COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3161 **Cir. Ct. No. 2006CV4712**

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

JAMES N. BARBIAN,

PETITIONER-APPELLANT,

V.

BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 FINE, J. James N. Barbian appeals a circuit-court order affirming on certiorari-review a decision of the Board of Zoning Appeals of the City of Milwaukee denying his application for a use-variance. Barbian claims that:

(1) the Board did not adequately articulate reasons for its findings, and (2) there was insufficient evidence to support the Board's decision. We affirm.

I.

¶2 Barbian owns eight acres of land in the City of Milwaukee. He leased the property to James Cape & Sons Company from 1995 until April of 2005, where Cape operated a concrete-crushing business under special-use permits issued in 1994 and 1998.[1] The 1998 permit expired on June 12, 2004. According to Barbian's submissions in the Record, Cape "became insolvent" in 2005 and "assigned its assets for the benefit of creditors" under WIS. STAT. ch. 128.

¶3 In December of 2005, Barbian applied for a permit to restart the concrete-crushing business. The Commissioner of City Development denied the permit and told Barbian to apply to the Board for a use-variance. The zoning classification of the property had changed in 2002 from a heavy industrial district to a light industrial district, and concrete-crushing operations in a light industrial district needed a use-variance.[2] *Compare* MILWAUKEE, WIS., ORDINANCE § 295-523-14-g (2000) (mining, crushing, grading, washing or storage of sand, gravel, or crushed stone special use in industrial districts), *with* MILWAUKEE, WIS.,

[1] A "special use" is "a use which is generally acceptable in a particular zoning district but which, because of its characteristics and the characteristics of the zoning district in which it would be located, requires review on a case-by-case basis to determine whether it should be permitted, conditionally permitted or denied." MILWAUKEE, WIS., ORDINANCE § 295-201-619 (2005).

[2] "Use zoning regulates fundamentally how property may be used, in order to promote uniformity of land use within neighborhoods or regions." ***State ex rel. Ziervogel v. Washington County Bd. of Adjustment***, 2004 WI 23, ¶4, 269 Wis. 2d 549, 556, 676 N.W.2d 401, 404. Use variances are limited to circumstances where property owners would have "no reasonable use" of their property "given the purpose of use zoning and the substantial effect of use variances on neighborhood character." *See* ***id.***, 2004 WI 23, ¶5, 269 Wis. 2d at 556, 676 N.W.2d at 404.

ORDINANCE § 295-803-1 (2007) (processing or recycling of mined minerals prohibited in light industrial district).

¶4 Barbian filed an application with the Board requesting a use-variance. The Board held a public hearing on Barbian's application on April 6, 2006. A representative from the Department of City Development told the Board that the Department was "very much opposed" to the variance request. He testified that when it was operated, the concrete-crushing facility had a "detrimental impact[]" on surrounding areas, was a "significant eyesore," and generated noise and dust. The representative also told the Board that he believed Barbian's property was a "developable site," despite a potential plan by the nearby General Mitchell International Airport to build a new runway because, from what he could determine, the runway would not affect the property. He further testified that Barbian's property could be used as industrial property without a variance, and that Barbian's claimed hardship was mainly economic.

¶5 Barbian's lawyer asserted that other city agencies, including the Department of Neighborhood Services and the Department of Public Works, had not opposed the variance. He claimed that Barbian would experience substantial hardship if the variance were not granted because, pointing to a nearby vacant wooded parcel and a vacant dance hall, he claimed, the runway proposal would inhibit potential investors, and thus, he argued, "the possibility of a use other than [for a concrete-crushing business] seems to be nominal." The lawyer also asserted that Barbian had spent up to $750,000 to build protective berms around the property, and contended that Barbian would suffer a "tremendous economic loss" if he could not use the property for a concrete-crushing business. He claimed that the business would not be a detriment to neighboring property owners given the nature of nearby businesses, including the airport, a trucking firm, and an

automobile salvage yard, and promised that Barbian would comply with the codes and ordinances of governmental agencies, such as the Department of Neighborhood Services and the Department of Natural Resources.

¶6 Two long-time residents of a mobile-home park across the street from the land opposed the variance and told the Board that there was so much dust from the business that they could not keep their houses clean, sit outside, or hang clothing outside. They also testified that when the property was used to crush concrete, trucks would make noise at 4:30 in the morning, and that they had complained to Cape and their alderman, but nothing was done to alleviate the problem. They also gave the Board a petition signed by approximately twenty-five other residents opposing the concrete-crushing business "on the grounds of health, dirt/dust considerations and appearance for the neighborhood."

¶7 An alderman from the district told the Board that he also believed that the concrete-crushing business was "detrimental," and had received complaints about dust and noise from residents of the mobile-home park as well as area businesses. The alderman testified that the area near the airport was a "hot area" for development and opined that there were alternate uses for Barbian's property, including trucking terminals and hotels.

¶8 The Board held an open hearing on April 27, 2006, to assess whether to grant or deny the variance. During deliberations, Board Member Catherine M. Doyle opposed granting the variance, and explained:

> Well, I've reviewed this -- this matter and the testimony that we had at the meeting, the last meeting, and the information and the evidence that was presented, and I still am not finding what is the criteria for -- that the hardship use has been met. I know that -- Some of it just is self-imposed. There were improvements made on this property without -- before we -- before we had the hearing. It seems

> like it just finally got cleaned up and now they are back asking to put the same materials back on this cleaned up site. I just don't see the hardship in this case, and therefore -- also, clearly I don't -- I think there are some issues with regard to the preservation of property rights, and absent the detriment, based on the testimony from the neighbors, which I thought was rather compelling, about the impact that this site has had on them when it was fully operational, and how they weren't able to sit outside and enjoy their property. Some of the people had been there for many, many years, and were just locked up in their homes by this. So I personally don't feel that the criteria has [*sic*] been met and I would vote to deny it.

Board Member Scott Winkler also opposed granting the variance:

> [T]hey didn't reach our criteria. The thrust of the argument that came from Mr. Barbian's counsel was that this is, or currently any appropriate use other than the one that's being licensed for here. If that argument is taken as true, it may present what we call exceptional circumstances. That's one of our criteria. I don't think it's necessarily true. I think, as forcefully as it was argued by [Barbian's lawyer], that alderman and [the Department of City Development] kind of shot it down …. There's a lot of -- a lot of -- knowing and interfering influences coming from the property, the trucking that is going in and out, the dust that is hitting the neighbors, all prevents the criteria from being met. My opinion, I think -- the property right -- the detriment, there is detriment. The property rights of the adjacent trailer park certainly impacted and not preserved, not enjoying substantial property rights, the same property rights as the mining operation enjoys using its property. Hardship again, I agree there is not a real good argument for hardship here, there just isn't. A use variance -- to show hardship is not self-imposed nor is it based on economic grounds and this is based on economic grounds. Let's get the business going, let's make it an economically advantageous use of the property. That's what Mr. Barbian wants to do. That's what every good businessman wants to do. That's not a hardship. That's an economic motivation. It's a tough road to hoe to find a hardship in this situation. Even if you go back and look at the written hardship submitted here by [Barbian's lawyer] originally …. We've got lots of other ways in which Mr. Barbian can use this property if he wants to put the money in. He put the money in the mining operation. That was his choice and his risk. It was a risk -- You've got to respect a good businessman

> for taking a risk, but sometimes these risks just don't pay off. I can't support this.

By a unanimous vote, with the Chairman abstaining, the Board denied Barbian's petition for a variance on two grounds: (1) absence of hardship, and (2) detriment to the public interest. *See* MILWAUKEE, WIS., ORDINANCE § 295-311-3-d (2007) (hardship and absence of detriment among criteria board considers in variance determination). The Board issued a written decision denying Barbian's application on May 2, 2006.

¶9 Barbian sought certiorari review in the circuit court, which, in a written memorandum, upheld the Board's decision. *See* WIS. STAT. § 62.23(7)(e)10.

II.

¶10 "On appeal, we review the Board's decision, not the decision of the circuit court." ***Roberts v. Manitowoc County Bd. of Adjustment***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 529, 721 N.W.2d 499, 502.

> When no additional evidence is taken, statutory certiorari 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 Adjustment, 2004 WI 23, ¶14, 269 Wis. 2d 549, 559, 676 N.W.2d 401, 405. Our review of the Board's decision is deferential, and we will not disturb the Board's findings if they are supported by any reasonable view of the evidence. ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals of the City of Milwaukee***, 2005 WI 117, ¶25, 284 Wis. 2d 1, 15–16, 700 N.W.2d 87, 94. A Board may not, however, "simply grant

or deny an application with conclusory statements that the application does or does not satisfy the statutory criteria." ***Id.***, 2005 WI 117, ¶32, 284 Wis. 2d at 19, 700 N.W.2d at 96. Rather, it must express on the record its reasons why an application does or does not meet the statutory criteria. ***Ibid.***

¶11 Barbian contends that the Board acted arbitrarily because, he claims, it did not adequately articulate the reasons for its decision. *See* ***ibid.*** He argues that the Board engaged in a "summary discussion" that "disregarded" what he alleges are "material facts," including:

- In 1998, the Board granted Cape a special-use permit (albeit under the then-applicable ordinance, which, as we have seen, is no longer operative for the Barbian property), finding, at that time, that the crushing of concrete was not detrimental to neighboring properties.

- The Department of Neighborhood Services and the Department of Public Works did not oppose the variance.

- Barbian promised to run the business in compliance with the ordinances and codes of the Department of Neighborhood Services and the Department of Natural Resources.

- How the neighboring property was used.

- Barbian would lose the $750,000 that he had invested in the property.

- General Mitchell International Airport's proposal to expand the airport's runway areas.

We disagree. The Board's reasons for its denial are more than adequately explained in the Record.

¶12 In denying Barbian's application for a use-variance, the Board relied on MILWAUKEE, WIS., ORDINANCE § 295-311-3 (2007), which draws its authority from WIS. STAT. § 62.23(7)(e)7. Section 62.23(7)(e)7 provides, as material:

> The board of appeals shall have the following powers: … to authorize upon appeal in specific cases such variance from the terms of the ordinance as 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 practical difficulty or *unnecessary* hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

(Emphasis added.) Thus, the applicant for a variance must prove that he or she will suffer "unnecessary hardship" in the absence of a variance. *See* ***Arndorfer v. Sauk County Bd. of Adjustment***, 162 Wis. 2d 246, 253, 469 N.W.2d 831, 833 (1991). As we have seen, an "unnecessary hardship" in use-variance cases is present only where the property owner can show that, in the absence of a variance, there is no reasonable or feasible use of the property. ***State ex rel. Ziervogel***, 2004 WI 23, ¶24, 269 Wis. 2d at 564–565, 676 N.W.2d at 408; ***Snyder v. Waukesha County Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 474, 247 N.W.2d 98, 102 (1976).

¶13 Consistent with WIS. STAT. § 62.23(7)(e)7, and case law interpreting it, MILWAUKEE, WIS., ORDINANCE § 295-311-3 (2007) provides, as material:

> d. Findings. No variance shall be granted unless the board, after due notice to the parties of interest, finds that the following facts and conditions exist, and so indicates in the minutes of its proceedings or its decision:
>
> d-1. Preservation of Intent. A variance would not be inconsistent with the spirit, purpose and intent of the regulations for the district in which it is requested.
>
> d-2. Exceptional Circumstances. Exceptional, extraordinary or unusual circumstances or conditions apply to the lot or intended use that do not apply generally to

> other properties or uses in the same district, and the variance is not of so general or recurrent nature to suggest amendment of the regulation.
>
> d-3. Preservation of Property Rights. The variance is necessary for the preservation and enjoyment of the same substantial property rights which are possessed by other properties in the same district and same vicinity.
>
> d-4. *Absence of Detriment. The variance will not create substantial detriment to adjacent property, and will not materially impair or be contrary to the spirit, purpose and intent of this chapter, or the public interest.*
>
> ….
>
> d-6. *Hardship; Use Variance. The alleged difficulty or hardship is not self-imposed, nor is it based solely on economic grounds.*

(Emphasis added.) As we show below, the Board sufficiently articulated its reasons for denying Barbian's application for a use-variance under WIS. STAT. § 62.23(7)(e)7 and § 295-311-3 (2007).

¶14 At the administrative review session, the Board Members gave specific reasons why Barbian did not establish "unnecessary hardship," including:

- There were alternate uses for his property.

- Barbian's "hardship" was self-imposed. As Board Member Doyle explained: "Some of [the hardship] is just is self-imposed. There were improvements made on this property without -- before we -- before we had the hearing," and, as we have already noted, Board Member Winkler commented, "[h]e put the money in the mining operation. That was his choice and his risk. It was a risk -- You've got to respect a good businessman for taking a risk, but sometimes these risks just don't pay off." *Cf.* ***Lake Bluff Hous. Partners v. City of South Milwaukee***, 222 Wis. 2d

222, 226–232, 588 N.W.2d 45, 46–49 (Ct. App. 1998) (spending money with the hope that permits will be granted does not give owner vested rights in the improvement).

- Barbian's "hardship" was solely economic.

¶15 The Board also explained why a variance would harm the public, pointing out that the concrete-crushing business previously operated on the site, under the then-applicable ordinance, cascaded the neighbors with dust and noise that prevented them from reasonably enjoying their property. *See* ***Arndorfer***, 162 Wis. 2d at 256, 469 N.W.2d at 835 ("unnecessary hardship" requires that variance not be contrary to the public interest). The Board's reasons were specific and sufficient, and were well-founded on the evidence before it. *See* ***Lamar Cent. Outdoor, Inc.***, 2005 WI 117, ¶¶31, 35, 284 Wis. 2d at 18, 20, 700 N.W.2d at 96 ("a written decision is not required as long as a board's reasoning is clear from the transcript of its proceedings"). Thus, Barbian's additional contention that the Board's decision is not supported by the evidence also fails. *See* ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 304–305, 519 N.W.2d 782, 784 (Ct. App. 1994) ("If any reasonable view of the evidence would sustain the board's findings, they are conclusive.").

¶16 Finally, Barbian contends that the concrete-crushing business was a legal non-conforming use under the new zoning ordinances entitling him to a special-use permit. *See* MILWAUKEE, WIS., ORDINANCE § 295-201-393 (2006) ("NONCONFORMING means legally established but no longer conforming with the regulations of this chapter."). He did not, however argue this rationale before the Board, and we will not consider the argument, which was presented for the first time on Barbian's request for certiorari review by the circuit court. *See*

Roberts, 2006 WI App 169, ¶10, 295 Wis. 2d at 529, 721 N.W.2d at 502 (We review the Board's decision, not that of the circuit court.).

¶17 Barbian concedes on appeal that after the Commissioner of City Development denied his application for a special-use permit, he "complied with the directions to apply for a use variance." While Barbian *had* initially referenced the criteria for a special-use permit in his "Statement in Support of Use Variance," he did not contend before the Board that he was entitled to operate the concrete-crushing business under a special-use permit. (Some uppercasing omitted.) He also did not mention the existence of a legal non-conforming use in his application materials, and his lawyer exclusively argued the criteria for a use-variance to the Board at the public hearing. The only time Barbian raised the issue of a legal non-conforming use was in a letter submitted the Board on April 26, 2006, after the Record had been closed.

¶18 Barbian argues, however, that the Board "waived" this "defect" when, he claims, it submitted his "request" for a special-use variance to a vote. Barbian mischaracterizes the Board Members' comments. At the administrative review session, the Board had the following discussion:

> CHAIRMAN ZETLEY: Thank you. All of those in favor of the motion -- Let me make one comment first. I think this was, Mr. Secretary, if I am right, there was a change from a special use criteria to a use variance? Is that correct?
>
> SECRETARY CRUMP: Correct. In 2002, with the code change it was previously special use for this use.
>
> CHAIRMAN ZETLEY: Right. I don't foresee this but the Chair would like to just address this also and see if anybody disagrees. I think even under a special use criteria it would not have been met. Because I believe that the protection of the public health, safety and welfare and protection of property here would not be shown. Unless

> anybody disagrees with me, I just want to put on the record that I think -- I agree with the board and I don't believe absent a detriment or hardship on the use variance has been shown, but I also agree even under a lesser standard of special use, that here the criteria would not be shown. Does anybody disagree?
>
> BOARD MEMBER DOYLE: No, I agree with you.
>
> BOARD MEMBER SIKER: No.
>
> CHAIRMAN ZETLEY: Thank you.

There was no "waiver."

¶19 We affirm the circuit court's denial of Barbian's petition for a writ of certiorari.[3]

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[3] While the certiorari action was pending before the circuit court, Barbian moved for a view of the premises and a *de novo* hearing. Barbian also tried to subpoena the Secretary of the Board. The circuit court denied the motions and quashed the subpoena. Barbian claims on appeal that the circuit court erroneously exercised its discretion, but does not set forth the relevant legal standards or adequately develop an argument. Accordingly, we decline to address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court can "decline to review issues inadequately briefed").