

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 18, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1907

Cir. Ct. No. 2006CV69

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEPHEN J. CHICILLO,

PETITIONER-APPELLANT,

V.

WASHBURN COUNTY,

RESPONDENT,

WASHBURN COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Stephen Chicilo appeals a circuit court judgment upholding the Washburn County Board of Adjustment's decision denying his

request for a variance. Chicilo argues the Board applied the wrong standard, and its decision lacked a factual basis and represented the Board's will rather than its judgment. He also argues the circuit court should have allowed him to conduct discovery. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 Prior to 2000, Chicilo owned an 11.65 acre parcel on Bean Lake in Washburn County. In 2000, Chicilo conveyed approximately half of the parcel to his sister, although that conveyance was not recorded. Chicilo's portion of the property included an existing cabin forty-four feet from Bean Lake. Washburn County zoning ordinances required setbacks of at least seventy-five feet. This meant the cabin was an existing non-conforming use, and a variance was required for any changes to it beyond ordinary maintenance and repair. *See WASHBURN COUNTY, WI, ORDINANCES §§ 38-594(2)(a), 38-605 (2002).*

¶3 In 2003, Chicilo decided to tear down the existing cabin and build a larger one on the same site. He obtained a sewer permit, but did not apply for a variance. Chicilo then tore down the existing cabin and began constructing the new one. During construction, the Washburn County zoning administrator told Chicilo to halt construction and apply for a zoning variance for the new cabin.

¶4 Chicilo applied to the Board for a variance. He claimed he had torn down the existing cabin only because the zoning office had told him the only permit he needed was the sewer permit. Chicilo asked for an exception to the setback requirement for that reason and because the current location of the cabin was the "only practical location" for a building on the property. The Board refused to grant the variance. The Board's written findings stated there was insufficient evidence to show Chicilo had no alternate building site, Chicilo's

hardship was self-created, and the structure would be contrary to the public interest because it would result in runoff to the lake and damage to shoreline vegetation.

¶5 Chicilo petitioned the circuit court for certiorari review.¹ He also served a set of interrogatories on the Board. The court refused to allow discovery, and ultimately affirmed the Board's decision denying the variance based on the existing record.

DISCUSSION

¶6 On certiorari review, we review the Board's decision, not the circuit court's decision.² *Roberts v. Manitowoc County Bd. of Adj.*, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. Our review is limited to the following questions:

(1) did the Board keep within its jurisdiction; (2) did the Board proceed on the correct theory of law; (3) was the action of the Board arbitrary, oppressive, or unreasonable, and did it represent the will of the Board rather than its judgment; and (4) was the evidence such that the Board could have reasonably reached the determination under review.

Id., ¶11.

¶7 Chicilo first argues the Board proceeded on an incorrect theory of law. When a landowner requests an area variance—as opposed to a use variance—the Board must decide whether denying the variance would impose an

¹ Chicilo's complaint also included a second claim not relevant here.

² Because we are reviewing the Board's decision, we need not reach Chicilo's argument that the circuit court should have held oral arguments before deciding the case.

“unnecessary hardship” on the landowner.³ *State ex rel. Ziervogel v. Washington County Bd. of Adj.*, 2004 WI 23, ¶¶21, 31, 269 Wis. 2d 549, 676 N.W.2d 401. Chicilo argues the Board applied the more stringent “no reasonable use” standard instead of the correct unnecessary hardship standard, pointing to a statement in the Board chair’s notes stating “denial of the variance would not prevent [Chicilo] from using the property” because Chicilo had not proven the property lacked an alternative building site.

¶8 Chicilo takes the chair’s statement out of context. The Board chair began the meeting by stating the correct unnecessary hardship standard and stated the correct standard again at the beginning of deliberations. The Board also applied the correct standard in its written findings. Indeed, the hearing in this case took place because the circuit court remanded with instructions to apply the unnecessary hardship standard. Chicilo argued an unnecessary hardship was present because of the lack of an alternative building site. Taken in this context, the chair’s notes simply reflected skepticism about Chicilo’s argument that no alternate site was available, not an application of the incorrect standard. We are satisfied the Board applied the correct unnecessary hardship standard to Chicilo’s variance request.

¶9 Chicilo argues the Board could only have reached the conclusion it did by applying the “no reasonable use” standard. However, Chicilo had the

³ A use variance allows the landowner a use of the land not permitted in the zoning district. An area variance allows the landowner relief from restrictions on the manner of a permitted use. *State ex rel. Ziervogel v. Washington County Bd. of Adj.*, 2004 WI 23, ¶21, 269 Wis. 2d 549, 676 N.W.2d 401. Here, Chicilo’s variance was an area variance because the cabin was a permitted use in the zoning district but the manner of that use was limited by the setback restrictions.

burden of proving enforcement of the setback requirements would create an unnecessary hardship. See *Ziervogel*, 269 Wis. 2d 549, ¶20. Chicilo testified no alternate site existed and presented two soil samples showing a high water table. However, the Board found this evidence was inadequate to prove no alternate building site existed on Chicilo's land or the land he conveyed to his sister in 2000. The Board, not the reviewing court, determines the weight to be given the evidence. *Roberts*, 295 Wis. 2d 522, ¶32. Nothing in the ultimate result indicates the Board applied the wrong standard.

¶10 Second, Chicilo argues the Board applied the wrong standard by relying on his failure to apply for a variance before tearing down the existing cabin and his sale of part of the land to his sister. However, whether a hardship is self-created is a proper consideration in determining whether an unnecessary hardship exists. *Ziervogel*, 269 Wis. 2d 549, ¶20. Both Chicilo's sale of part of his land and his decision to tear down his existing cabin limited his use of the property. Chicilo argues the Board should have assigned more blame to the zoning office; however, the Board's disagreement with his position on this point does not mean it applied the wrong standard.

¶11 Third, Chicilo argues no evidence supported the Board's conclusion that a variance would not be consistent with the purpose of the ordinance because a variance would cause runoff and damage to shore cover. The parties dispute the meaning of several photographs in the record, which the circuit court concluded showed damage to shore cover due to Chicilo's new cabin.⁴ However, whether a

⁴ The photos in the record are poor quality, and the record does not conclusively indicate what all of the photos depict. In his brief, Chicilo asserts that some of the photos show other cabins on the lake, not his cabin.

variance is consistent with the purpose of the ordinance is only one component of whether an unnecessary hardship exists. *Id.* Our role on review is to determine whether the evidence is “such that the Board could have reasonably reached the determination under review.” *Roberts*, 295 Wis. 2d 522, ¶11. Even assuming the photos do not depict damage to shore cover, the evidence that the hardship was self-created and Chicilo’s failure to prove lack of an adequate building site are adequate to make the Board’s ultimate determination reasonable. *See id.*

¶12 In addition, we see no reason why the Board could not rely on its experience on the likely ecological consequences of Chicilo’s proposal. Chicilo was building a new, substantially larger 1,200 square foot cabin only forty-four feet from the lake. One Board member expressed the opinion that it was “obvious” that construction would result in increased runoff. As with other aspects of an unnecessary hardship, Chicilo had the burden of showing a variance was consistent with the public interest. *See Ziervogel*, 269 Wis. 2d 549, ¶20. The Board, not the reviewing court, determines the weight to be given the evidence. *Roberts*, 295 Wis. 2d 522, ¶32. Chicilo simply failed to convince the Board his variance was consistent with the public interest.

¶13 Fourth, Chicilo argues the Board’s decision was arbitrary and capricious, representing its will rather than its judgment. This test is met only if the Board’s findings are “unreasonable or without a rational basis,” or if no “reasonable view of the evidence sustains them.” *Snyder v. Waukesha County Zoning Bd. of Adj.*, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). Put another way, an arbitrary decision is “an unconsidered, wilful and irrational choice ... not the result of the ‘winnowing and sifting’ process.” *Donaldson v. Board of Comm’rs*, 2004 WI 67, ¶63, 272 Wis. 2d 146, 680 N.W.2d 762 (citations omitted).

¶14 Chicilo argues this standard was met because the Board considered a town board recommendation that his variance be denied. Chicilo apparently was not given notice his variance would be discussed at the town board meeting. However, the Board's consideration of the town board recommendation was relatively brief, and the Board recognized the recommendation was advisory. The Board chair stated, "although we respect the towns and we do want their input ... in this case we have enough other stuff to base a decision on." Another member flatly stated the town board recommendation was "not relevant." We are satisfied the Board reached its own conclusion based on the evidence before it, and did not arbitrarily follow the town board recommendation.

¶15 Chicilo also argues the Board's decision was arbitrary and capricious because the Board "had already determined that Chicilo should be penalized for proceeding without a permit." The record does not support this claim. Chicilo was allowed a full opportunity to present all evidence he had that supported his position. The statements by Board members Chicilo relies on simply express doubts about the strength of his evidence or disagreement with his arguments. The Board members' discussion of whether Chicilo should be charged with notice of the setback ordinance, for example, simply reflects their opinions on whether to grant the variance, not bias or prejudice against Chicilo.

¶16 Finally, Chicilo argues the circuit court should have allowed him to conduct discovery as part of the certiorari review. In a certiorari proceeding, the circuit court has discretion to allow discovery if it is "necessary for the proper disposition of the matter...." WIS. STAT. § 59.694(10). Chicilo argues discovery might have established the extent to which the Board considered matters outside the record, and might have shown the Board acted arbitrarily and capriciously. Chicilo appears to be referring to the Board's consideration of the town board

recommendation. However, as explained above, the town board recommendation played a minor role in the hearing, and the Board decided the case based on the evidence before it and did not blindly follow the town board's recommendation. Under those circumstances, the circuit court properly exercised its discretion when it concluded discovery was not necessary because it would "not change the ultimate conclusion and may only confuse the issue with undue effort and expense."

By the Court.—Judgment affirmed.

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

