

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2007

A. John Voelker
Acting 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. 2006AP382

Cir. Ct. No. 2005CV1209

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. SUSAN SHOEMAKER,

PETITIONER-APPELLANT,

V.

**CITY OF EDGERTON AND CITY OF EDGERTON BOARD OF ZONING
APPEALS,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Susan Shoemaker appeals an order affirming a zoning variance decision by the City of Edgerton Board of Zoning Appeals. We affirm.

¶2 The City of Edgerton applied for a zoning variance in March 2005 to make certain modifications to its public library. The variances concerned the floor area ratio, yard setback, and parking requirements. After a public hearing, the board granted the variances. Susan Shoemaker sought judicial review by petition for writ of certiorari, and the circuit court affirmed the board's decision. Review on certiorari is limited to whether the agency (1) kept within its jurisdiction; (2) acted according to law; (3) acted in a manner that was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) had before it evidence such that it might reasonably make the order or determination in question. *Coleman v. Percy*, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980).

¶3 On appeal, Shoemaker argues that the board was not legally able to consider the City's March 2005 application. Her argument is based on a city ordinance that generally bars the board from reconsidering an application within one year after the board has dismissed or denied the application. Shoemaker's argument fails because the ordinance plainly does not apply to this situation. The ordinance applies when the board has previously dismissed or denied the application. Here, the board had earlier acted to grant the variances and was reconsidering the variances because the circuit court reversed the board's decision granting the variances and remanded the matter back to the board for further consideration, leading to the decision Shoemaker now challenges. Thus, there was no prior dismissal or denial by the board. Furthermore, considering that the court reversed based on its conclusion that the City did not file an application in 2004, we question whether the board's current decision is a second review of an application.

¶4 Shoemaker argues that the City failed to satisfy the hardship requirement in WIS. STAT. § 62.23(7)(e)7. (2005-06),¹ which states that variances may be granted “where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship.” The property owner bears the burden of proving unnecessary hardship. *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶20, 269 Wis. 2d 549, 676 N.W.2d 401.

¶5 The supreme court has distinguished between a use variance and an area variance. *See id.*, ¶¶21-26. An area variance is the type at issue here. The correct legal standard for hardship in area variances is whether compliance with the strict letter of the restrictions governing area, setbacks, 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.*, ¶33. The hardship must be based on conditions unique to the property, rather than considerations personal to the property owner; cannot be self-created; and must be evaluated in light of the purpose of the zoning restriction at issue. *Id.*, ¶20. The variance cannot be contrary to the public interest. *Id.*

¶6 Shoemaker argues that the City did not sufficiently demonstrate hardship. We disagree. The hardship lies in the combination of several factors. One of those factors is a deed restriction on the library property that prevents the property from being used for other purposes. Another factor is that the deed restriction and original construction of the building date back to approximately

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

1905, before the enactment of modern zoning codes. The building in its current form does not comply with accessibility requirements, which would be remedied as part of the new modification. Based on these factors, the board could reasonably conclude that denying variances would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with zoning code restrictions unnecessarily burdensome.

¶7 Shoemaker argues that there was insufficient evidence for the board to reach its decision. This argument underlies her claims that the board acted arbitrarily and that its findings were inadequate. However, the evidence was sufficient. The various factors showing hardship and other necessary elements were supported by testimony of city and library officials and an architect. To the extent Shoemaker is arguing that the board's findings were not adequately explained, we conclude that the written findings adopted by the board were adequate.

¶8 Shoemaker argues that the board's decision was improper because, as part of the reason to grant the variances, the board considered the fact that the property is publicly owned. Shoemaker cites no authority holding that this is an improper factor. We perceive no reason why this is an improper consideration.

¶9 Shoemaker argues that three of the board's members and the board's attorney had conflicts of interest. As to board chair Dave Thomas, her argument is founded entirely on one question he asked during the 2004 proceedings that might be read as indicating his desire to "help the city out." Shoemaker argues that this was a clear statement that Thomas had prejudged the matter. We disagree. Nothing about this brief comment indicates prejudgment.

¶10 As to board member Alona Webb, Shoemaker does not appear to have objected to Webb's participation previously and, therefore, we conclude that this issue is raised for the first time on appeal and need not be addressed. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶11 As to board member Cindy Richardson, Richardson spoke in support of the variances as a member of the public, but did not participate in the board's vote. Shoemaker argues that this could be perceived as exerting undue influence on her fellow board members. This is not a reasonable interpretation of Richardson's conduct, or of how her conduct was likely to have been perceived by other board members.

¶12 As to board attorney David Moore, Shoemaker argues that Moore's participation tainted the process because he is paid to represent the applicant City in other matters, and was paid by the applicant City for his work with the zoning board. We do not agree that this is a basis to overturn the board's decision. Moore did not represent the City in this proceeding. Instead, the City was represented by special counsel not connected with Moore.

¶13 Finally, to the extent that we have not specifically addressed arguments made by Shoemaker on appeal, we have concluded that those arguments were either so lacking in merit as to not require individual discussion or were not sufficiently developed. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

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

