COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 10, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appeaR-1 in the bound volume of the Official Reports.

No. 96-3517

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

STATE OF WISCONSIN EX REL PENELOPE L. VON HADEN AND JEFFREY P. HAVENOR,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF ELEVA ZONING BOARD OF APPEALS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Trempealeau County: ROBERT W. WING, Judge. *Affirmed.*

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

PER CURIAM. Penelope VonHaden and Jeffrey Havenor (collectively VonHaden) appeal a judgment denying certiorari relief from a decision of the Village of Eleva Zoning Board of Appeals to grant a variance to Eleva Lutheran Housing, Inc. The board of appeals granted variances to allow

expansion of an existing facility to allow construction of an additional six unit facility for the elderly. VonHaden argues that the board did not act according to law and unreasonably and without evidence found the existence of an unnecessary hardship. We affirm the judgment that affirmed the board of appeals' decision.

Eleva Lutheran Housing applied to the village board to rezone a parcel of land from R-1 to R-4 and to allow a variance for construction of their proposed expansion. The village board rezoned the property but denied the variance. The board of appeals then overturned the village board's decision on the variance. The circuit court upheld the board of appeals' decision. The decision to rezone the property from R-1 to R-4 has not been appealed.

In reviewing the board of appeals' decision to grant the variance, this court is limited to deciding: (1) whether the board stayed 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 evidence was such that the board might reasonably make the decision in question. *See* ***State ex rel. Brookside v. Jefferson Bd***., 131 Wis.2d 101, 120, 388 N.W.2d 593, 600-01 (1986). VonHaden concedes that the board had jurisdiction to hear the matter, but argues that the board's decision violates the other three standards.

Section 62.23(e)7, STATS., made applicable to the village by § 61.35, STATS., allows the board of appeals to grant a variance "where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done." Unnecessary hardship exists when complying with the strict letter of zoning

restrictions would unreasonably prevent the property owner from using the real estate for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. *See* ***Arndorfer v. Board of Adjustment***, 162 Wis.2d 246, 255, 469 N.W.2d 831, 834 (1991). Practical difficulties or unnecessary hardship does not include conditions personal to the owner of the land, but rather conditions especially affecting the lot in question. ***Snyder v. Waukesha Co. Zoning Bd***., 74 Wis.2d 468, 479, 247 N.W.2d 98, 104 (1976). A situation where, in the absence of a variance, no feasible use can be made of the property is an instance of unnecessary hardship. ***Id***. at 474, 247 N.W.2d at 102. The main purpose of allowing variances is to prevent land from being rendered useless. ***Id***.

The board of appeals reasonably concluded based on the evidence that Eleva Lutheran Housing established a hardship that was not of its own making. The building size and setback requirements for R-4 property would prevent Eleva Lutheran Housing from completing any R-4 construction. The testimony and exhibits presented to the board establish that no R-4 construction could take place on the lot in question. VonHaden faults the board for accepting the testimony of Richard Nelson on this question because Nelson's testimony is "self-serving." The law does not prohibit the board from considering self-serving testimony. In addition, the drawings submitted to the board establish that enforcement of the setback requirements would allow no construction on the property because the setbacks from each direction overlap.

We reject VonHaden's argument that the hardship is self-created because Eleva Lutheran Housing requested the zoning change from R-1 to R-4. Rezoning by amendment of the ordinance is legislative in nature. *See* ***Quinn v. Town of Dodgeville***, 120 Wis.2d 304, 315, 345 N.W.2d 747, 753 (1984), *aff'd,* 122 Wis.2d 570, 364 N.W.2d 149 (1985). The hardship is created by enforcement

of zoning laws that render the property unbuildable. The applicant's role in creating the law should not be considered when deciding whether the hardship is self-created. Generally, self-created hardships occur when application for the variance is made after construction has been completed and the applicant complains of the expense of removing the completed construction. *See, e.g.*, ***Snyder***, 74 Wis.2d at 476, 247 N.W.2d at 103; ***SXR Markdale Corp. v. Board of Appeals***, 27 Wis.2d 154, 160, 133 N.W.2d 798, 797 (1965). No such concerns are present here. The present zoning restrictions which allow no use of the lot is also sufficiently unique to justify the variance. *See* ***Arndorfer,*** 162 Wis.2d at 340, 469 N.W.2d at 171. Therefore, the board of appeals acted reasonably and within its power created by § 62.23(e), STATS., when it granted the variance.

By the Court.—Judgment affirmed.

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