COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP920-FT **Cir. Ct. No. 2004CV249**

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

MALCOLM, INC.,

PLAINTIFF-APPELLANT,

V.

EAU CLAIRE COUNTY BOARD OF LAND USE APPEALS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Reversed and cause remanded with directions.*

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

¶1 CANE, C.J. Malcolm, Inc., appeals an order from the circuit court affirming the Eau Claire County Board of Land Use Appeals' decision to deny its

application for an area variance.[1] Malcolm argues that the board applied the incorrect, no reasonable use standard from ***State v. Kenosha County Bd. of Adjustment***, 218 Wis. 2d 396, 577 N.W.2d 813 (1998). We agree. Malcolm next argues that this court should overturn the board's decision and grant the variance. We disagree. Finally, Malcolm argues that if we remand this matter to the board for further review, we should include an instruction to the board that it may not entertain any new evidence. Again, we disagree. Accordingly, we reverse and remand this matter to the circuit court with directions to remand to the board for further proceedings. The board's analysis of Malcolm's variance application should be based on the unnecessary hardship standard articulated in ***Ziervogel v. Washington County Bd. of Adjustment***, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401. We further hold that the board may consider any new evidence in its application of the correct legal standard.

BACKGROUND

¶2 Malcolm sought a variance from the board that would allow it to fly an American flag at its commercial property at a height above what is currently allowed by local zoning law. Specifically, Malcolm wanted to fly the flag from a 1,048-foot MSL[2] flagpole while the maximum allowed height in the zoning district is 1,034-foot MSL. Malcolm contended the flag was not viewable by passing motorists at the current maximum allowed height.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] MSL stands for "Mean Sea Level."

¶3 Malcolm filed the application for an area variance in response to a January 5, 2004, letter from the Eau Claire County land use controls supervisor that threatened to commence an enforcement action against the 1,048-foot MSL flagpole on Malcolm's property. The letter stated that "[u]nder a recent state Supreme Court case, you must show that there is no reasonable use of the property without the variance. As you currently have a business on the property, you cannot show there is no reasonable use of the property and variance should be denied." Similarly, the Eau Claire County variance application materials set forth the following requirement for the granting of a variance: "Unnecessary hardship (may not be self-imposed) is present in that a literal enforcement of the terms of the zoning ordinance would deny the petitioner all reasonable use of the property."

¶4 At the board hearing on Malcolm's variance application on March 10, 2004, the supervisor stated the following: "[I]t is the burden of the applicant to prove hardship. Again, I'll take you back to the Kenosha Case which states that if you have a reasonable use of your property, you cannot get a variance. They have reasonable use, they have a business on the property." *See* ***Kenosha County***, 218 Wis. 2d 396. Similarly, the board president stated, "[w]e are obligated to enforce the laws of the state and in particular the decisions and case law such as the Kenosha case …." Ultimately, the board denied Malcolm's variance application. Nine days later, on March 19, 2004, the Wisconsin Supreme Court decided in ***Ziervogel*** that a zoning board of appeals must apply an unnecessary hardship standard when considering whether to grant an area variance, essentially overruling the test for an area variance set forth in ***Kenosha County***. *See* ***Ziervogel***, 269 Wis. 2d 549.

¶5 Malcolm challenged the board's determination in circuit court, which affirmed the board's decision. This appeal follows.

STANDARD OF REVIEW

¶6 A decision of a zoning board of adjustment is reviewed under a certiorari standard. WIS. STAT. § 59.694(10). This court reviews the decision of the board and not that of the circuit court. ***Miswald v. Waukesha County Bd. of Adjustment,*** 202 Wis. 2d 401, 408, 550 N.W.2d (Ct. App. 1996). We accord a presumption of "correctness and validity" to the board's decision. ***Ziervogel***, 269 Wis. 2d 549, ¶13. Statutory certiorari review is limited to the following issues:

> (1) [w]hether 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 evidence was such that it might reasonably make the order or determination in question.

Arndorfer v. Sauk County Bd. of Adjustment, 162 Wis. 2d 246, 254, 469 N.W. 2d 831 (1991) (citation omitted).

DISCUSSION

¶7 Under the decision in ***Ziervogel***, a zoning board of appeals should grant an area variance if it finds an unnecessary hardship. ***Ziervogel***, 269 Wis. 2d 549, ¶7. An unnecessary hardship exists when "compliance with the strict letter of the restrictions governing area, set backs, 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." ***Id.*** (quoting ***Snyder v. Waukesha County Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 475, 247 N.W.2d 98 (1976) (citations omitted)). Whether the standard has been met is based upon the "purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger

public interest." ***Ziervogel***, 269 Wis. 2d 549, ¶7. Finally, the hardship must be unique to the parcel and not self-created by the party. ***Id.***

¶8 Prior to the decision in ***Ziervogel***, the standard to determine whether to grant an area variance was whether a "feasible use [of the property] is possible without the variance." ***Kenosha County***, 218 Wis. 2d at 413. Specifically, a variance should be denied when the record before the zoning board of appeals "demonstrates that the property owner would have a reasonable use of his or her property without the variance." ***Id***. This no reasonable use standard was replaced with the unnecessary hardship standard set forth in ***Ziervogel***. ***Ziervogel***, 269 Wis. 2d 549, ¶7.

¶9 We agree with Malcolm that the board must analyze this variance request under the unnecessary hardship rule from ***Ziervogel***. The Wisconsin Supreme Court has held that a zoning board of appeals must reevaluate the facts under the more recent unnecessary hardship standard if it has previously applied the no reasonable use standard. *See* ***Lamar Cent'l Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, ¶24, 700 N.W.2d 87. In ***Lamar***, a zoning board of appeals denied an application for an area variance under the no reasonable use standard. ***Id.*** Subsequent to the zoning board of appeals' decision, the Court decided ***Ziervogel***. ***Id.*** Pointing to the zoning board of appeals' incorrect application of the no reasonable use standard, the court held that the "failure to proceed on the correct theory of law independently justifies a remand." ***Lamar***, 700 N.W.2d 87, ¶24. The facts in ***Lamar*** closely parallel the case at present.

¶10 As in ***Lamar***, this case must be remanded to the board, so it may properly apply the unnecessary hardship standard. Through no fault of its own, the board improperly analyzed the variance request under the no reasonable use

test from ***Kenosha County***. ***Kenosha County***, 218 Wis. 2d at 413. However, the Wisconsin Supreme Court has now made it clear that an application for an area variance must be evaluated in light of the more recent standard laid out in ***Ziervogel***. *See* ***Lamar***, 700 N.W.2d 87, ¶24.

¶11 The board argues that it has already applied the unnecessary hardship test through the application process. Specifically, the board contends that eight requirements for a variance set forth in the local zoning code integrate the unnecessary hardship standard, and therefore they have already properly applied the unnecessary hardship test. We disagree. Although there is evidence that the unnecessary hardship test was considered in part, there is nothing in the record that indicates the board applied this test exclusively. ***Ziervogel***, 269 Wis. 2d 549, ¶7. Further, the board's statements at the March 10, 2004, hearing demonstrate that the board's analysis was based, in large part, on the former no reasonable use test. Therefore, we remand with instructions to apply the unnecessary hardship test from ***Ziervogel***. ***Id.***

¶12 We reject Malcolm's argument that this court should grant the variance. Remand to the board provides the appropriate avenue for the application of the proper standard.

¶13 We also reject Malcolm's argument that the board may not consider any new evidence when it applies the unnecessary hardship test. As the court stated in ***Ziervogel***, whether the standard has been met is based upon the "purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest." ***Id.***, ¶7. Any material changes to these considerations may rightfully affect the board's decision.

Therefore, as the board considers the correct standard and conducts this fact-intensive analysis, it may consider any new relevant evidence.

¶14 We reverse and remand to the circuit court with directions to remand to the board, so it may apply the unnecessary hardship test. The board may consider new evidence it considers relevant.

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

Not recommended for publication in the official reports.