COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP691 **Cir. Ct. No. 2006CV89**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN EX REL. DAVID MASTERJOHN,

PETITIONER-RESPONDENT,

V.

WASHBURN COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Brunner and Vergeront, JJ.

¶1 PER CURIAM. The Washburn County Board of Adjustment appeals a judgment entered by the circuit court upon certiorari review of a Board decision. The Board contends the circuit court erred when concluding the Board

lacked jurisdiction to deny a variance sought by David Masterjohn. We agree. However, because the Board made an inadequate record of the facts and reasoning behind its decision, we reverse and remand to the circuit court with directions to enter an order requiring the Board to vacate its decision and re-hear and re-decide Masterjohn's variance application.

BACKGROUND

¶2 In November 2005, Masterjohn requested that Web Macomber, the Washburn County Zoning Administrator, measure setbacks on a lot that he wished to buy on Trego Lake. Macomber measured the setbacks and determined a building location for Masterjohn. Masterjohn then purchased the lot, installed a septic system, obtained a building permit, and installed a foundation for a cabin.

¶3 After receiving numerous complaints about Masterjohn's project, Macomber returned to the site to re-measure the setbacks. He observed that the foundation was "basically" where he told Masterjohn to put it, though one side slightly encroached on a side setback. However, Macomber also discovered an area of lakebed he had not noticed before, which resulted in the foundation encroaching on the lake setback by four feet. He also noticed that the road had an official marked right-of-way and that the foundation was 16 feet from the right-of-way, when it should have been 33.9 feet. In short, the foundation encroached on setbacks on three sides. Further, neither Masterjohn nor Macomber had accounted for the cabin's overhangs when calculating the setbacks. Work on the cabin stopped, and Macomber encouraged Masterjohn to apply for a variance.

¶4 Masterjohn applied for a variance, and a public hearing was held before the Board. At the hearing, the Board first read the recommendation of Macomber, who opined that a hardship was present due to the lot's size and that it

was not self-created because the building was approved before Masterjohn purchased the property. The Board then read a few letters from citizens opposed to the variance, most of whom opined that the lot was too small to be buildable. Masterjohn testified and explained the circumstances leading him to buy and build on the lot, including his reliance on Macomber. Citizens present at the meeting also spoke, and most opposed the variance because of the lot's small size.

¶5 After hearing from the public, the Board closed testimony and began deliberations. The Board chair, Ruth King noted the questions the Board had to decide. As to whether the hardship was self-created, she noted the problem was partly because of the small lot size, but also that Macomber and Masterjohn "screwed up" by not accounting for the overhangs. She then directed the Board to the questions of whether the circumstances were unnecessarily burdensome to Masterjohn and whether granting the variance would be contrary to the public interest. One of the Board members responded, "I think yes to both." King noted that she would not even consider granting the variance if construction had not already started. She then asked the Board to consider whether there was a hardship that would justify a variance. After one Board member raised Macomber's role in creating the hardship, another noted that hardship "is a relative thing" and that "We're in a hell of a spot," followed by a motion to deny the variance. The Board voted to deny the variance and the meeting was adjourned.

¶6 The Board's order denying the variance was rendered on a fill-in form, with the following conclusions of law:[1]

> (1) "Unnecessary hardship *is* present in that a literal enforcement of terms of the zoning ordinance would … render compliance with said ordinance unnecessarily burdensome … because: *mistakes made by [zoning administrator] resulted in the applicant exceeding setbacks-however, he should have known that the eave overhangs count-applicant should have been more careful on such a small lot*;" (2) "The hardship *is and is not* due to physical limitations of the property rather than the circumstances of the applicant because: *is=small parcel size[,] is not=the applicant should have known that the eave overhang counts*;" and (3) "The variance *will* be contrary to the public interest as expressed by the objectives of the ordinance because: *ordinance's purpose is to develop in a way that does not adversely impact the resource*."

¶7 Masterjohn sought certiorari review in the circuit court, which vacated the Board's decision. The court concluded that the Board exceeded its jurisdiction in what the court described as "an enforcement action disguised as a variance review." The court stated that, rather than attempt to enforce the ordinance by issuing Masterjohn a citation, Macomber "advised the unrepresented Masterjohn that he needed a variance." After noting that Masterjohn already had the appropriate permits, the court concluded that "Masterjohn does not need a variance." Additionally, the court concluded that the Board proceeded on an incorrect theory of law by assuming that a variance was necessary. Finally, the court concluded that the record failed to demonstrate that the Board acted with its judgment, rather than its will, because it failed to adequately address the legal

[1] The conclusions of law are partly handwritten. We represent the Board's handwritten and multiple-choice selections in italics.

questions presented and its decision was not supported by evidence. The Board appeals the circuit court's decision.

DISCUSSION

¶8 A person aggrieved by the issuance or denial of a zoning variance may seek certiorari review in the circuit court. WIS. STAT. § 59.694(10).[2] A reviewing court accords a presumption of correctness to a board of adjustment's decision. ***State ex. rel. Ziervogel v. Washington County Bd. of Adj.***, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. On certiorari review, we review the decision of the agency—here, the Board—rather than the circuit court.[3] *See* ***Kraus v. City of Waukesha Police & Fire Comm'n***, 2003 WI 51, ¶10, 261 Wis. 2d 485, 662 N.W.2d 294.

¶9 Pursuant to WIS. STAT. § 59.694(7)(c), boards of adjustment are empowered:

> 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.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] Because we are reviewing the Board's decision, not the circuit court's, we need not address in depth another claim made by the Board, which is that the circuit court improperly considered additional evidence not before the Board in an affidavit by Masterjohn. To the extent the court considered this additional evidence without conducting the appropriate analysis under ***Klinger v. Oneida County***, 149 Wis. 2d 838, 440 N.W.2d 348 (1989), the court erroneously exercised its discretion. Further, Masterjohn does not refute the Board's argument that this additional evidence should not have been considered, thereby conceding it. *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments deemed conceded). In rendering our decision, we do not consider the additional facts in Masterjohn's affidavit.

In the context of an area variance,[4] the question of whether unnecessary hardship exists has been described as "whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with the restrictions unnecessarily burdensome." ***Snyder v. Waukesha County Zoning Bd. of Adj.***, 74 Wis. 2d 468, 474-75, 247 N.W.2d 98 (1976). Unnecessary hardship must be based upon conditions unique to the property rather than considerations unique to the property owner and cannot be self-created. ***Ziervogel***, 269 Wis. 2d 549, ¶20. The Board must evaluate the hardship in light of the purpose of the zoning restriction at issue, and a variance cannot be contrary to the public interest. ***Id.***

¶10 When no additional evidence is taken by the circuit court, certiorari review is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination based on the evidence. ***Id.***, ¶14.

¶11 We conclude the Board had jurisdiction to hear and decide Masterjohn's variance application. However, because the Board's decision is not supported by factual findings and adequate reasoning, we cannot conclude that the Board exercised its judgment rather than its will.

[4] Masterjohn was seeking an area variance, as opposed to a use variance.

¶12 We first address the Board's jurisdiction to consider Masterjohn's variance application. Pursuant to WIS. STAT. § 59.694, counties may create boards of adjustment, which have the power to decide variance applications. WIS. STAT. § 59.694(1), (7). Further, WASHBURN COUNTY, WIS., ORDINANCE § 38-630 (March 19, 2002), establishes the Board and provides, among other things, that the Board may

> authorize upon appeal in specific cases, a variance from the terms of this article as will not be contrary to the public interest where owing to special conditions, a literal enforcement of the provisions of this article will result in unnecessary hardship and so that the spirit of the article shall be observed and substantial justice done. No variance shall have the effect of allowing in any district uses prohibited in that district.

Therefore, the plain language of WIS. STAT. § 59.694 and ORD. § 38-630 authorize the Board to decide variance applications. Because Masterjohn filed a variance application, the Board had the power to decide it. The Board did not exceed its jurisdiction in doing so.

¶13 Therefore, we disagree with the circuit court's conclusion that the Board lacked jurisdiction because Masterjohn "[did] not need a variance" and the Board proceedings were an "enforcement action disguised as a variance review." Given his structure's noncompliance with setback requirements, Masterjohn needed a variance to protect himself from enforcement actions in the future. None of the facts relied upon by the circuit court converted the variance proceedings into an enforcement action. By filing his variance application, Masterjohn properly invoked the Board's jurisdiction to consider it.

¶14 We next address the Board's decision on Masterjohn's variance application. The Board's decision must represent its judgment, not merely its will,

and must not be arbitrary, oppressive, or unreasonable. *See* ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, ¶16, 284 Wis. 2d 1, 700 N.W.2d 87. We accord a presumption of correctness and validity to a board of adjustment's decision, and we do not disturb a board's findings if any reasonable view of the evidence supports them. ***Id.***, ¶24. However, for certiorari review to be meaningful, a board must give reviewing courts something to review. ***Id.*** A board may not merely rely on conclusory statements about whether the application meets statutory criteria, but must express, on the record, why the application does or does not meet that criteria. ***Id.***, ¶32. This does not mean boards must write judicial opinions. ***Id.***, ¶31. In fact, a board decision need not even be in writing, so long as its reasoning is clear from the transcript of its proceedings. ***Id.***

¶15 Here, the hearing transcript is devoid of factual findings, and the "finding of fact" portion of the form on which the Board rendered its written decision was not completed. As a result, it is impossible to review the Board's factual findings because we do not know what those findings were.

¶16 Moreover, the Board's reasoning is not clear from its written decision or the transcript of its proceedings. In its written decision, the Board determined that an unnecessary hardship existed. In order to deny the variance, the Board needed to determine either that the hardship was self-created, rather than due to the unique conditions of the property, or that granting the variance would be contrary to the public interest. *See* ***Ziervogel***, 269 Wis. 2d 549, ¶20. In the transcript of its proceedings, the Board chair proposed discussion on these two questions. However, the Board seemingly became distracted and never addressed them. Instead, after a Board member raised the issue of Macomber's role in the creation of the hardship, another member noted that hardship "is a relative thing" and that "We're in a hell of a spot," which was followed by a vote to deny the

variance. Thus, the transcript does not demonstrate that the Board adopted any reasoning justifying a conclusion that the hardship was self-created or contrary to the public interest.

¶17 The Board's written decision also fails to demonstrate adequate reasoning on these two issues. Regarding whether the hardship was self-created, the Board determined the hardship *was* self-created—and *was not*. Facts were listed supporting each possible conclusion. However, the Board essentially failed to decide the issue. In effect, the Board's written decision acknowledges that there are facts supporting either conclusion. However, the Board failed to exercise its discretion by weighing the facts to determine which conclusion was more appropriate.

¶18 As for whether granting the variance would be contrary to the public interest, the Board's written decision clearly concluded that it would be. The stated justification for this conclusion was that the "ordinance's purpose is to develop in a way that does not adversely impact the resource." While the ordinance's purpose is relevant to whether a variance would be contrary to the public interest, reciting the ordinance's purpose is not, by itself, sufficient. *See* ***Lamar***, 284 Wis. 2d 1, ¶32. The Board does not even state what "the resource" is; presumably it is Trego Lake. Moreover, the Board does not state how that resource will be adversely affected by granting the variance or what facts support that conclusion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.