently the takings clause and the possibility of a regulatory taking. The explicit language of the statutory variance procedure recognizes that there may be circumstances in which a zone, appropriate for most all of the land embraced, may nonetheless include a parcel or two that is physically different from the other parcels and different in ways that make it impossible for the owner to develop the land consistent with the limitations of the regulation. Nowhere in her opinion in *Outagamie County* does Justice Sykes acknowledge or discuss the takings clause.¹⁴⁹ As emphasized earlier, though, the variance

146. *Id.* § 59.694(1).

147. *See supra* notes 55–56 and accompanying text.

148. WIS. STAT. § 59.694(7)(a).

149. Justice Sykes's preference for substantive due process over the takings clause is especially perverse. The takings clause provides far greater protection to property interests than does substantive due process. Substantive due process, properly understood, provides protection only against arbitrary limitations to a person's liberty. Given the court's deference

provision is not even intended to be the sole remedy for a potential regulatory taking. Quite obviously, under the explicit conditions set out in the statute, a ZBA is to deny a variance either if the condition that makes it impossible to develop the land is not unique to the owner or if the variance would be dissonant with the character of the neighborhood, *even if the owner can make no economically beneficial use of the land*. In that circumstance, implicit in the limitations of the statute, the remedy for the problem is with the legislative, policy-making body of the municipality with the advice of its professional planning commission—not the unelected, volunteer, amateur board. That understanding of the proper and complimentary roles of boards and legislatures has been recognized repeatedly by courts, including the Wisconsin Supreme Court in *Arndorfer*.¹⁵⁰ Once again, a proper understanding of the statute's allocation of authority between boards and municipal legislatures belies the broad discretion that Justice Sykes imagined for ZBAs.

The capstone of Justice Sykes's transformation of the lowly ZBA into the *über* land use justice commission is judicial deference. Judicial deference to the decisions of ZBAs is not new. The court in *Snyder* recalled that “[i]n reviewing the decisions of the adjustment board in this case it must be kept in mind that the court is hesitant to interfere with administrative determinations . . . and accords the decision of the board of adjustment a presumption of correctness and validity.”¹⁵¹ Justice Sykes adds nothing rhetorically to this formulation. However, by eliminating the uniqueness requirement as a practical limitation on the availability of variances, making the hardship requirement relative to the interests of the property owner, and allowing the boards to judge the weight to be given to the legislature's regulations, she has reduced the

to legislative determinations, and the consequent burden on challengers, as Professor Mandelker observes, it is virtually impossible to win a substantive due process challenge. MANDELKER, *supra* note 33, § 2.39.

The takings clause, on the other hand, presumes that a regulation serves a legitimate purpose but goes further and asks whether the regulation fairly allocates the costs of providing a public benefit to the owner or whether it ought more fairly to be assumed by the entire community. This is the great and enduring insight of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Justice Sykes reverses the preference only because of her inaccurately expansive understanding of substantive due process as demanding a case-by-case balancing of private frustration and public need.

150. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 255–56, 469 N.W.2d 831, 834 (1991).

151. *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 247 N.W.2d 98, 103 (1976) (citations omitted).

test to little more than a judgment call by a ZBA, case by case.

Under the more robust test for variances, the courts could at least determine if the uniqueness requirement had been considered and whether the evidence truly supported a decision judged against the objective standard of no reasonable use. What was left for deference was a decision by a ZBA that under the circumstances, granting the variance would not unduly compromise the goals of the regulation from which the variance was sought. For example, in *Snyder* itself, the supreme court carefully evaluated the evidence behind the decision of the board of adjustment that there was neither a hardship nor unique circumstances.¹⁵² The court concluded its discussion by observing, “[T]he evidence establishes that the appellant’s claimed practical difficulty or hardship relied upon for granting the variance is either self-created or no more than personal inconvenience. Therefore, the board’s decision to refuse a variance was not unreasonable or without a rational basis.”¹⁵³ As mentioned earlier, the court in *Snyder* never reached the issue of whether the requested variance would unduly compromise the goals of the regulation.¹⁵⁴ There was no need since the property owner had not satisfied the threshold issues.

In sharp contrast to the analysis in *Snyder*, Justice Sykes never addressed the traditional threshold issues in *Outagamie County* and instead leaped to the conclusion that

[t]he hardship suffered under either scenario—basically, the complete loss of the basement—is substantial, far outweighing the benefits of enforcing the strict letter of the flood elevation requirements. True, one sure way to avoid basement flood damage is to get rid of the basement altogether, but this is such regulatory overkill under the circumstances of this case that the Board’s action in granting the variance was completely justified.¹⁵⁵

Combining so stripped-down an inquiry by a board with judicial deference leaves virtually nothing for a court to countermand and, consequently, virtually eliminates judicial oversight and leaves the amateur ZBAs as the final judge of every land use issue brought before

152. *Id.* at 479, 247 N.W.2d at 104.

153. *Id.* at 479, 247 N.W.2d at 104.

154. *See supra* note 81 and accompanying text.

155. *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶ 52, 244 Wis. 2d 613, ¶ 52, 628 N.W.2d 376, ¶ 52.

them.¹⁵⁶

2. Justice Crooks's Concurring Opinion

On first blush, Justice Crooks's concurring opinion in *Outagamie County* looks as if it avoided all of the confounding errors in Justice Sykes's opinion. He recognized that *Snyder* refused to endorse a different and lower standard for area variances.¹⁵⁷ He acknowledged that the proper definition of "unnecessary hardship" is no reasonable use, though he attributed that definition to *Kenosha County*.¹⁵⁸ He even seems to understand that whether the regulation creates a hardship for an owner is distinct from the issue of its necessity in light of the public need. He repeatedly quotes that part of *Snyder* where the *Snyder* court drew a clear distinction between hardship and necessity in explaining the misapprehension that hardship for area variances is less than hardship for use variances, that in fact, the greater ease of obtaining an area variance "relates to what hardships or practical difficulties *may be*

156. Slightly over a year after deciding *Ziervogel* and *Waushara County*, in *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of the City of Milwaukee*, the court acknowledged the statutory right of applicants to appeal the denial of variances by ZBAs. 2005 WI 117, ¶¶ 15–16, 284 Wis. 2d 1, ¶¶ 15–16, 700 N.W.2d 87, ¶¶ 15–16. To assure the meaningfulness of an appeal, the court required ZBAs to disclose their reasons for denying a variance. *Id.* ¶ 39, 284 Wis. 2d 1, ¶ 39, 700 N.W.2d 87, ¶ 39. The court did not insist that ZBAs prepare a written decision, however, and, in the absence of a written decision, the court would review a transcript of the proceedings before the ZBA. *Id.* ¶ 31, 284 Wis. 2d 1, ¶ 31, 700 N.W.2d 87, ¶ 31. In *Lamar*, the court overturned the denial of the variance and remanded the application for reconsideration. *Id.* ¶ 39, 284 Wis. 2d 1, ¶ 39, 700 N.W.2d 87, ¶ 39. The court found that even the transcript did nothing more than recite the grounds laid out in the ordinance, failed to refer to evidence in support of the finding, and was tainted by one member's personal distaste for billboards. *Id.* ¶¶ 36–38, 284 Wis. 2d 1, ¶¶ 36–38, 700 N.W.2d 87, ¶¶ 36–38.

These would appear to be minimal and welcome procedural requirements. The criticism in the text focuses on the court's evisceration of the criteria for granting a variance and the conversion of the test into a balance of the desires of the owner against the board's assessment of the importance of the regulation in the particular situation. If a board recites the facts of the case and explicitly exercises the extraordinary judgment bestowed by *Ziervogel* and *Waushara County*, there remains much less for a reviewing court to review even given the procedural requirements of *Lamar*.

157. Although, without citing any earlier Wisconsin decisions, Justice Crooks mistakenly believed that Wisconsin law before *Snyder* recognized a standard of hardship for area variances that was lower than the standard for use variances: "Prior to the time *Snyder* was decided, area variances apparently were granted based upon a showing of 'practical difficulties' which was 'something much less severe than unnecessary hardship' . . . *Snyder* eliminated that distinction." *Outagamie County*, 2001 WI 78, ¶ 72, 244 Wis. 2d 613, ¶ 72, 628 N.W.2d 376, ¶ 72 (Crooks, J., concurring) (quoting *Snyder*, 74 Wis. 2d at 473, 247 N.W.2d at 101–02).

158. *Id.* ¶ 73, 244 Wis. 2d 613, ¶ 73, 628 N.W.2d 376, ¶ 73.

considered unnecessary or unreasonable in light of the purpose of the zoning law.”¹⁵⁹ He refused to join Justice Sykes’s lead opinion because he rejected her revision of the standard of unnecessary hardship and saw no reason to overturn *Kenosha County*.¹⁶⁰

But it becomes clear as one reads further into the opinion that Justice Crooks fell into exactly the confusion that the court in *Snyder* warns against. Having accepted that the standard of hardship is no reasonable use, Justice Crooks nonetheless, quite bizarrely and without explaining how it might actually be done, insisted that whether there is no reasonable use must be determined in light of the policy of the regulation. “However,” he wrote, “the ‘no reasonable use’ language of *Kenosha County* should have been applied by the Board only after considering the purpose of the zoning ordinance, and the nature of the specific restriction at issue.”¹⁶¹ He seems to believe that the standard of no reasonable use can vary with the goals of the regulation. It is patently clear, as the court recognized in *Snyder* and *Kenosha County*, that the *necessity* of the hardship varies with the goals of the regulation and the extent of the variance—indeed it must. But “no reasonable use” is simply *no* reasonable use. It is one thing, as Justice Sykes insisted in her lead opinion, for the standard of hardship to be less than that for use and to be measured against the owner’s desires. It is quite another thing to insist that the standard for area variances, as for use variances, is no reasonable use, but that the standard of “*no* use” can somehow vary from circumstance to circumstance. The language alone precludes variation.

The absolute nature of the concept, and at least one important justification, are well illustrated in Justice Scalia’s opinion in *Lucas v. South Carolina Coastal Council*.¹⁶² *Lucas* was an enormous leap in the sophistication of the Supreme Court’s regulatory takings jurisprudence. In *Lucas*, Justice Scalia, among other things, eliminated the vague balancing test from *Penn Central*, converting the public policy counterweight into a bright line nuisance exception.¹⁶³ More importantly for the present discussion, he also introduced into the doctrine a second,

159. *Id.* ¶ 72, 244 Wis. 2d 613, ¶ 72, 628 N.W.2d 376, ¶ 72 (quoting *Snyder*, 74 Wis. 2d at 473, 247 N.W.2d at 101–02); see *supra* text accompanying note 69.

160. *Id.* ¶¶ 71–72, 244 Wis. 2d 613, ¶¶ 71–72, 628 N.W.2d 376, ¶¶ 71–72 (“I write separately because I see no reason to overrule [*Kenosha County*]. . . . It is with the lead opinion’s interpretation of the ‘unnecessary hardship’ standard that I part company . . .”).

161. *Id.* ¶ 76, 244 Wis. 2d 613, ¶ 76, 628 N.W.2d 376, ¶ 76.

162. 505 U.S. 1003 (1992).

163. *Id.* at 1031; see also *supra* note 141.

bright line per se rule: a regulation that so restricts the use of a parcel of land that it “deprives the owner of all economically feasible use” is a taking per se.¹⁶⁴ The per se rule of *Lucas* is identical to the traditional hardship threshold condition of variances. That it meant exactly what it said is illustrated by Justice Scalia’s careful reply to Justice Stevens’s complaint that the rule was too severe and arbitrary in that it compensated an owner 100% of the value of the owner’s property when the entire value had been destroyed but gave an owner no remedy when the regulation destroyed only 95% of the value.¹⁶⁵ Justice Scalia explained that the rule did not preclude compensation in the latter case.¹⁶⁶ In such cases, the owner might not have the benefit of the per se rule, but might still be entitled to some compensation under the weighing test of *Penn Central*. Justice Scalia did not say that the no economic use test allowed for variation depending on the public interest at stake. Indeed, such a move would have been completely antithetical to the conversion of the public’s interest from a counterweight in a balance to a bright line nuisance exception.¹⁶⁷

Justice Crooks made a second error that also suggests a very loose apprehension of the concept of a hardship in the context of the variance provision. Although the immediate desire of the owners in *Outagamie County* was to add a porch to their home, the obstacle to constructing the porch was not any regulation bearing on the porch itself. The obstacle to the porch was the fact that the basement to the house violated floodplain regulations that prohibited the basement altogether. The owners were therefore seeking a variance from the floodplain regulations concerning the basement. Because the floodplain regulations were in effect when the owners built their home, the nonconforming basement would ordinarily have been considered a self-created hardship.¹⁶⁸ But the owners in *Outagamie County* argued that the basement was not a self-created hardship because when they applied for the building permit to construct their home with the nonconforming

164. *Id.* at 1015, 1016 & n.7.

165. *Id.* at 1019 & n.8.

166. *Id.*

167. A few years ago, I had the opportunity to talk with Justice Scalia about this aspect of his decision in *Lucas*. I suggested to him that his reply to Justice Stevens’s criticism was oddly dissonant with the rest of *Lucas* which, by eliminating the soft balancing from *Penn Central* and introducing a bright line per se rule, otherwise sought to bring clarity to the rule and eliminate the soft and unpredictable balancing of *Penn Central*. His response, refreshing in its candor, was, “You’re assuming I wrote footnote eight.”

168. See, e.g., *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 247 N.W.2d 98, 103 (1976).

basement, the town's building department not only failed to inform them of the floodplain regulation but granted them the permit.¹⁶⁹ Justice Crooks agreed with that argument and held that the actions of the town's building department estopped the county ZBA from denying the variance.¹⁷⁰

The problem with this argument begins with conceiving of the basement as a hardship, whether or not self-created. The only kind of hardship that is significant for the sake of a variance is the inability to develop because of special conditions of the land. As the court made clear in *Snyder*,

Practical difficulties or unnecessary hardship do not include conditions personal to the owner of the land, but rather to the conditions especially affecting the lot in question. "[I]t is not the uniqueness of the plight of the owner, but uniqueness of the land causing the plight, which is the criterion."¹⁷¹

In addition, the Wisconsin Supreme Court had never applied the doctrine of estoppel against a municipality because of the actions of a zoning administrator. A similar issue arose in *Snyder*, and the court unequivocally refused to adopt the doctrine in that circumstance: "[T]he mere statements or assurances of the building inspector cannot confer such a right. The [owner] is charged with knowledge of the zoning ordinance and thus may not successfully contend that the existence of the porch, constructed without first obtaining a variance, is not a self-created hardship."¹⁷²

Justice Crooks believed that the unavailability of estoppel should only apply, however, in cases where a neighbor seeks to enforce the provisions of a regulation. Estoppel should apply, according to Justice Crooks, when the government itself is seeking to enforce a regulation over its own prior error.¹⁷³

As intuitively appealing as it might be to relieve a property owner of

169. See *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶ 17, 244 Wis. 2d 613, ¶ 17, 628 N.W.2d 376, ¶ 17.

170. *Id.* ¶ 78, 244 Wis. 2d 613, ¶ 78, 628 N.W.2d 376, ¶ 78 (Crooks, J., concurring).

171. *Snyder*, 74 Wis. 2d at 479, 247 N.W.2d at 104 (quoting 8 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 25.167, at 543–45 (3d ed. 1965)).

172. *Id.* at 477, 247 N.W.2d at 103 (citation omitted).

173. *Outagamie County*, 2001 WI 78, ¶ 78, 244 Wis. 2d 613, ¶ 78, 628 N.W.2d 376, ¶ 78 (Crooks, J., concurring).

burdens caused at least in part by the negligence of a zoning administrator, the variance would still not appear to be the appropriate relief. As mentioned earlier, both the requirement that the property be unique and that the owner suffer a hardship because of the unique conditions preclude the remedy of a variance.¹⁷⁴ The statutory conditions for the variance are not elastic enough to accommodate the doctrine of estoppel. The more appropriate remedy would be a declaratory judgment by a court that, in the appropriate circumstance, the municipal government is estopped from enforcing its regulations. If the municipal government is estopped from enforcing its regulations, then the nonconformity is no longer a nonconformity simply by virtue of the estoppel and no variance is required. Accommodating estoppel within the variance provision adds confusion to the meaning of hardship and compromises the intended functions of the variance remedy. It also suggests a willingness to twist doctrine whenever expedient to reach a desired outcome.

B. Ziervogel and Waushara County

After *Outagamie County*, *Ziervogel* might seem to be something of an anticlimax, and indeed in many ways it is. Justice Sykes came to the same conclusions concerning area variances and offered the same arguments that she introduced in *Outagamie County*. *Kenosha County*, she still claimed, wrongly departed from the standard set in *Snyder*.¹⁷⁵ More fundamentally, the definition of “unnecessary hardship” must be expansive enough to provide local ZBAs with discretion, so they can do justice in circumstances where the public policy does not justify the frustration of an owner’s desire to improve her property.¹⁷⁶ Thus, “unnecessary hardship” in the case of area variances requires a ZBA to balance the public interest in zoning compliance “against the private interests of property owners in individual cases.”¹⁷⁷ The methodological and conceptual errors in this line of argument were already discussed in the preceding section.

What is most interesting about *Ziervogel*, then, is not the opinion but

174. See *supra* Part III.

175. State *ex rel.* Ziervogel v. Washington County Bd. of Adjustment, 2004 WI 23, ¶¶ 3–4, 269 Wis. 2d 549, ¶¶ 3–4, 676 N.W.2d 401, ¶¶ 3–4.

176. *Id.* ¶¶ 4–5, 269 Wis. 2d 549, ¶¶ 4–5, 676 N.W.2d 401, ¶¶ 4–5.

177. *Id.* ¶ 17, 269 Wis. 2d 549, ¶ 17, 676 N.W.2d 401, ¶ 17. (“Variance procedure in zoning law serves several essential purposes: . . . to provide a procedure by which the public interest in zoning compliance can be balanced against the private interests of property owners in individual cases . . .”).

the votes. Only one new member joined the court after *Outagamie County* and before *Ziervogel*: Justice William Bablitch left the court to be replaced by Justice Patience Roggensack. Justices Abrahamson and Bradley, who dissented in *Outagamie County*, did not participate in the decision. Otherwise, all of the justices joined in Justice Sykes's opinion for the court, including Justices Crooks and Wilcox, who refused to join Justice Sykes in *Outagamie County*. It is those two born-again votes that made Justice Sykes's plurality opinion in *Outagamie County* the court's opinion in *Ziervogel*.

Equally intriguing is Justice Crooks's opinion for the same majority two months later in *Waushara County*.¹⁷⁸ We have already seen that in his concurring opinion in *Outagamie County*, Justice Crooks embraced a categorical error that allowed the relatively bright line concept of no reasonable use to vary with the goals of the regulation. In *Waushara County*, he found that the lower courts had not applied the no reasonable use test as flexibly as he had hoped. "When we consider the emphasis on purpose that we find in *Kenosha County*," he wrote, "it appears that the no reasonable use standard has been applied, since that case, in a very restrictive manner."¹⁷⁹ But as was discussed earlier, how else does one apply language that is nigh on absolute?¹⁸⁰

His disappointment with the way in which the condition has been administered leads him to declare it no longer the law. In its place, the court will return to the definition of hardship that he believed was given in *Snyder*: "in evaluating whether to grant an area variance to a zoning

178. See *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514. It is also intriguing that there were two opinions in these cases. Both were argued together on the same day, both involved the exact same issue—the definition of hardship for area variances, both came to roughly the same conclusion, and the same majorities joined both of the court's opinions. Curiously, too, though the court's opinion in *Waushara County* came out two months after the court's opinion in *Ziervogel*, Justice Crooks's opinion in *Waushara County* does not discuss or even cite to the opinion in *Ziervogel* until near the very end, in a footnote that says only, "We note that this opinion should be read together with our decision in *State ex rel. Richard W. Ziervogel v. Washington County Bd. of Adjustment*, which was released earlier this term of the court." *Id.* ¶ 34 n.20, 271 Wis. 2d 547, ¶ 34 n.20, 679 N.W.2d 514, ¶ 34 n.20 (citation omitted). Speculation would be idle, especially where the known facts, the opinions in these cases, and their development, themselves pose ample problems.

179. *Id.* ¶ 32, 271 Wis. 2d 547, ¶ 32, 679 N.W.2d 514, ¶ 32 (citing *Ziervogel*, 2003 WI App 82, 263 Wis. 2d 321, 661 N.W.2d 884; *Voss v. Waushara County Bd. of Adjustment*, No. 02-1307, 2003 WL 1889443 (Wis. Ct. App. Apr. 17, 2003); *State v. Waushara County Bd. of Adjustment*, No. 02-2400 (Wis. Ct. App. May 7, 2003)).

180. The very fact that at least two panels of the court of appeals applied the no reasonable use rule absolutely further underscores the eccentricity of Justice Crooks's position.

ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.”¹⁸¹ Thus, jettisoning the more objective standard of no reasonable use, hardship becomes, as it does with Justice Sykes, relative to the desires of the owner. In Justice Sykes’s version of the test, the ZBA is supposed to assign weights to the desire of the owner and the goals of the regulation and balance the two.¹⁸² Justice Crooks never used the term balance and did not elaborate beyond what has already been discussed. The continued ambiguity in his opinion is the result of the combination of, on the one hand, failing to disentangle the two dimensions of “unnecessary hardship,” i.e., (i) hardship and (ii) whether it is nonetheless necessary to preserve the goals of the regulation, and, on the other hand, failing to explain consequently whether policy bears on necessity or hardship. It is possible that his test is modest: the variance must be denied, regardless of the degree of frustration of the owner’s desires, if the variance, were it granted, compromises the goals of the regulation. Or perhaps Justice Crooks is willing to allow a variance to compromise the policy of the regulation to a greater degree when the hardship is more significant. Justice Crooks’s formulation of the rule leaves the idea unclear.

It would appear, in any event, that Justice Crooks should have agreed with Justice Sykes that *Kenosha County* must be overruled, particularly because he, along with the rest of the majority, joined Justice Sykes’s opinion in *Ziervogel* that explicitly overruled *Kenosha County*. But, quite bizarrely, he once again rejected that conclusion: “We find no need to accept the [owners’] invitation to overrule *Kenosha County*. Rather, the term ‘no reasonable use,’ as set forth in *Kenosha County*, is no longer applicable when consideration is being given to whether to grant an area variance.”¹⁸³ Reading these opinions, one has the discomfiting feeling that words do not bind as expected and rules no longer guide. A post-modernist with a deconstructive bent might have a field day with these opinions, though I suspect the legal realist would be content to nod knowingly.

181. *Waushara County*, 2004 WI 56, ¶ 2, 271 Wis. 2d 547, ¶ 2, 679 N.W.2d 514, ¶ 2.

182. *See State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶ 38, 244 Wis. 2d 613, ¶ 38, 628 N.W.2d 376, ¶ 38.

183. *Waushara County Bd. of Adjustment*, 2004 WI 56, ¶ 32, 271 Wis. 2d 547, ¶ 32, 679 N.W.2d 514, ¶ 32.

C. *The Scope of Ziervogel and Waushara County: Consideration of Special Conditions*

I suggested at the outset that the effect of *Ziervogel* and *Waushara County* might be modest if the court still limited the availability of variances to situations in which there is, in the words of the statute, some “special condition” of the property which, given the regulation, creates the hardship. We have seen that this condition was intended to distinguish cases that were appropriate for administration by a local quasi-judicial board from cases that were more appropriately resolved by the elected, policy-making legislative body of the municipality with the advice of its professional planning commission. As the court observed in *Arndorfer*: “The ‘uniqueness’ element is necessary to prevent the purposes of the zoning regulations from being undermined by the granting of piecemeal exceptions to those regulations. . . . [W]here the hardship imposed on the applicant’s land is shared by nearby land, relief should be addressed through legislative, rather than administrative, means.”¹⁸⁴

In both *Ziervogel* and *Waushara County*, the court mentions the uniqueness requirement a number of times in passing, suggesting that it still provides a discrete and independent limit that continues to circumscribe the availability of variances.¹⁸⁵ However, there are also a great many reasons to believe that the uniqueness limitation has been subordinated to the overriding goal of granting the ZBAs the discretion to do justice in individual cases.

In the first instance, there is no acknowledgement in either Justice Sykes’s or Justice Crooks’s opinions in *Outagamie County*, or in their opinions in *Ziervogel* or *Waushara County*, of the role of the legislature in providing relief in any cases of hardship caused by a land use regulation. Furthermore, if the court is serious about assuring that the ZBAs have the authority to do justice in individual cases, it would appear that the uniqueness requirement, as much as, if not more than, the hardship requirement, restricts that discretion to a very small number of cases. In *Ziervogel*, for instance, Justice Sykes complained that “[a]pplication of the ‘no reasonable use’ standard to area variances

184. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 255–56, 469 N.W.2d 831, 834 (1991) (citing *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476–79, 247 N.W.2d 98, 103–04 (1976)).

185. See, e.g., *Waushara County Bd. of Adjustment*, 2004 WI 56, ¶ 6 n.8, 271 Wis. 2d 547, ¶ 6 n.8, 679 N.W.2d 514, ¶ 6 n.8; *Ziervogel*, 2004 WI 23, ¶ 7, 269 Wis. 2d 549, ¶ 7, 676 N.W.2d 401, ¶ 7.

overwhelms all other considerations in the analysis, rendering irrelevant any inquiry into the uniqueness of the property, the purpose of the ordinance, and the effect of a variance on the public interest.”¹⁸⁶ The same is equally true of the uniqueness requirement. Perhaps an implicit recognition of that fact, and explicitly motivated by the desire to ensure that the ZBAs have ample discretion, Justice Sykes gave the uniqueness requirement a spin such that it no longer acts as a limitation on the variance, but rather as a condition that favors the grant of the variance. She wrote, “For the statutory discretionary authority to be meaningful, boards of adjustment must have the opportunity to distinguish between hardships that are unnecessary in light of unique conditions of the property and the purpose of the ordinance, and hardships that do not warrant relief”¹⁸⁷

The most telling evidence that the court no longer regards the uniqueness requirement as a significant condition is its own disregard of the requirement in its analysis of the merits of the variance applications in these various cases. In *Outagamie County*, for instance, the owners’ hardship had nothing to do with any features of the property that prevented them from building in compliance with the regulations, much less features of the property not shared by their neighbors; the hardship they claimed came about because they built a basement in an area where basements were not allowed.¹⁸⁸ Justice Sykes deemed the circumstances to be unique because, presumably, only these owners built a basement based on an erroneously granted permit from the town building department. She held, “[T]he hardship is unique to the property and not ‘self-created’ to the extent that the [owners] built their home (with the nonconforming basement floor) pursuant to and in reliance upon a building permit duly issued by the Town of Bovina.”¹⁸⁹

In *Ziervogel*, in their brief before the court, the owners describe conditions that indicate that their nonconforming home, squeezed between the lakeshore and a road, is located on the only buildable space on their lot.¹⁹⁰ Likely because those same conditions apply to all of the properties adjacent to the owners’ property, the owners do not mention the uniqueness requirement and neither Justice Sykes nor Justice

186. *Ziervogel*, 2004 WI 23, ¶ 28, 269 Wis. 2d 549, ¶ 28, 676 N.W.2d 401, ¶ 28.

187. *Id.* ¶ 29, 269 Wis. 2d 549, ¶ 29, 676 N.W.2d 401, ¶ 29.

188. *See generally* *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

189. *Id.* ¶ 53, 244 Wis. 2d 613, ¶ 53, 628 N.W.2d 376, ¶ 53.

190. Brief of Plaintiffs-Appellants-Petitioners at 5–6, *Ziervogel v. Washington County Bd. of Adjustment*, No. 02-1618 (Wis. July 10, 2003).

Crooks in their respective opinions considers whether there is anything unique about the owners' parcel.

This is in sharp contrast to all of the court's opinions in the cases immediately preceding *Outagamie County*, beginning with *Snyder*. In *Snyder*, where the court supported the denial of a variance and instead required an owner to demolish a nonconforming porch, the court prominently addressed the uniqueness requirement and held that "the offset requirement placed upon appellant's lot is not unique or peculiar to his property, for it applies equally to all lots of similar size. Because the restriction does not especially affect appellant's lot, it may not constitute hardship or difficulties which justify a variance."¹⁹¹

In *Arndorfer*, the homeowners had installed a holding tank in an area where holding tanks were prohibited.¹⁹² They sought a variance after the fact.¹⁹³ The court held that "[t]he record provides no basis for concluding that the soil problems that have caused the Arndorfers' hardship are unique to their land. Because the Arndorfers have not met their burden of establishing uniqueness, this court is not in a position to order the Board to grant their variance."¹⁹⁴

Finally, in *Kenosha County*, the last case correctly decided by the court, Justice Geske, writing for the court, after first acknowledging the important role of the legislature in these cases, held with regard to the plaintiff's nonconforming porch that

[t]he Board itself noted that [the owner's] complaint about loss of shoreline due to erosion was likely a condition shared by other Hooker Lake property owners. In any event, no evidence was offered to demonstrate that the erosion, even in combination with the slope, formed a unique condition, one which prevents [the owner] from enjoying a reasonable use of her property.¹⁹⁵

If, as this contrast suggests, the court has subordinated uniqueness, just as it has hardship, to no more than a factor in a balancing of private

191. *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 477, 247 N.W.2d 98, 103 (1976).

192. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 250, 469 N.W.2d 831, 832 (1991).

193. *Id.* at 250–51, 469 N.W.2d at 832.

194. *Id.* at 258, 469 N.W.2d at 835.

195. *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 420, 577 N.W.2d 813, 824 (1998).

interests and public policy, then it has truly radically reinterpreted the statutory provision for variances in Wisconsin and thrown its support behind the rogue practices of the ZBAs themselves.

V. VARIANCES AND PRE-EXISTING, NONCONFORMING USES

Variations and nonconforming structures are obviously intimately connected. The function of a variance is to permit a structure (or a use) that would otherwise not be permitted under zoning or other land use ordinances and would therefore otherwise be nonconforming. The effect of granting the variance is to relieve the property of the force of the regulation so that the structure permitted by the variance is a conforming structure. The variance effectively alters the regulations applicable to the lot.

The court's decision in *Waushara County* raises a unique issue, however, and suggests an additional wrinkle to the variance provision that cannot be squared with a sound theory of variances. *Waushara County* suggests that an owner might be entitled to a variance from the nonconforming use provisions of the state statute independently of the underlying regulations that make a structure nonconforming.¹⁹⁶ The owners in *Waushara County* owned a home on Silver Lake in Waushara County.¹⁹⁷ Their lot was 120 feet deep but subject to overlapping setbacks, one of 110 feet from the road at the rear of the lot and a second from the lakeshore of 35 feet, so there was no room left on the lot for the construction of any improvements.¹⁹⁸ As the court observed, their home was not in danger of being destroyed because it was already in existence when the setbacks went into effect.¹⁹⁹ It was, in Wisconsin zoning parlance, a *legal* nonconforming use.

Legal nonconforming uses in Wisconsin, as in every other state, are nonetheless subject to some restrictions. The most important restriction in this instance is the 50% reinvestment rule. Under Wisconsin law at the time *Waushara County* was decided, the owners of a nonconforming structure could not invest in their structure more than 50% of the assessed value of the structure.²⁰⁰ For example, the county ordinance in

196. See *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

197. *Id.* ¶ 3, 271 Wis. 2d 547, ¶ 3, 679 N.W.2d 514, ¶ 3.

198. *Id.* ¶¶ 3–4, 271 Wis. 2d 547, ¶¶ 3–4, 679 N.W.2d 514, ¶¶ 3–4.

199. *Id.* ¶ 4, 271 Wis. 2d 547, ¶ 4, 679 N.W.2d 514, ¶ 4.

200. For counties, the rule is codified at Wisconsin Statutes section 59.69(10). The parallel provision for cities, villages and qualifying towns is at Wisconsin Statutes section 62.23(7)(h). The county rule provides in pertinent part:

Waushara County provided that “[n]o nonconforming structure or use during its total lifetime shall be enlarged or expanded in excess of 50% of its equalized assessed value over the life of the structure or project unless permanently changed to conform with the regulations of this ordinance.”²⁰¹ Because of the reinvestment rule, the owners in *Waushara County* were denied a building permit to expand their nonconforming home and add an extension to an outside porch.²⁰²

Though there is no case law on point, it would appear safe to assume that the inability of the owners to develop their property because of the overlapping setbacks would satisfy even the strictest hardship standard even though the provisions for nonconformities did not require them immediately to raze their home.²⁰³ Nonetheless, under a strict reading of the variance rules, the owners would not have been eligible for a variance because, very likely, every home on either side of the subject

An ordinance enacted under this section may not prohibit the continuance of the lawful use of any building, premises, structure, or fixture for any trade or industry for which such building, premises, structure, or fixture is used at the time that the ordinance[] take[s] effect, but the alteration of, or addition to, or repair in excess of 50 percent of its assessed value of any existing building, premises, structure, or fixture for the purpose of carrying on any prohibited trade or new industry within the district where such buildings, premises, structures, or fixtures are located, may be prohibited.

WIS. STAT § 59.69(10) (2005–2006). The rule is a masterpiece of confusion. Most problematic, the rule does not distinguish between nonconforming structures and nonconforming uses. It appears by its terms to be concerned only with nonconforming uses, and then only trades and industries, yet the remedy focuses narrowly on reinvestment in the building. Fortunately, many municipalities, like Waushara County, in their ordinances, distinguish between nonconforming uses and structures and create appropriate remedies for each.

201. Waushara County Ordinance No. 76 § 2.10(2)(b) (quoted in *Waushara County*, 2004 WI 56, ¶ 5 n.6, 271 Wis. 2d 547, ¶ 5 n.6, 679 N.W.2d 514, ¶ 5 n.6). The applicable section has been recodified. See WAUSHARA COUNTY, WIS., ZONING ORDINANCE § 58-235(b)(2) (2007). The 50% rule, like the variance, is another instance of a land use regulation that is rarely enforced. In numerous personal conversations with municipal lawyers, I was told that municipalities have not set up the record keeping systems that would enable them to keep track of accumulating investments. The only time that the rule is enforced, if then, is when an owner seeks a permit for large scale construction, as in *Waushara County*.

202. *Waushara County*, 2004 WI 56, ¶ 5, 271 Wis. 2d 547, ¶ 5, 679 N.W.2d 514, ¶ 5.

203. This was the theory of then Judge Roggensack, who dissented from the decision of the court of appeals. Her own opinion, that the variance should have been upheld, ignored the plain failure of the homeowners to demonstrate uniqueness. After the court of appeals decision in *Waushara County*, Justice Roggensack was appointed to the Wisconsin Supreme Court. Though she joined the majority in *Ziervogel*, she did not participate in the supreme court’s review of *Waushara County*.

home for some distance was subject to the same disabling regulations. Consequently, the owners' home was not subject to "special conditions" and would therefore not satisfy the uniqueness requirement. This would have been the sort of situation in which remedies by the ZBA for each of the homes along that stretch of the lake necessarily would have been piecemeal. The appropriate remedy was before the county board for relief from the setbacks.

Instead of seeking relief from the overlapping setbacks from the county board, however, the owners sought a variance from the ZBA from the 50% reinvestment rule. Typical of ZBAs, the Waushara County ZBA granted the variance because, without being overly concerned about the legal standards, in its opinion, "enforcing the exact terms of the zoning ordinance would result in unnecessary hardship for the [owners]."²⁰⁴ It also found that the proposed expansion would not bring the house any closer to the lake.²⁰⁵ The circuit court and the court of appeals, however, purporting to follow *Kenosha County*, held that the existence of a current house precluded a finding of hardship and overturned the grant of the variance.²⁰⁶

We have already seen that in *Waushara County*, the court, in its own oblique way, reaffirmed its decision in *Ziervogel* to overrule *Kenosha County* and the strict no reasonable use standard for area variances. But the court also pointedly emphasized that the variance application was from the 50% reinvestment rule. It observed:

While the dissent focuses on the fact that the [owners'] home was near the shore of Silver Lake, we feel that it bears further emphasis that the [owners] sought a variance from the 50 percent rule in § 2.10(b), which relates to nonconforming structures and uses, not from the shoreland zoning provisions²⁰⁷

The clear implication is that one could grant a variance from the 50% rule even if an owner might not be eligible for a variance from the underlying regulation that made the structure nonconforming.

While this may be possible under the open-ended tests of *Ziervogel*

204. *Waushara County*, 2004 WI 56, ¶ 6, 271 Wis. 2d 547, ¶ 6, 679 N.W.2d 514, ¶ 6.

205. *Id.* ¶ 6, 271 Wis. 2d 547, ¶ 6, 679 N.W.2d 514, ¶ 6.

206. *Id.* ¶¶ 8–9, 271 Wis. 2d 547, ¶¶ 8–9, 679 N.W.2d 514, ¶¶ 8–9. The circuit court and the court of appeals did not appear to take into consideration the fact that the setbacks working together prohibited any development of the owner's parcel.

207. *Id.* ¶ 5 n.7, 271 Wis. 2d 547, ¶ 5 n.7, 679 N.W.2d 514, ¶ 5 n.7.

and *Waushara County*, which give the ZBAs the discretion and charge simply to balance private interests against public goals, this is not sound under the traditional understanding of variances that this article defends. This is a simple function of the fact that the statutory standard permits a variance only when there is some unique property of the parcel, which in combination with the land use regulations makes it impossible to develop the parcel. Setbacks that overlap because of the small size of a lot are an extreme but not uncommon example. Setbacks on a parcel that is home to a sizable wetland can eliminate any possible building site on a parcel and thus create the required hardship. But the 50% rule does not interact with unique features of the land in the same way as setbacks to constrain an owner's ability to develop the property. The hardship, the inability to develop the land, if there is a hardship, is created by the dimension limitations. If an owner is not entitled to a variance for any of the reasons demanded by the traditional rule—lack of uniqueness, lack of hardship, dissonance with the goals of the underlying statute—it is difficult to see how those inhibitions would be any different if one shifted the focus of the analysis to the 50% rule instead of the underlying land use restrictions that created the nonconformity. One will still be led back at every turn to the underlying dimension restrictions. Even to determine if the variance will affront the policy goals, one cannot focus on the reinvestment rule alone. The reinvestment rule simply operates to put off the time that the structure has to be brought into harmony with the goals of the underlying dimension requirements. Thus it is the goals of the underlying limitations that are the pertinent goals.²⁰⁸

VI. THE VARIANCE PROVISION FOR CITIES

Each of the decisions discussed in this article concerned the definition of the term “unnecessary hardship” as it appears in the Wisconsin zoning enabling act for counties.²⁰⁹ Under the traditional approach defended in this article, the term refers to two of the three conditions necessary to grant a variance: (i) that the owner can make no reasonable use of the land (hardship); (ii) that the requested variance would not compromise the land use regulations that prevent a

208. This would appear to be true even under the more freewheeling approach of *Ziervogel* since the 50% rule is not so much a policy goal for the area as relief for the property owner. The 50% rule is a limit to the grace period provided for a nonconforming structure to become conforming.

209. WIS. STAT. § 59.694(7)(c) (2005–2006).

reasonable use (necessity); and (iii) that the hardship is caused by some condition of the land not shared by other parcels within the contiguous zone (uniqueness). We have also seen that in *Ziervogel*, the court dramatically revised this formulation, at least for variances from dimension regulations. An owner apparently no longer needs to demonstrate that his land is unique or that the unique features plus the regulations prevent development. The owner need only convince the ZBA that the frustration of the owner's desires are weighty enough to outbalance the policy goals of the regulation.

The parallel variance provision for cities, villages and qualifying towns differs in one very important and pertinent respect from the provision for counties. Where the county statute refers only to "unnecessary hardship,"²¹⁰ the provision for municipalities refers to either "practical difficulty or unnecessary hardship."²¹¹ It does not distinguish anywhere between variances for uses and variances for structures, much less indicate that these different formulations of the hardship requirement apply one to uses and the other to structures.

The difference would appear to have no practical significance under *Ziervogel* since the court there interpreted the single term "unnecessary hardship" to mean something different in its application to these two circumstances. The appearance of the distinct term "practical difficulties" could easily be interpreted to support the recognition of a distinct standard of hardship for area variances. In *Ziervogel*, the court adopted the different term "unnecessarily burdensome," first used redundantly in *Snyder*, to distinguish the hardship standard for area variances from the no-reasonable-use rule for use variances.²¹² The difference is hardly significant. Neither term, "practical difficulties" nor "unnecessarily burdensome," is transparent or more descriptive than the other; what is important is that there are two distinct terms that suggest the possibility of different standards for two different situations. The court could also draw support for this conclusion from other jurisdictions that have recognized distinct standards of hardship for area variances when the statute contains these two terms.²¹³

How the appearance of the second term "practical difficulties" in the

210. *Id.*

211. WIS. STAT. § 62.23(7)(e)7 (2005-2006).

212. State *ex rel.* Ziervogel v. Washington County Bd. of Adjustment, 2004 WI 23, ¶ 41, 269 Wis. 2d 549, ¶ 41, 676 N.W.2d 401, ¶ 41.

213. See generally MANDELKER, *supra* note 33, § 6.48. No other jurisdiction, however, has gone as far as *Ziervogel* in effectively subordinating uniqueness and converting hardship into a balancing test.

provision for cities and villages would play out under *Snyder* is not as clear. The confounding factor is that in *Snyder* the court specifically held that “practical difficulties” meant the exact same thing as “unnecessary hardship” and that they both meant no reasonable use. However, as we saw, the court was likely motivated to that conclusion in an effort to avoid a conflict between a local ordinance that used both terms and the governing statute for counties that used only the single term “unnecessary hardship.” Where the enabling statute uses both terms, those concerns are absent, and the court might read the statute as obliquely suggesting two standards that could be applied to these two distinct circumstances. As noted above, other courts have followed that reasoning, though none has gone so far as the court in *Ziervogel*—effectively subordinating uniqueness and converting the hardship determination into a balancing test. Sensitive to the dominate policy-making role and accompanying procedures of legislative bodies, other courts more appropriately continue to limit the availability of variances to circumstances in which the property suffers some feature not shared by other properties and, even if the hardship is made relative to the desires of the homeowner, the policy goals are not subject to a balance and continue to impose a more firm limit on the ability of a ZBA to grant the variance.