COURT OF APPEALS DECISION DATED AND FILED

May 20, 2008

David R. Schanker
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. 2007AP2429

Cir. Ct. No. 2006CV212

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT III

DENNIS DESBROW, MICHAEL LYNCH AND MARY ANN LYNCH,

PETITIONERS-APPELLANTS,

V.

LANGLADE COUNTY ZONING BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT,

RAYMOND PORTER, DOROTHY PORTER AND LANGLADE COUNTY,

INTERVENORS-RESPONDENTS.

APPEAL from an order of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dennis Desbrow, Michael Lynch, and Mary Ann Lynch (the Neighbors) appeal an order of the circuit court affirming the Langlade County Board of Adjustment's decision granting Raymond and Dorothy Porter a variance from the minimum lot width requirement. They argue the Board proceeded on an incorrect theory of the law, and the evidence did not support the Board's decision. We disagree and affirm the order.

BACKGROUND

¶2 The Porters own a densely wooded vacant lot on Greater Bass Lake at the apex of a peninsula. The lot is fifty-eight feet wide at the lake and forty feet wide at the road, and was created in 1958 by dividing a larger lot. The lot exceeds 15,000 square feet and is zoned residential. The Porters purchased the lot in 1981. The Porters' neighbors on either side are Desbrow and the Lynches.

¶3 Due to the unusual shape of the lot, the Porters needed a variance in order to build. They requested three variances. The first was for a variance to allow them to build on the property even though the lot did not meet the minimum width requirement of sixty-five feet. The second was to allow them to deviate from the fifteen-foot side-yard setbacks. Finally, they requested a fifty-foot setback from the shoreline as opposed to the required seventy-five feet.

¶4 On October 9, 2006, the Langlade County Board of Adjustment held a hearing on the Porters' request. At the hearing, a realtor testified that allowing the Porters to build a home on the property would create a crowding effect that would reduce Desbrow's property value. A letter from a different realtor was submitted which stated that building a home on the Porters' lot would decrease the value of the Lynch home.

¶5 The Board found that an unnecessary hardship was present because the parcel was a long, narrow lot, created prior to the Langlade County Zoning Ordinances. The Board further found that literal enforcement of the terms of the ordinance would unreasonably prevent the Porters from using the property for a permitted purpose or would render conformity with the restrictions unnecessarily burdensome. The Board stated the hardship was due to the physical limitations of the property because the lot was situated on the apex of the peninsula, causing the setback to be further back. The Board concluded the variance was not contrary to the public interest because the house would not be visible from the lake, the vegetative shoreline would not be disrupted, environmental impact would be minimal, property values would not decrease, and a proposed driveway would be placed outside the wetland area. The Board then approved the requested variances. However, the Board cut the size of the proposed building from twenty-six feet by eighty feet to twenty-four feet by seventy feet and required that the Porters maintain existing shoreline vegetation and locate the driveway outside any wetland areas.

¶6 The Neighbors filed a writ with the circuit court, and the circuit court upheld the Board's decision with respect to the first part of the variance, the sixty-five-foot lot width requirement, but remanded for further consideration on the side-yard and shoreline setback variances.[1] On remand, the Board granted the variance for the side-yard setbacks but denied the shoreline setback variance.

[1] The parties may only appeal the circuit court decision. Therefore our opinion will only address the first variance.

DISCUSSION

¶7 On certiorari review, we review the Board's decision, not the circuit court's decision. ***Roberts v. Manitowoc County Bd. of Adj.***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. Our review is limited to the following questions:

> (1) did the Board keep within its jurisdiction; (2) did the Board proceed on the correct theory of law; (3) was the action of the Board arbitrary, oppressive, or unreasonable, and did it represent the will of the Board rather than its judgment; and (4) was the evidence such that the Board could have reasonably reached the determination under review.

Id., ¶11.

¶8 The Neighbors first argue the Board proceeded on an incorrect theory of law by failing to consider whether the Porters' hardship was self-created. When a landowner requests an area variance, the Board must decide whether denying the variance would impose an "unnecessary hardship" on the landowner.[2] ***State ex rel. Ziervogel v. Washington County Bd. of Adj.***, 2004 WI 23, ¶¶19, 21, 31, 269 Wis. 2d 549, 676 N.W.2d 401. Unnecessary hardship must be based upon conditions unique to the property itself rather than considerations unique to the property owner and cannot be self-created. ***Id.***, ¶20. The Board must evaluate the hardship in light of the purpose of the zoning restriction at issue, and a variance cannot be contrary to the public interest. ***Id.***, ¶18.

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[2] A use variance allows the landowner a use of the land not permitted in the zoning district. An area variance allows the landowner relief from restrictions on the manner of a permitted use. ***State ex rel. Ziervogel v. Washington County Bd. of Adj.***, 2004 WI 23, ¶21, 269 Wis. 2d 549, 676 N.W.2d 401. The Porters' variance was an area variance because the property was zoned residential but the manner of that use was limited by the setback restrictions.

¶9 On appeal, the Neighbors contend that the Porters "created their own hardship in purchasing this particular substandard lot." This argument has no merit. The Neighbors have cited no Wisconsin cases that state the mere purchase of property can be a self-created hardship. The cases that address self-created hardship describe situations where an owner makes some physical changes to the property. *See* ***Accent Developers, LLC v. City of Menomonie Bd. of Zoning Appeals***, 2007 WI App 48, 300 Wis. 2d 561, 730 N.W.2d 194; ***State ex rel. Markdale Corp. v. Board of Appeals***, 27 Wis. 2d 154, 133 N.W.2d 795 (1965). Additionally, the Neighbors fail to respond to the Porters' contention that "[t]he concept of self-created hardship was intended to address situations where a property owner makes physical changes to his or her property." Arguments not refuted are deemed admitted. ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191. We conclude the Board proceeded on the correct theory of the law.[3]

¶10 The Neighbors next argue that the evidence does not support the Board's decision. They contend the Board failed to consider statements from realtors. The Board, not the reviewing court, determines the weight to be given to the evidence. ***Roberts***, 295 Wis. 2d 522, ¶32. The Board is not required to accept an expert's opinion, even where it is not contradicted. *See* ***State v. Fleming***, 181 Wis. 2d 546, 561, 510 N.W.2d 837 (Ct. App. 1993). Our role on review is to

[3] The Neighbors also contend the Board proceeded on an incorrect theory of law because there is a different legal standard that should apply to area variances when shoreland zoning is implicated. The Neighbors contend the standard should be close to a "no reasonable use" test using reasoning from ***State v. Kenosha County Board of Adjustment***, 218 Wis. 2d 396, 577 N.W.2d 813 (1998). However, that case was abrogated by ***State v. Waushara County Board of Adjustment***, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514. The Neighbors attempt to create a distinction in the standard applicable to shoreland property that is not supported by the language of ***Waushara County***.

determine whether the evidence is "such that the Board could have reasonably reached the determination under review." ***Roberts***, 295 Wis. 2d 522, ¶11.

¶11 According to local ordinances, a variance should not be granted if it is damaging to the property values in the area. LANGLADE COUNTY, WI, ZONING ORDINANCE § 17.64(4)(a)(4) (May 2007). In this case, the Board listened to the testimony from one realtor stating that the proposed home would reduce the value of the Desbrow property. A letter from a different realtor stated that building a home on the Porters' lot would decrease the value of the Lynch home. There was no evidence that a home on the lot would be generally damaging to the property values in the area. The lot is zoned residential. This is not a case where an offensive use was proposed that would decrease values in the area. The Board even took steps to ensure that the building would not decrease property values by requiring that the vegetative shoreline not be disrupted and requiring that the driveway be placed outside of any wetland. The Board was free to discount the realtors' testimony and letter. The variance was granted after proper consideration of the evidence; we see no error.

By the Court.—Order affirmed.

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