

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP3180

Cir. Ct. No. 2003CV650

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DAVID HENSE, MARY HENSE, ROBERT FLEMING AND MARJORIE
FLEMING,**

PLAINTIFFS-APPELLANTS,

V.

**ST. CROIX COUNTY BOARD OF ADJUSTMENT, DONALD SWENSON,
GERALDINE SWENSON, PAUL ROSSO AND SANDRA ROSSO,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. David and Mary Hense and Robert and Marjorie Fleming appeal a judgment denying their request for certiorari relief from a

St. Croix County Board of Adjustment decision. The Board granted area variances to Donald and Geraldine Swenson and Paul and Sandra Rosso for construction of a home along the St. Croix River. The Henses and Flemings, who own adjoining property, contend the Board improperly granted the variances because: (1) there was no evidence that the lot was unique; (2) the Board failed to consider the purposes of the zoning ordinances; and (3) the variances granted were not the least extensive deviation that would allow a reasonable use of the property. Because we conclude the Board properly granted the variance, we affirm the circuit court's judgment upholding the Board's decision.

BACKGROUND

¶2 This case involves a .45-acre lot situated beside the St. Croix River. The property was platted as a residential lot in 1957 and purchased by the Swensons in 1965, before the St. Croix Riverway Zoning Ordinance at issue in this appeal was enacted. Due to the lot's size and slope, it is unbuildable under that ordinance.

¶3 In February 2002, the Rossos agreed to purchase the lot from the Swensons, conditioned on the Rossos obtaining a building permit and the necessary variances to build a home on the lot. The Rossos hired Bruce Lenzen to design and construct the home.

¶4 In May 2002, Lenzen applied for variances and special exceptions necessary to build the home he designed for the lot.¹ The proposed home was 2,000 square feet on the main level and had an 864-square-foot garage. The

¹ Only the variances are relevant to this appeal.

application sought a 125-foot variance from the ordinary high water mark setback, a fifteen-foot variance from the side lot setback, and a variance to excavate and build on slopes exceeding 12%.

¶5 On June 27, 2002, the Board held a hearing on the variance application. The Wisconsin Department of Natural Resources lodged a formal objection to the application.² The Board tabled the matter, allowing the Swensons and Rossos to work out a building plan that was satisfactory to the DNR.

¶6 The DNR eventually agreed not to oppose the variance application if the Swensons and Rossos met all of the conditions contained in an October 29, 2002 letter. Those conditions included a 100-foot setback from the river's ordinary high water mark, minimal grading on slopes exceeding 12%, a vegetation screening plan, a deed restriction preventing future expansion of the house, and advance approval of the house's color.

¶7 Lenzen produced new plans that incorporated all of the DNR's conditions and filed a new variance application in February 2003. The revised house plans reduced the main floor to 1,368 square feet and the garage to 432 square feet. This variance application requested a 100-foot variance from the ordinary high water mark setback and a variance to build and excavate on slopes exceeding 12%. Lenzen also agreed to use a special construction technique that would minimize soil and vegetation disruption.

¶8 After a delay during which the Swensons and Rossos provided additional information to the Board and made changes to the plans, the second

² At the time, the Board could not issue a variance over the DNR's objection.

variance application was considered at the June 26, 2003 board meeting. The Board tabled the matter again to obtain additional information on seven items, including the color of the house and the direction of water run-off.

¶9 At the October 23, 2003 board meeting, the Swensons and Rossos additionally requested a three-foot variance from the side lot setback to accommodate the roof overhang.³ The DNR did not object to the final plans or variance application.

¶10 On November 12, 2003, the Board issued its decision to grant the variances. On December 11, 2003, the Henses and the Flemings, commenced this certiorari action challenging the Board's decision to grant the variances. The circuit court upheld the Board's decision.

STANDARD OF REVIEW

¶11 On certiorari, our review is limited to: (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 ex rel. Ziervogel v. Washington County Bd. of Adj.*, 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401. We accord a presumption of correctness and validity to the board's decision, and its findings will not be disturbed if any reasonable view of the evidence sustains them. *Id.*, ¶13.

³ Lenzen intended for the second design to comply with the side lot setback requirements. However, he prepared those plans assuming that the side lot setbacks were measured from the base of the structure and thus would not include the roof overhangs.

DISCUSSION

¶12 Variance procedures from zoning ordinances serve a number of essential purposes, such as to:

prevent otherwise inflexible zoning codes from precipitating regulatory takings; to provide a procedure by which the public interest in zoning compliance can be balanced against the private interests of property owners in individual cases; and, most broadly, to allow a means of obtaining relief from the strict enforcement of zoning restrictions where individual injustices might occasionally occur.

Id., ¶17. Accordingly, county zoning boards have the authority to grant variances from ordinances “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.” WIS. STAT. § 59.694(7)(c).⁴

¶13 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.” *Ziervogel*, 269 Wis. 2d 549, ¶33. When determining whether a land owner has demonstrated an unnecessary hardship, the board should consider “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. The hardship must be based on conditions unique to the property rather than considerations personal to the property owner and cannot be self-created. *Id.*, ¶20.

⁴ All references to the Wisconsin Statutes and Administrative Code are to the 2003-04 version unless otherwise noted.

¶14 The Board made the following findings regarding hardship:

The variances are not contrary to the public interest and special conditions exist such that a literal enforcement of the ordinance would result in unnecessary hardship:

- a. The lot was created in 1957.
- b. The lot has no reasonable use without the variances.
- c. The ordinance allows substandard lots to be developed.
- d. The residence is compatible with the neighborhood.
- e. The size of the structure is comparable to neighboring structures on similarly sized lots.
- f. The residence, water runoff, and erosion control plans have been designed by professional engineers and have been reviewed and approved by all appropriate agencies.

The Henses and Flemings do not challenge any of the Board’s findings. Instead, they argue the Board improperly granted the variances because there was no evidence that the lot was unique.

¶15 The Henses and Flemings contend that because the St. Croix Riverway Zoning Ordinance applies to all shoreland property, the Swensons and Rossos cannot demonstrate a unique hardship, citing *State v. Winnebago County*, 196 Wis. 2d 836, 845-46, 540 N.W.2d 6 (Ct. App. 1995) (no unique hardship exists where the property’s hardship is not greater than that shared by neighboring properties). However, taken to its logical conclusion, their argument would mean no one could ever obtain a zoning variance. By definition, zoning applies equally to all parcels in a defined area and, thus, the hardship of the zoning ordinance itself is shared equally by all parcels in the zoned area.

¶16 Variances are permitted where an owner demonstrates an unnecessary hardship: 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.” *Ziervogel*, 269 Wis. 2d 549, ¶33. Here it is undisputed that the lot is platted residential but the applicable ordinances prevent the owners from building any house on the lot. This hardship is not shared by the neighboring lots; indeed, the Henses and Flemings each have homes on their adjoining lots. Thus, there was ample evidence for the Board to find that the Swensons and Rossos were unreasonably prevented from using the lot for a permitted purpose and, having concluded there was an unnecessary hardship, that the hardship was based on conditions “unique to the property rather than considerations personal to the property owner.” *Id.*, ¶20.

¶17 The Henses and Flemings also argue the Board improperly granted the variances because it failed to consider the underlying purposes of the zoning ordinances. The St. Croix Riverway Zoning Ordinance enumerates those purposes:

1. Reduce the adverse effects of poorly planned shoreland and bluff area development.
2. Prevent pollution and contamination of surface and groundwaters and soil erosion.
3. Provide sufficient space on lots for sanitary facilities.
4. Minimize flood damage.
5. Maintain property values.
6. Preserve and maintain the exceptional scenic and natural characteristics of the water and related land of the Lower St. Croix River Valley in a manner consistent with the National Wild and Scenic River Act, Federal Lower St. Croix River Act and the Wisconsin Lower St. Croix River Act.

ST. CROIX COUNTY, WIS., ORD. § 17.36(1)(a).⁵ The Henses and Flemings argue that the Board was required to consider these purposes to determine

whether a hardship unique to the property has been demonstrated and whether the relief requested is consistent with the public interest such that the variance should be granted, or whether a variance would subvert the purpose of the zoning restriction to such an extent that it must be denied.

Ziervogel, 269 Wis. 2d 549, ¶34. Because the Rossos and Swensons presented no evidence to the Board that the requested variances would not conflict with these purposes and because “[t]here is no indication in the [Board’s] decision” that it considered these purposes, they argue, the variance should not have been granted.

¶18 Although the decision does not quote the purposes of the zoning ordinance or make specific findings as to each purpose, the record as a whole shows that the Board did consider those purposes. Its decision noted that the erosion and water run-off control plans had been designed by professional engineers and were approved by the appropriate agencies. These plans assure that all water run-off is contained and no pollutants enter the river.

¶19 The Board also carefully considered the size and color of the house and its potential impact on the surrounding environment. The Board rejected the original house plan, requiring that the house be smaller and further from the river. The house is comparable in size to neighboring houses and less than the maximum

⁵ The Henses and Flemings also quote purposes from other laws, such as WIS. ADMIN. CODE § NR 118.01 and WIS. STAT. § 30.27(1). However, they do not explain whether those sections provide additional purposes not included in the St. Croix ordinance, nor do they make any arguments as to what specific purposes the Board was required but failed to consider. Accordingly, we construe their argument as objecting to the Board’s failure to consider the purposes of the St. Croix ordinance, generally, and address it as such.

allowable height. The Board imposed a number of conditions on the variance. A deed restriction prevents later expansion of the house. The house color must be approved to ensure it is a suitable earth tone to minimize the visual impact of the house. The Board required a vegetation maintenance plan with native grasses and shrubs, which serves to preserve the river's natural characteristics, stabilize the ground and mitigate erosion. It required the owners to care for the existing trees and vegetation and provide screening to make the house visually inconspicuous, including five years of monitoring to ensure the screening is effective.

¶20 Finally, the Board heard and considered the testimony of the neighbors. Their concerns precipitated several tablings, requests for additional information, and revisions to the plans. Thus, the record demonstrates that the Board considered the purposes of the zoning ordinance when making its decision.

¶21 The Henses and Flemings also challenge the extent of the variances granted, arguing that the variances were excessive and were improperly granted for the personal convenience of the owners. However, boards of adjustment have broad discretion not only to grant variances, but also to determine the scope of those variances. *See Miswald v. Waukesha County Bd. of Adj.*, 202 Wis. 2d 401, 412, 550 N.W.2d 434 (Ct. App. 1996). Here, the record demonstrates that the Board did not merely adopt the variances requested in the application. In fact, the Board rejected the first house design and variance requests, ultimately approving variances for a smaller house.

¶22 The Henses and Flemings argue there was no evidence that the variances requested were the least extensive in order to give the owners a permitted use. They rely on *State ex rel. Spinner v. Kenosha County Bd. of Adj.*, 223 Wis. 2d 99, 107, 588 N.W.2d 662 (Ct. App. 1998), where we stated a variance

applicant “must present evidence demonstrating that no other home design could incorporate the setback requirement on his property.” However, here the parties agree that this lot would not accommodate a house that would comply with all the setback requirements; the lot as platted is unbuildable under the zoning ordinance. Accordingly, their reliance on *Spinner* is unpersuasive. They further argue that the Swensons and Rossos were required to prove they could not build a smaller house than the one they propose. However, they cite no legal authority that supports this contention. *See State v. Shaffer*, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980) (We need not address arguments unsupported by citation to authority.).

By the Court.—Judgment affirmed.

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

