COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1307 **Cir. Ct. No. 01-CV-241**

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

ROBERT VOSS AND BARBARA VOSS,

PLAINTIFFS-APPELLANTS,

V.

WAUSHARA COUNTY BOARD OF ADJUSTMENT, CHARLES PLACH AND MARY PLACH,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waushara County: LEWIS MURACH, Judge. *Reversed and cause remanded with directions*.

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 VERGERONT, P.J. Robert and Barbara Voss appeal the decision of the circuit court affirming the Waushara County Board of Adjustment's approval of the variance application made by their neighbors, Charles and Mary

Plach.[1] The application requested a variance from the minimum fifteen-foot side-yard requirement, allowing a house that would extend to within twelve feet of the west lot line, and an attached garage that would extend to within eleven feet of the east lot line. The Vosses contend the circuit court erred in affirming the Board because its finding of unnecessary hardship is not supported by the record, and the variance is contrary to the public interest as expressed by the ordinance, as well as detrimental to their property. We conclude that the evidence does not support the Board's determination that enforcement of the ordinance will result in unnecessary hardship, and we are unable to tell whether and how the Board analyzed the effect of granting the variance on the public interest and on the purpose of the ordinance. We therefore reverse the circuit court's decision and direct that it enter an order reversing the Board's decision and remanding to the Board for the additional taking of evidence and a redetermination consistent with this decision.

BACKGROUND

¶2 Plach's property[2] is a parcel located on Silver Lake in the Town of Marion, in the RS-20 Zoning District, residential single family. WAUSHARA COUNTY ORDINANCE NO. 76, § 12.02(3)(b) ("ordinance") establishes a minimum side yard of fifteen feet for structures in this zoning district. Plach applied for a variance for the residence and attached garage he proposed to build, because the west side of the planned residence would come within twelve feet of the west lot line, and the east side of the garage would come within eleven feet of the east lot

[1] We will refer to both Charles and Mary as "Plach."

[2] Bruce MacNeish was designated the owner of the lot on the application for variance, which Plach signed. Apparently since that time Plach completed the purchase of the lot and is now the owner.

line. The Vosses own the parcel to the west and Bruce MacNeish owns the parcel to the east. The boundary of the lots opposite the lake is State Road 73.

¶3 The drawings Plach submitted with his application showed the first floor of the proposed residence to be 45 feet 6 inches by 48 feet 6 inches and the attached garage to be 29 feet by 23 feet 4 inches. In a letter accompanying the application, Plach stated that he would "need a four foot variance on the [one] side of the lot for the garage portion only. The reason being we would like an attached garage. On the [other] side we are requesting a three foot variance. The reason being, our house plans require this." Plach also filled out a form provided by the County:

> VARIANCE REQUEST STANDARDS
>
> A variance is a request for a relaxation of a dimensional standard of a zoning ordinance. In order to be granted a variance, a landowner has to prove that all three of the following standards exist. Failure to prove these three standards will result in the denial of the request. Therefore, please summarize why your application meets these standards. Please consider carefully these standards before completing this form:
>
> 1. Unnecessary hardship – Unnecessary hardship is a situation where, in the absence of a variance an owner can make no feasible or reasonable use of the property. Convenience, loss of profit, financial limitations, or self imposed hardship are not grounds for approving a variance.
>
> *Because of the driveway location off Highway 73, the garage has to be moved back four feet in order to have a turnaround so we do not have to back out on the highway. This is the East side of the property.*
>
> 2. Unique property limitations – The property must be unique and peculiar to the parcel in question, and different from other parcels in the area. Unique physical limitations of the lot must exist, not the desires or limitations of the applicant, preventing the development of the lot.

> *On the West side of the property we are asking for a three foot variance to accommodate the building structure to coincide with the other property owners.*
>
> 3. Protection of the public interest – Granting of a variance must neither harm the public interest or undermine the purposes of the ordinance. The public interest includes the interest of the public at large, not just neighboring property owners.

(Emphasis to Plach's response added.)

¶4 At the hearing on the application,[3] Plach appeared and explained that the variance for the garage was needed so that he could turn around in the driveway, without having to back out onto State Road 73. The variance on the west side was needed so that the house, which was two stories, could have all the living quarters on the first floor, "for health reasons" because "we aren't getting any younger…." The master bedroom and a bath are on the first floor, and, Plach stated, there are two bedrooms and a bath on the second story. The garage has two and one-half stalls; he had wanted three stalls but could not because of the requirement that the garage be a certain distance from the road.

¶5 Two letters were accepted in support of Plach's application. Bruce MacNeish wrote that he had no problem with the four-foot variance for the garage. The Bartels, who owned the lot to the east of MacNeish's lot, stated that MacNeish's house was closer than fifteen feet to their west lot line and their house was closer than fifteen feet to their east lot line. They "guess[ed] that the majority of the homes on Silver Lake have gone for variance[s] in order to build their

[3] The proceeding before the Board, up to the time the Board deliberated, was videotaped, and the videotape is part of the record.

homes." They had been granted a variance five years ago by the Board for a side lot line, and they hoped the Board would do the same for Plach.

¶6 Robert Voss appeared and spoke against the variance of three feet on the west. He stated that his house was only eleven feet from the boundary line with Plach's lot, so there would be only twenty-three feet between their houses if the variance were granted, while there would be thirty feet between Plach's house and MacNeish's. He felt the distance between the houses should be equalized.

¶7 The staff representative stated that Plach's proposed building plan would meet the water and road setback requirements, that the east side of the house would meet the fifteen-foot side-yard setback on the southeast, and the site was level, with no soil erosion of storm runoff. The staff representative advised the Board that in making its decision it had to ask what use of the property was possible without the variance, and how the interests of the neighbors and the public were affected by either granting or denying the variance; and the applicant had to show that no reasonable use existed without the granting of the variance.

¶8 The Board approved Plach's application by a four-to-one vote. The notice of decision states that the reasons for the decision are that "[o]wing to special conditions, a literal enforcement of the terms of the Zoning Ordinance will result in unnecessary hardship, the variance requested will be consistent with the spirit or purpose of the ordinance, the variance will do substantial justice, and will not be contrary to the public interest."

¶9 The Vosses sought review by certiorari in the circuit court, and the circuit court affirmed. As relevant to this appeal, the court stated that side lot variances abound in the area, that the variance furthered highway safety, that the interests of the public would not suffer significantly from granting the variance,

and that no significant state issues were presented. The court concluded the Vosses had not rebutted the presumption of correctness and validity accorded the Board's decision and had not shown the Board had exceeded its jurisdiction, proceeded on an incorrect theory of law, acted arbitrarily, or lacked substantial evidence to support its decision.

DISCUSSION

¶10 Judicial review in a certiorari action is limited to determining whether: (1) the Board kept within its jurisdiction; (2) the Board proceeded on a correct theory of law; (3) its action was arbitrary, oppressive or unreasonable; and (4) the evidence was such that the Board might reasonably make the determination in question. ***State ex rel. Spinner v. Kenosha County***, 223 Wis. 2d 99, 103, 588 N.W.2d 662 (Ct. App. 1998). We accord a presumption of correctness and validity to the Board's decision, and we accept the findings of the Board if any reasonable view of the evidence sustains them. ***Id.*** at 103-104. Our standard of review of the Board's decision is the same as that employed in the circuit court, and we review the circuit court's decision de novo. ***Id.*** at 103.

¶11 The parties agree on the legal standards the Board is to apply in considering an application for a variance from a side line setback, and we begin by summarizing those.

¶12 The Board's authority to grant variances to zoning regulations is derived from WIS. STAT. § 59.694(7)(c) (2001-02),[4] which provides that the Board may upon appeal in specific cases authorize:

> [V]ariances 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.

¶13 Case law has developed the following standards for applying this statute. The statute requires the applicant for a variance to prove that he or she will suffer an "unnecessary hardship" in the absence of a variance. ***Arndorfer v. Sauk County Bd. of Adjustment***, 162 Wis. 2d 246, 253, 469 N.W.2d 831 (1991). "Unnecessary hardship" requires proof that the hardship relates to a unique condition of the property, ***id.*** at 255; "hardship" does not include a condition personal to the landowner, such as personal inconvenience, ***Snyder v. Waukesha County Zoning Board of Adjustment***, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98 (1976), nor may it be self-created. ***Id.*** at 476. More recently, the supreme court has held, in considering an application for an area variance, that proof of unnecessary hardship also requires that the property owner demonstrate that, without a variance, he or she has no reasonable use of the property. ***State v. Kenosha County Bd. of Adjustment***, 218 Wis. 2d 396, 398, 577 N.W.2d 813

[4] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(1998).[5] Whether a particular hardship is unnecessary is judged against the purpose of the zoning law. ***Id.*** at 412-13, *citing* ***Snyder***, 74 Wis. 2d at 473. A variance may not be contrary to the public interest; in other words, "some hardships are 'necessary' to protect the welfare of the community." ***Arndorfer***, 162 Wis. 2d at 256.

¶14 WAUSHARA COUNTY ORDINANCE NO. 76, § 25.04(2) contains identical language to that in WIS. STAT. § 59.694(7)(c). In addition, WAUSHARA COUNTY ORDINANCE NO. 76, § 25.05 establishes principles for the Board to follow that closely track many of the case law requirements:

> (1) The burden is on the appellant to prove the need for a variance.
>
> (2) Pecuniary hardship, loss of profit, self-imposed hardships … are not sufficient reasons for granting a variance.
>
> ….
>
> (4) The plight of the appellant must be unique, such as a shallow or steep parcel of land, or situation caused by other than his own action.

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[5] In ***State v. Outagamie County Board of Adjustment***, 2001 WI 78, ¶¶ 5, 33, 37, 244 Wis. 2d 613, 628 N.W.2d 376, three members of the supreme court voted to overrule this holding of ***State v. Kenosha County Board of Adjustment***, 218 Wis. 2d 396, 577 N.W.2d 813 (1998), and employ the less-strict test for area variances as expressed in ***Snyder v. Waukesha County Zoning Board***, 74 Wis. 2d 468, 475, 247 N.W.2d 98 (1976): "whether compliance with the strict letter of the restrictions governing the area, setbacks, 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." However, we conclude that, because four justices did not join in that decision, the standard established in ***Kenosha County*** remains binding precedent. We observe that this is the same conclusion reached by the majority decision in ***State of Wisconsin ex rel. Ziervogel v. Washington County Board of Adjustment***, No. 02-1618, slip op. at ¶25 (WI App Mar. 26, 2003). We also observe that the differing views on ***Snyder/Kenosha/Outagamie*** among members of this court and the supreme court indicate that clarification by the supreme court would be helpful to provide guidance to the municipalities and lower courts.

> (5) The hardship justifying a variance must apply to individual appellants parcel or structure and not generally to other properties in the same district.
>
> (6) The variance must not be detrimental to adjacent properties.

Although the ordinance does not contain the requirement that, without a variance the applicant has no reasonable use of the property, that requirement is contained in the form given Plach to fill out,[6] and the Board was instructed on that requirement at the hearing.

¶15 We address first the Vosses' contention that the Board's determination of unnecessary hardship is not supported by evidence. Because the Board's reasons for its decision to grant the variance are stated in the conclusory terms of the statute and WAUSHARA COUNTY ORDINANCE NO. 76, § 25.04(2), its decision does not inform us of the evidence it viewed as proving an unnecessary hardship. Mindful that we are to presume the correctness of the decision, we have examined the record to determine whether there is any reasonable view of the evidence that would support the Board's determination that a literal enforcement of the setback would result in unnecessary hardship to Plach. We conclude there is none. The evidence establishes that he cannot build the house and garage according to the building plan without a setback, but there is no evidence from which one may reasonably infer that without a variance he cannot build a residence that permits a reasonable use of his property. The dimensions of the house and garage are such that it is not reasonable to infer, in the absence of any other evidence, that a smaller floor plan that will fit within the setbacks in the

[6] The requirement that the variance not harm the public interest or undermine the purpose of the ordinance was also contained in the form Plach filled out.

ordinance will not allow a reasonable use of the property as a residence. Plach testified that, because of health—essentially, aging—he wanted to have all the living quarters on the first floor. However, there is no evidence from which one may reasonably infer that this same purpose cannot be accomplished within the ordinance setbacks. Similarly, the need for a variance to have a driveway that permits a turnaround to avoid backing out on the highway arises because of the proposed dimensions and placement of the house and garage: there is no basis in the evidence for a reasonable inference that it is not reasonable to have smaller dimensions with or without a different placement that would permit a driveway turnaround.

¶16 The Board argues that the Vosses contended at the hearing only that the structure should be moved closer to the east side lot line and did not show that Plach could build a home on the property without a variance. However, it is the burden of Plach to prove an unnecessary hardship, ***Arndorfer***, 162 Wis. 2d at 253 (or, in the words of the ordinance, "to prove the need for a variance." WAUSHARA COUNTY ORDINANCE NO. 76, § 25.05(1)). The burden is not on objectors to prove there is no need for a variance. Even if the Vosses had made no objection at all, Plach would still have the burden of proving an unnecessary hardship.

¶17 We next address the Vosses' contention that the grant of a variance is contrary to the public interest as expressed by the ordinance and is detrimental to the adjacent property—presumably theirs. The Board responds that it could reasonably decide that a variance was needed to place the house and garage in the center of the lot. Since this reason was not explained in the Board's decision, we are uncertain why placing a residence and garage in the center of Plach's lot required a variance, unless the assumption is that the residence and garage had to be the size and configuration proposed by Plach. As we have already explained,

there is no evidence that permits a reasonable inference that smaller dimensions would not enable Plach to have a reasonable use of his property.

¶18 The Board also argues that the evidence supports its determination that the public interest would not be harmed by the variance, even though the Vosses objected. Again, since the Board did not explain why it decided the variance would not harm the public interest and was consistent with the purpose of the ordinance, we are hampered in our review on this point. It may be that the Board decided that the number of feet involved in the requested variance, when viewed in the context of the size of the lot and the purposes of the setback, were not harmful to the public interest or inconsistent with the purpose of the setback requirements.[7] However, a determination that the variance does not harm the public interest does not authorize the Board to grant a variance in the absence of a showing of a hardship. First, the applicant must establish a hardship. Once a hardship has been demonstrated, the Board must consider whether granting a variance would be contrary to the public interest, because some hardships are "necessary" to protect the public interest. ***Arndorfer***, 162 Wis. 2d at 256. Neither in its decision nor in its brief on appeal does the Board identify the hardship to Plach if the variance is not granted. Therefore, we cannot evaluate whether the

[7] Side-yard setback regulations "are intended to provide unoccupied space for several purposes, including to afford room for lawn and trees, to promote rest and recreation, to enhance the appearance of the neighborhood, and to provide access to light and air." ***Snyder v. Waukesha County Zoning Bd.***, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976).

hardship was unnecessary in light of the public interest and the purpose of the setback.[8]

¶19 Although the Board's decision was framed in terms of the correct legal standard for granting a variance, its lack of explanation for that decision and our review of the record leaves us uncertain whether the Board actually applied that standard. It appears from the videotape of the hearing that the focus of the Board may have been on whether there were any problems with the proposed building plan other than the need for a variance, and that may have contributed to the lack of evidence on why, in the absence of a variance, Plach would have no reasonable use of his property.[9] We therefore conclude that the equitable

[8] The circuit court concluded that the evidence showed that "side lot variances abound in that area." The Board does not argue in its brief on appeal that this is a permissible basis for granting the variance; however, we are uncertain whether or not this was a factor in the Board's determination. In ***Kenosha County***, the court disapproved of partially basing the grant of a variance on the fact that many other lakefront property owners had a lesser setback than the applicant requested. The court cautioned against the "piecemeal" granting of exceptions to zoning regulations, citing ***Arndorfer***, 162 Wis. 2d at 255, and stated: "The fact that [the applicant'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 applicant] has a reasonable use of her property without the deck." 218 Wis. 2d at 417. The court also observed that, "[e]ven if the Board could look beyond [the applicant's] property in deciding whether to grant the variance" there needed to be testimony on specific instances of shorter setbacks; guesses and generalizations were not evidence on which the Board could reasonably rely. ***Id.*** at 417-18, and n.13. We read ***Kenosha County*** to preclude the Board from considering other variances it has granted for sideline setbacks in determining whether, in the absence of a variance, Plach will have no reasonable use of his property. However, in our view ***Kenosha County*** does not preclude taking those other variances into account in evaluating the effect of granting this variance on the public interest and on the purpose of the ordinance, so long as the evidence is sufficiently specific.

[9] We appreciate that the Board may have viewed its role as accommodating an applicant's request for a variance if there would be no significant harm to the public interest; and the circuit court's observations on the importance of the Board's function in balancing the various competing interests at stake are thoughtful. Nonetheless, the Board and the circuit court, like this court, are bound by the decisions of the supreme court that construe and apply WIS. STAT. § 59.694(7)(c).

disposition is a reversal and remand to the Board to allow additional evidence to be taken and a redetermination whether Plach has met the burden of establishing unnecessary hardship. *See* ***Arndorfer***, 162 Wis. at 259 (remand for additional evidence and redetermination of unnecessary hardship is the equitable disposition in certain situations).[10]

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

Not recommended for publication in the official reports.

[10] The Vosses make other arguments relating to the lack of evidence of a hardship as defined in the case law, but we conclude it is unnecessary to address them, in view of the remand to the Board for the taking of additional evidence.

¶20 ROGGENSACK, J. (*concurring*). While I agree with the majority's conclusion that the variance earlier granted by the Waushara County Board of Adjustment must be reversed and remanded for an additional evidentiary hearing and decision so that the Board can explain what evidence it finds dispositive in applying the "unnecessary hardship" standard required by WIS. STAT. § 59.694(7)(c), I write separately to point out that the factors the Board should consider are those relevant to a request for an area variance.

¶21 In order to be granted the variances he seeks, Plach must present evidence to the Board to show that the requested variances are not contrary to the public interest, are in keeping with the spirit of the ordinance, are based on conditions special to the property and that refusing variances to the fifteen foot side yard set backs will result in unnecessary hardship. WIS. STAT. § 59.694(7)(c). "Unnecessary hardship" is equivalent to, and often described as, "practical difficulty" when an area variance is at issue. ***Snyder v. Waukesha County Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 472, 247 N.W.2d 98, 101 (1976). As the supreme court has explained, "where peculiar and exceptional practical difficulties, which justify a variance, exist unnecessary hardship will also exist." ***Id.*** at 474, 247 N.W.2d at 102. The test for evaluating a request for an area variance is "whether compliance with the strict letter of the restrictions … would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." ***Id.*** at 475, 247 N.W.2d at 102 (citation omitted).

¶22 That area variances still require an analysis differing from that applied to use variances was affirmed by both the plurality in ***State v. Outagamie County Board of Adjustment***, 2001 WI 78, ¶37, 244 Wis. 2d 613, 628 N.W.2d 376, and the concurrence, ***id.*** at ¶73 n.1 (Crooks, J., concurring). And although we have recently opined that one who requests an area variance must prove that he or she has no reasonable use of the property[11] without the requested variance, ***State ex rel. Ziervogel v. Washington County Board of Adjustment***, No. 02-1618, slip op. at ¶25 (Wis. Ct. App. Mar. 26, 2003, publication decision pending), we must follow the most recent supreme court precedent on this issue which is ***Outagamie County***. Because both the plurality and the concurrence in ***Outagamie County*** agree that when an area variance is requested unnecessary hardship may be shown if "compliance with the strict letter of the restrictions … would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome," ***Outagamie County***, 2001 WI 78 at ¶37 (citation omitted); *see also* ***id.*** at ¶73 n.1 (Crooks, J., concurring) (citation omitted), that is the test I conclude that the Waushara County Board of Adjustment must apply to Plach's request.

¶23 The Plach property is approximately 75 feet wide by 170 feet deep. Of the length, a highway set back removes 50 feet and a shoreland set back removes 55 feet. The Waushara County side yard set backs total 30 feet. Plach

[11] In ***Snyder v. Waukesha County Board of Adjustment***, 74 Wis. 2d 468, 474, 247 N.W.2d 98, 102 (1976), the "no reasonable use" test was held to apply when a use variance was requested. ***Id.*** (citing ***State ex rel. Markdale Corp. v. Board of Appeals***, 27 Wis. 2d 154, 163, 133 N.W.2d 795, 799 (1965)). However, it was applied to a request for an area variance in ***State v. Kenosha County Board of Adjustment***, 218 Wis. 2d 396, 577 N.W.2d 813 (1998), without discussion, where the court purposely did not examine the two different types of variance requests and whether differences exist. ***Id.*** at 412 n.10, 577 N.W.2d at 821 n.10.

requested two side yard area variances. One variance was needed in order to move the garage four feet into the easterly side yard set back to provide a turn around in front of the garage so that the Plachs and their guests would not have to back out onto State Highway 73 as they exited the property. The other variance was a three foot encroachment into the westerly side yard set back to permit the home to have one bedroom on the first floor while honoring the 50 foot highway and 55 foot shoreland set backs required by the state codes.

¶24 In determining whether unnecessary hardship exists, the Board may consider the safety factor inherent in backing a vehicle out onto a state highway as compared with being able to proceed onto the highway in a forward fashion, the foreshortened nature of the property due to the highway and shoreland zoning regulations that restrict building on more than two-thirds of the lot, the size of the footprint of the house as compared with the sizes of neighboring dwellings, the public interest furthered by the side yard set backs, the spirit of the side yard set backs as that spirit has been interpreted in the past and any other peculiarities of the lot that would cause a hardship and thereby make conforming with the side yard set backs "unnecessarily burdensome" in constructing a residential dwelling on the property.

¶25 Accordingly, with above described conditions, I respectfully concur in the mandate of this court.