COURT OF APPEALS DECISION DATED AND FILED

June 2, 2009

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. 2008AP1493

Cir. Ct. No. 2007CV94

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

JAMES KLUG AND DEBORAH KLUG,

PETITIONERS-APPELLANTS,

V.

BOARD OF ADJUSTMENT FOR TOWN OF NASHVILLE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Forrest County: MARK A. MANGERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. James and Debra Klug appeal a summary judgment upholding the decision of the Town of Nashville Board of Adjustment denying a variance application. The Klugs contend the board proceeded on an incorrect theory of law, acted arbitrarily, made its determination without any

investigation or evidence, without a hearing and without conducting a vote of the board members. They also argue the circuit court improperly substituted its own discretion for the board's, applied the wrong definition of "hardship," and applied an incorrect legal standard. The board contends the Klugs' appeal is frivolous. We affirm the judgment but conclude the appeal is not frivolous.

¶2 The Klugs purchased a cabin with a deck in 1983. Two years later, the town adopted a zoning ordinance mandating shoreline setback limits. The ordinance permits preexisting, nonconforming structures such as the Klugs' deck to "continue until they are removed, destroyed, or abandoned." In 2005, the Klugs removed the deck and constructed a new one without first securing the requisite permit. The deck violates the seventy-five foot shoreline setback requirement by encroaching within fifty-three feet of the ordinary high water mark. The board concluded the Klugs violated the zoning ordinance by building a new structure within the setback limits without a permit, and directed the Klugs to remove the deck by June 2006. When the Klugs failed to do so, the board initiated an enforcement proceeding.

¶3 In the enforcement proceeding, the board prevailed on summary judgment and this court upheld the judgment on appeal. The circuit court concluded removal of the new deck was a self-created hardship. It ordered the Klugs to remove the deck, but stayed its order to allow the Klugs time to pursue a variance application "should such remedy be available." The Klugs then requested a variance from the board. The board returned the application along with the fee, explaining that the time for applying for a variance had expired.

¶4 The Klugs' argue the ordinances impose no deadline for applying for a variance. The board contends the request for a variance after unlawful

construction is a "species of administrative appeal" that must be requested within thirty days. We need not resolve that issue because, regardless of the alleged errors in the board's procedure and the court's analysis, the Klugs are not entitled to a variance as a matter of law.

¶5 WISCONSIN STAT. § 59.694(7)(c) (2007-08), allows the Board of Adjustment to grant variances where a literal application of zoning regulations would result in unnecessary hardship. The statute does not define "unnecessary hardship," but the term has been defined by the courts. A hardship cannot be self-created. ***Ziervogel v. Washington County Bd. of Adj.***, 2004 WI 23, ¶7, 269 Wis. 2d 549, 676 N.W.2d 401. The question is whether a hardship unique to the property has been demonstrated and whether granting a variance is consistent with the public interest or whether a variance would subvert the purpose of the zoning restriction to such an extent that it must be denied. ***Id.***, ¶34. If the applicants create the hardship by their own acts, even if they are ignorant of zoning laws, they are not entitled to relief. ***State ex rel. Markdale Corp. v. Board of Appeals of Milwaukee***, 27 Wis. 2d 154, 163, 133 N.W.2d 795 (1965). The hardship must originate in the zoning ordinance, and cannot arise because of the applicants' actions. ***Id.*** at 162.

¶6 The hardship in this case arises from the Klugs' construction of a new nonconforming deck. By replacing the deck without first checking the ordinances or getting a permit, the expense and inconvenience of removing the nonconforming deck was their own creation. The Klugs contend the hardship should not be viewed as the cost of removing the nonconforming deck because the ordinances allow after-the-fact or late variance applications. However, the only other "hardship" would be having a dwelling without a deck that encroaches within seventy-five feet of the ordinary high water mark. If that "hardship"

constituted a valid basis for a variance, the purpose of the zoning restriction would be subverted. *See* ***Ziervogel***, 269 Wis. 2d 549, ¶34.

¶7 Because variances are not permitted for self-created hardships, it would have been beyond the board's power to grant a variance. Neither the circuit court nor this court is substituting its discretion for the board's. There is no discretion to exercise when the law prohibits a variance.

¶8 Although we affirm the decision denying the variance, we conclude the Klugs' appeal is not frivolous. The issues they raise on appeal are not lacking in arguable merit.

By the Court.—Judgment affirmed. Motion for frivolous costs denied.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).