COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0778 **Cir. Ct. No. 02CV000193**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

OUTAGAMIE COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT,

WILLIAM E. GERRITS AND LYNN M. GERRITS,

INTERVENING DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State of Wisconsin appeals an order affirming the Outagamie County Board of Adjustment's decision to grant William and Lynn Gerrits' variance request. The State argues the board's decision was contrary to law and not reasonably supported by the evidence. We agree and reverse the order.

¶2 The Gerrits own a 1.3-acre lot adjacent to Apple Creek, a navigable body of water. The Gerrits obtained both a sanitary permit and building permit for a residence they intended to construct on the property. Although the applications included a hand-drawn map of the property, neither application showed Apple Creek nor the seventy-five-foot setback required by ordinance. The Gerrits ultimately constructed a residence on the property, a portion of which is located within the seventy-five-foot setback.[1] The Outagamie County Deputy Zoning Administrator informed the Gerrits of the setback violation and ordered them to either bring the residence into compliance with the setback provision or apply for a variance. The board granted the Gerrits' subsequent variance request and the circuit court affirmed the board's decision. This appeal follows.

¶3 Our role on certiorari review is limited to whether the board (1) acted within its jurisdiction; (2) proceeded on a correct theory of law; (3) was arbitrary, oppressive or unreasonable; or (4) might have reasonably made the order or finding it made based on the evidence. ***State v. Kenosha County Bd. of Adjust.***, 218 Wis. 2d 396, 410-11, 577 N.W.2d 813 (1998). We accord the board's decision a presumption of correctness and validity. ***Id.*** at 415. "A reviewing court

[1] A portion of the residence is 57.7 feet from the ordinary high-water mark of Apple Creek.

may not substitute its discretion for that committed to the Board by the legislature." ***Id.***

¶4 WISCONSIN STAT. § 59.694(7)(c) (2001-2002) grants county zoning boards the authority to grant variances where literal enforcement of a zoning ordinance results in "unnecessary hardship." In cases involving minimum setbacks from navigable waters, unnecessary hardship exists only when a property owner demonstrates that without the variance the owner has no reasonable use of the property. *See* ***Kenosha County***, 218 Wis. 2d at 398.

¶5 Here, the State argues the board's decision was contrary to law and not reasonably supported by the evidence. We agree. The board did not apply the "no reasonable use" standard, but rather, granted the variance on grounds that the Gerrits had "made a reasonable effort to comply with the setback requirement."[2] The board further concluded that "a government entity had made a mistake here" because the county and town failed to inform the Gerrits "that the home was too close to Apple Creek prior to issuing the building permit and sanitary permit."

¶6 The State contends the Gerrits did not make a reasonable effort to comply with the setback requirement because they "never broached the subject with the town or county." The State further argues that there was no mistake on the government's part, because the building and sanitary permits were issued based on applications that failed to disclose either the creek or the setback line. In

[2] To the extent the Gerrits contend our supreme court has abandoned the "no reasonable use" standard of ***State v. Kenosha County Bd. of Adjust.***, 218 Wis. 2d 396, 577 N.W.2d 813 (1998), in favor of the less stringent "unduly burdensome" standard, they are mistaken. In S***tate v. Outagamie County Bd. of Adjust.***, 2001 WI 78, ¶33, 244 Wis. 2d 613, 628 N.W.2d 376, Justice Diane S. Sykes's lead opinion indicated she would have liked to overrule the ***Kenosha*** decision; however, only two other members of the court joined in this conclusion.

any event, because the Gerrits have failed to show that, in the absence of a variance, they would have no reasonable use of their property, the board erred by granting the variance.[3] Although we recognize the burden this imposes on the Gerrits, the present law mandates our conclusion. Moreover, it is a fundamental element of zoning law that the cost of coming into compliance is not an unnecessary hardship that justifies a variance. ***State v. Winnebago County***, 196 Wis. 2d 836, 845 n.9, 540 N.W.2d 6 (Ct. App. 1995); *see also* ***Kenosha County***, 218 Wis. 2d at 418-19. Therefore, we reverse the circuit court's order affirming the Board and remand the matter to the circuit court with directions to reverse the Board's decision granting the variance.

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

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

[3] Although the county concedes the Gerrits fail to satisfy the "no reasonable use" standard, it nevertheless argues that equitable estoppel should apply. We disagree. A board of adjustment has no equitable power. ***Forest County v. Goode***, 219 Wis. 2d 654, 668, 579 N.W.2d 715 (1998). "The board only reviews whether the applicant met his or her burden to establish that, in the absence of a variance, he or she will have no reasonable use of the land." ***Id.***