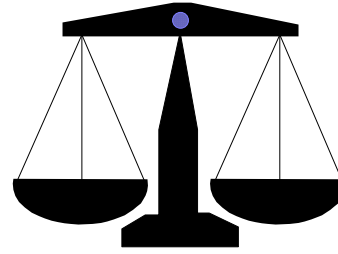


# Zoning



## Case Law in Wisconsin

Cases Relevant to Shoreland and  
Floodplain Zoning in Wisconsin

Published Decisions of the  
Wisconsin Supreme Court and  
Court of Appeals

DNR Publication # WT-540  
Revised October 2004

Prepared by the WDNR  
Bureau of Legal Services



---

## ZONING CASE LAW IN WISCONSIN

### PUBLISHED DECISIONS OF THE WISCONSIN SUPREME COURT AND COURT OF APPEALS

---

#### 1 AMERICANS WITH DISABILITIES ACT ("ADA") & FAIR HOUSING ACTS APPLIED TO ZONING DECISIONS

##### Reasonable Accommodation Decisions

*K Care, Inc. v. Town of Lac du Flambeau*, 181 Wis. 2d 59, 510 N.W.2d 697 (Ct. App. 1993).

Facts: The owners of an existing residential facility for the frail elderly located on a 40 acre lakeshore parcel wished to expand, and requested an exception to the statutory prohibition under s. 62.23(7)(i)(1), Stats., against building community living facilities within 2500 feet of each other unless an exception is granted at the discretion of the town. (Actually, it is s. 60.63(1), Stats., that applies to towns, but the wording of the two sections of the statutes is comparable.) The town board refused to grant the exception.

Holding/Analysis: **The Court of Appeals held that the town board failed to make a reasonable accommodation within the meaning of the federal Fair Housing Act (42 U.S.C. § 3604 (f)(3)(B), 1977). Failure to make a reasonable accommodation under the Fair Housing Act and reliance on the state spacing statute constituted discrimination against the handicapped.** The Town had argued that the Fair Housing Act did not apply because the residents of the proposed facility were elderly, but not handicapped. **The Court of Appeals found that the proposed elderly residents were handicapped within the meaning of the Fair Housing Act.** “At the hearing before the town board, uncontradicted evidence was presented that the present group home residents were frail elderly. Most suffer from disabilities that often affect the elderly. Some residents had suffered strokes, others have had hip replacements, others suffered early dementia. Heart problems, high blood pressure and diabetes were also common ailments. None of the residents require skilled nursing, though all require assistance in daily living. Some require assistance eating, bathing and using a toilet. Some residents need assistance using a toilet. Some residents need assistance using a walker or exiting in the event of an emergency. Others are confined to a wheelchair. We conclude that the proposed residents of the new facility, whose physical condition is undisputed, are handicapped within the meaning of the FHA. These residents obviously suffer from physical and mental impairments that substantially limit one or more major life activities. They are unable to eat, bathe, walk or use a toilet without assistance. In short, they are no longer able to live independently.”

*K Care, Inc.*, 181 Wis. 2d 59 at 67. The Court found that the evidence presented at the hearing before the town board did not support the board’s finding that granting an exception would undermine the purposes of the statutory spacing statute. The factual basis for the town's refusal to grant the exception reflected an opposition to change in population density, which was not a rational basis from which to conclude that a proposed facility for eight more people would alter the character of the neighborhood.

*County of Sawyer Zoning Board v. Wisconsin Department of Workforce Development*, 231 Wis. 2d 534, 605 N.W.2d 627 (Ct. App., 1999).

Facts: Mr. Gregory Klint owned a cabin on a parcel that abuts Grindstone Creek as it flows into Lac

Courte Oreilles in Sawyer County. He and his family used the cabin on summer weekends. Mr. Klint suffers from Marfan's Syndrome (he has congestive heart failure, pulmonary hypertension and restrictive lung disease, which necessitates use of a room air concentrator or an oxygen supply.) The parties to the lawsuit stipulated that he is disabled for purposes of applying the "Wisconsin Fair Housing Act (WFHA)"(now numbered s. 106.50, Stats., and currently referred to as the Wisconsin's open housing law). In 1993, Mr. Klint hired a contractor to build a 20' x 22' addition to the cabin (which more than doubled the size of the cabin). A building permit was not obtained before the addition was built, and a triangular portion of the addition infringed upon the 40-foot shoreland setback (determined by setback averaging). The addition permitted Mr. Klint to have a better view of the creek and lake and the sandbar area where his children played. In addition, Mr. Klint argued that the linear design of the addition allowed him to keep his air hose out of the traffic pattern and to move about the cabin without the hose getting tangled. After construction of the addition was completed, the zoning administrator issued two citations to Mr. Klint, one for building without a permit and one for violating the minimum setback. Mr. Klint applied for an after-the-fact variance. The Sawyer County Zoning Board rejected the variance request on the grounds that it would be for the convenience of the owner and would not be due to special conditions unique to the property. The Board ordered the removal of part of the addition so that it would comply with the setback requirement. Mr. Klint filed a disability discrimination complaint against the Board under the "Wisconsin Fair Housing Act," claiming that the Board had refused to grant him a reasonable accommodation.

Issue: Whether the Department of Workforce Development, in enforcing the "Wisconsin Fair Housing Act," may order a county zoning board to issue a shoreland zoning variance based upon characteristics unique to the landowner, not unique characteristics of the land.

Holding/Analysis: **The Court of Appeals held that the Board's failure to grant the variance did not constitute discrimination against the disabled, but rather was the only legal action it could take given the proof before it.** "The department [of Workforce Development] contends that the board is subject to the WFHA when enforcing its zoning ordinances. Initially, the department asserts that the 'reasonable accommodation requirement of the WFHA can be read harmoniously with the literal language of Wis. Stats. s. 59.694(7)(c), since a person with a disability may present "special conditions" which result in an "unnecessary hardship" if a variance is not granted.' We reject this argument because, as the department concedes, **our supreme court has consistently interpreted the terms 'special conditions' and 'unnecessary hardship' in s. 59.694(7)(c), Stats., to apply to the conditions especially affecting the lot in question and not to conditions personal to the landowner.**" *County of Sawyer Zoning Bd.*, 231 Wis. 2d 534 at 539–540 (emphasis added). "The department next urges us to modify the supreme court's consistent holdings by interpreting them 'slightly more expansively . . . to encompass persons with a "disability" who require a variance as a "reasonable accommodation"' within the unnecessary hardship definition. We reject this invitation for the same reason; our supreme court has proscribed examination of personal characteristics of the owner when considering granting a variance to a shoreland zoning ordinance." *County of Sawyer Zoning Bd.*, 231 Wis. 2d 534 at 541. **"The board could consider only those factors delineated by s. 59.694(7)(c), Stats., and existing case law. There is no dispute that Klint has feasible uses of the property absent a variance. The board could not grant the variance without acting in excess of its powers and contrary to state law."** *County of Sawyer Zoning Bd.*, 231 Wis. 2d 534 at 542 (emphasis added).

See also *Oconomowoc Residential Programs, Inc. v. City of Greenfield and Village of Greendale*, 23 F. Supp. 2d 941 (United States District Court for the Eastern District of Wisconsin, September 30, 1998).

See also *United States v. Village of Marshall, Wisconsin*, 787 F. Supp. 872 (U. S. District Court for the Western District of Wisconsin, April 22, 1991).

Facts: The Housing and Civil Enforcement Section, Civil Rights Division of the United States Department of Justice sued the Village of Marshall alleging that the Village had discriminated against the operator of a group residential facility for the mentally ill when the Village failed to grant an exception, pursuant to the federal Fair Housing Act, from the group home spacing requirement that is found in s. 62.23 (7)(i) 1, Stats.

Holding/Analysis: The U.S. District Court held that the Wisconsin statute that established spacing restrictions for proposed community-based residential facilities constituted “rules, policies, practices, or services” within the meaning of the federal Fair Housing Act, and that **the Village’s refusal to grant an exception to the spacing restriction constituted a failure to make “reasonable accommodation” and was wrongful discrimination under the federal Fair Housing Act.**

See also *Brandt v. Village of Chebanse, Illinois*, 82 F. 3d 172 (7<sup>th</sup> Circuit, 1996)

See also *Oak Ridge Care Center, Inc. v. Racine County*, 896 F. Supp. 867 (E.D. Wis. 1995)

See also *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D. N.Y. 1983) and *U.S. v. Borough of Audubon*, 797 F. Supp. 353 (D. N.J. 1991)

“Courts have unanimously applied the reasonable accommodations requirement to zoning ordinances and other land use regulations and practices.” *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 at 1185 (E.D. N.Y. 1983)

"An accommodation is reasonable under the FHA if it does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve." *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 at 1186 (E.D. N.Y. 1983)

“ . . . although a municipality has a legitimate governmental interest in regulating land use, we have a duty under the [federal Fair Housing] Act to ensure that the interest is effectuated in a nondiscriminatory manner.” *U.S. v. Borough of Audubon*, 797 F. Supp. 353 (D. N.J. 1991)