

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 17, 2003**

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. 02-1648**  
**STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-119

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**v.**

**SAWYER COUNTY BOARD OF APPEALS,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Sawyer County:  
NORMAN L. YACKEL, Judge. *Reversed.*

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

¶1 PER CURIAM. The State of Wisconsin appeals a judgment upholding a variance granted to the Padilla Family Trust. The State argues (1) the trust failed to prove the elements of unnecessary hardship, and (2) the board misapplied the reasonable use standard and based the variance on improper considerations. We agree with the State's first argument and reverse on that basis.

Because the first issue is dispositive, we do not address the State's second argument.

## BACKGROUND

¶2 The Padilla Family Trust wished to build a single-family home on its property located on the Chippewa Flowage in the Town of Hunter. A Sawyer County ordinance requires a seventy-five-foot setback from the ordinary high water mark for all structures on properties adjacent to any navigable water and navigable wetlands adjacent to navigable water.<sup>1</sup> In order to build the home, the

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<sup>1</sup> WISCONSIN STAT. § 281.31(1) provides:

To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

In fulfillment of this provision, Sawyer County enacted Zoning Ordinance 4.49(1), which states in part:

For lots that abut on navigable waters, all buildings and structures, new dwellings on vacant lots and replacement dwellings; except piers, boats lifts, boathouses, and open fences which may require a lesser setback, shall be set back a minimum of 75 feet from the ordinary highwater mark of navigable waters and navigable wetlands adjacent to any navigable water.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

trust requested a variance to build the home thirty-four feet from the ordinary high water mark of the flowage.

¶3 In its variance application, the trust stated the variance was necessary due to “new zoning regulations” and “more stringent and restrictive interpretations of various terms used in zoning.”<sup>2</sup> The trust stated that, because of amendments to the ordinance, the lot was buildable when purchased in 1993 but now was not. Finally, the trust stated a variance would not be contrary to public interest because the current buffer zone and septic requirements make the harm negligible, if not non-existent, because the area was almost 90% undeveloped. The town denied the variance request.

¶4 The trust appealed to the Sawyer County Board of Appeals. At a hearing on July 17, 2001, the trust argued that its situation was “unique because of the location, because of the wetland, because of the text amendment change.” One board member stated,

I'm going to make a motion that we grant the variance for the Padilla Family Trust based on the fact that in 1993 when they did own the property, at that time it would have been legal to place the building exactly at the site they have chosen. There is no change in the use of the zone district. It's going to be used for residential. Some people will quarrel as to whether it has an effect on the property value, I don't believe that to be the case. It's not a self[-]created hardship. They didn't create the zoning in 1996 so that part had nothing to do with it. That's it.

The board voted two to one to grant the variance. It did not find, however, that the lot was unique or that the variance was in the public interest.

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<sup>2</sup> The zoning ordinance was enacted in 1991, and amended in 1995 and 1997.

¶5 The State filed a complaint in the Sawyer County circuit court for certiorari review of the board's decision. The court affirmed, and the State appeals.

#### STANDARD OF REVIEW

¶6 Our certiorari review of the board's decision is limited to whether the board (1) acted within its jurisdiction; (2) proceeded on a correct theory of law; (3) was arbitrary, oppressive or unreasonable; or (4) might have reasonably made the order or finding it made based on the evidence. *See Antisdel v. City of Oak Creek Police & Fire Comm'n*, 2000 WI 35, ¶13, 234 Wis. 2d 154, 609 N.W.2d 464. Furthermore, the interpretation of a statute and its application to a set of facts are questions of law we review independently. *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999).

#### DISCUSSION

¶7 A county may make special exceptions, or variances, from the terms of a zoning ordinance in harmony with the ordinance's general purpose and intent. WIS. STAT. § 59.694(1). A board of adjustment's authority to grant variances is codified in WIS. STAT. § 59.694(7)(c), which describes the broad scope of the power in this way:

To authorize upon appeal in specific cases variances from the terms of the ordinance 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.

¶8 The statute requires a person seeking a variance to prove that he or she will suffer an "unnecessary hardship" in the absence of a variance. *Arndorfer*

*v. Sauk County Bd. of Adjust.*, 162 Wis. 2d 246, 253, 469 N.W.2d 831 (1991). The hardship must be unique to the property and not a condition personal to the landowner, such as mere inconvenience. *Snyder v. Waukesha County Zoning Bd. of Adjust.*, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976). It cannot be self-created. *Id.* at 476. The hardship is evaluated against the purpose of the zoning restriction at issue. *Id.* at 473. A variance cannot be contrary to the public interest. *Arndorfer*, 162 Wis. 2d at 256.

¶9 The State maintains the trust failed to show that its lot was unique, nor did the board find the lot was unique. The trust's response to this argument is, "Although other properties on the Chippewa Flowage may have wetlands adjacent to them, this property is unique due to the configuration of the parcel and the location of the adjacent wetlands." This statement is merely a conclusion. The trust directs us to no evidence as to how these characteristics make the property unique.

¶10 Nothing in the record demonstrates that the trust's land is unique. At the board hearing, the trust stated that the land was unique due to its location, because of the wetland, and because of text amendment changes. However, this is not the same thing as saying that the property itself is unique. As the trust concedes, other properties border the Chippewa Flowage, and may also contain wetlands contiguous to the flowage. The trust did not present evidence to prove that its property was the only one with these characteristics, nor did the board ask for evidence of the land's uniqueness.

¶11 The trust did not show, and the board did not find, that the trust's property was unique. Thus, the board did not follow a correct theory of law in

granting the variance. This alone is a sufficient basis for reversal, and we therefore do not discuss the State's remaining arguments.

*By the Court.*—Judgment reversed.

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

