

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 10, 1997

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

NOTICE

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

No. 96-3369-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. KERRY WOHLFORD,

PLAINTIFF-APPELLANT,

V.

BARRON COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Kerry Wohlford appeals a judgment affirming the Barron County Board of Adjustment's decision to deny him a request for a variance. Wohlford argues that the board applied the wrong ordinance. We disagree and affirm the judgment.

Wohlford, a building contractor, entered into a contract to purchase a lot on Beaver Dam Lake for the purpose of building a 1,200-square-foot "spec" house. The lot has 100 feet lake frontage, and 130 feet frontage on the highway; its side lot lines are 87.9 feet and 70 feet. Because the residential lot is too small under current zoning regulations, Wohlford requested a variance to waive the minimum setbacks from both the lake and the highway. A hearing was held at which concerns regarding the lot's slope, septic system installation and the proposed eighteen-foot setback from the highway were discussed. The board denied the request, concluding that there was "no proof of ownership of the abandoned roadway" and "[n]o undue hardship has been shown." Wohlford appealed to the circuit court, which affirmed the board's decision.

Wohlford argues that the board applied an incorrect theory of law. We disagree. We review the board's decision, not that of the circuit court. *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). Our review is limited to determining whether the board (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted arbitrarily; and (4) reasonably made a decision based upon substantial evidence. *Arndorfer v. Sauk County Bd. of Adjust.*, 162 Wis.2d 246, 254, 469 N.W.2d 831, 834 (1991). Wohlford limits his challenge to whether the board proceeded on a correct theory of law.

Wohlford argues that the board failed to consider the following ordinance:

Any vacant lot or parcel shown on a recorded subdivision plat or assessor's plat, or a conveyance, and recorded in the office of the register of deeds for the county prior to the effective date of this chapter may be used for any purpose permitted by this chapter, even though such a use will not conform to the minimum lot size, width, side or rear yard

or setback requirements of the district in which it is located, except that:

(a) Any lot so used shall satisfy all requirements of the Sanitary Code.¹

Section 17.17(6) Land Use Ordinance.

Wohlford argues that the lot is located in Plat of Huntington's Park and that the plat was recorded in 1956, before the enactment of the Barron County Land Use ordinance.² Wohlford directs us to "R.4" as support for his assertion. Record document four is the twenty-two-page record that was before the board. Our review of the twenty-two pages fails to uncover any evidence as to the date the lot or plat was recorded. As a result, there is no evidence of record to demonstrate that § 17.17(6) applies.

The board relied on § 17.73(7)(a) of the land use ordinance, providing that

Variances are an available form of relief only where the use in question is allowed in the zoning district, but the dimensional standards (setbacks, minimum lot area, building height, etc.) block or hinder the desired form of development. Where dimensional standards create a hardship which can be relieved by modifying the standards for that parcel of land without destroying the basic intent of the ordinance, a variance is the appropriate means of granting the relief.

We conclude that the board correctly proceeded under § 17.73(7)(a).

¹ The ordinance section provides certain other exceptions that we do not address because we conclude that this section does not apply.

² This is an expedited appeal under RULE 809.17, STATS.

By the Court.—Judgment affirmed.

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

