COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2084

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TREMPEALEAU COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-CO-APPELLANT,

HAROLD AND MARLENE PAASKE, HUSBAND AND WIFE, AND THOMAS AND MARY POELLINGER, HUSBAND AND WIFE,

INTERVENING-DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

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

¶1 CANE, C.J. Harold and Marlene Paaske, Thomas and Mary Poellinger and the Trempealeau County Board of Adjustment appeal from a judgment reversing the board's decision to grant a variance for modifications to cottages owned by the Paaskes and the Poellingers. Because we conclude there was insufficient evidence for the board to conclude that absent the variances there was no reasonable use for the property, we affirm the judgment.

BACKGROUND

¶2 The Paaskes and the Poellingers owned single level residential buildings located in a floodway zone governed by Trempealeau County's Floodplain Zoning Ordinance. The buildings were susceptible to periodic flood waters. Consequently, the property owners applied for building permits to elevate their respective residential buildings in order to raise the living quarters above the regional flood level. In correspondence denying the permit applications, the zoning administrator noted his reasons for the denials and further intimated that although the property owners' only recourse was to seek a variance from the board, he was unaware of any ground upon which a variance could be granted.

¶3 Rather than appealing the zoning administrator's denial of their permit applications, the property owners sought variances from the board. The board granted the variances to allow the modifications and subsequently issued building permits. Thereafter, the State commenced an action in circuit court seeking certiorari review of the board's decision. Because the circuit court found the record of the board's hearing defective, it remanded the matter for further hearing. In the subsequent hearing, the board confirmed its earlier decision to grant the variances and issued orders with extensive findings of fact and conclusions of law.

¶4 During the pending review of the board's decision, the property owners made the proposed modifications to their respective properties. They also sought orders declaring, in relevant part, that they were entitled to proceed with their proposed modifications without a variance. On review, the circuit court reversed the board's decision to grant the variances. This appeal followed.

ANALYSIS

¶5 The property owners argue that because their application for a building permit should have been granted in the first instance, the board need not have addressed whether they should have been granted a variance. The property owners never appealed to the board from the zoning administrator's denial of their permit applications, but rather sought a variance from the board. Therefore, the issue of whether the property owners' initial permit applications should have been granted is not before us. *See* ***Goranson v. DILHR***, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980) (Generally, issues not raised before an administrative agency cannot be raised for the first time on appeal.). The only issue before us is whether the board erred by granting the variances.

¶6 Our role on certiorari review is limited. Where, as here, the circuit court does not take additional evidence, we will only consider

> (1) whether the Board kept 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 Board might reasonably make the order or determination in question, based on the evidence.

State v. Kenosha County Bd. of Adjust., 218 Wis. 2d 396, 410-11, 577 N.W.2d 813 (1998). The State contends the board erred by granting the variances because

the property owners could not show the "unnecessary hardship" required to grant a variance. We agree.

¶7 Section 7.3(4) of the Trempealeau County Floodplain Zoning Ordinance provides in relevant part that the board may grant a variance from the dimensional standards of the ordinance where an applicant convincingly demonstrates that "literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship on the applicant."[1] The board concluded that denying the property owners' requests for a variance would impair their safety and their guests' safety and would leave them with no reasonable use of their property, thus constituting an unnecessary hardship or practical difficulty.

¶8 We accord the board's decision a presumption of correctness and validity. *See* ***Kenosha County***, 218 Wis. 2d at 415. "A reviewing court may not substitute its discretion for that committed to the Board by the legislature."[2] ***Id.*** When the board acts on an application for a variance, however, "it acts in a quasi-judicial capacity." ***Id.*** The board's action must be based on evidence and "[o]n certiorari review, a reviewing court applies the substantial evidence test to ascertain whether the evidence before the Board was sufficient." ***Id.*** at 416. The

[1] Although § 7.3(4) of the Trempealeau County Floodplain Zoning Ordinance permits the granting of a variance upon a showing of either "practical difficulty or unnecessary hardship," our supreme court has decided that "there is no significant distinction between the meaning of the two terms." *See* ***State v. Kenosha County Bd. of Adjust.***, 218 Wis. 2d 396, 409, 577 N.W.2d 813 (1998) (citing ***Snyder v. Waukesha County Zoning Bd. of Adjust.***, 74 Wis. 2d 468, 474, 247 N.W.2d 98 (1976)).

[2] Pursuant to WIS. STAT. § 59.694(7)(c), county boards of adjustment are empowered

> [t]o authorize upon appeal in specific cases variances 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.

board's findings are conclusive if any reasonable view of the evidence would sustain its findings. *See* ***id.***

¶9 In ***Kenosha County***, our supreme court clarified the "unnecessary hardship" standard, holding that "[o]nly when the applicant has demonstrated that he or she will have no reasonable use of the property, in the absence of a variance, is an unnecessary hardship present." ***Id.*** at 421. There, the court overturned a variance granted to a resident who, desiring to build a deck on her home, sought a variance from that ordinance's shoreland setback requirement.

¶10 In the present case, both the property owners and the board argue that ***Kenosha County***'s standard for "unnecessary hardship" is inapplicable where, as here, there is a preexisting nonconforming structure involved. In essence, they argue that an owner of a nonconforming structure will never be able to obtain a variance because there will always be *some* reasonable use of the property. Although we may agree that the "no reasonable use" standard imposes a high burden on variance applicants, ***Kenosha County*** neither limits application of the standard nor distinguishes its facts from those of cases involving preexisting nonconforming structures. Therefore, ***Kenosha County***'s standard for "unnecessary hardship" governs.

¶11 The board focused on safety issues in granting the variances. It concluded, in essence, that without the variances, the property owners would be unable to continue using their buildings for residential purposes "because of safety concerns relating to the [property owners] themselves and their property." Although the intermittent flooding undoubtedly compromises the safety of both people and property, the property owners nevertheless concede that "the owner of a nonconforming structure seeking to make an alteration has some reasonable use

of the property." Accordingly, under ***Kenosha County***'s standard for "unnecessary hardship," there was insufficient evidence for the board to conclude that absent the variances, there was no reasonable use for the property at issue.[3]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] We refrain from addressing any alternative arguments because only dispositive issues need be addressed. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).