

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 5, 2002

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. 02-1683

Cir. Ct. No. 01-CV-133

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JACKSON COUNTY BOARD OF ADJUSTMENT

DEFENDANT-RESPONDENT,

ROGER HEINECK,

**INTERVENING DEFENDANT-
RESPONDENT.**

APPEAL from a judgment of the circuit court for Jackson County:
ROBERT W. RADCLIFFE, Judge. *Reversed and cause remanded with
directions.*

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

¶1 PER CURIAM. The State appeals a judgment affirming a decision of the Jackson County Board of Adjustment to grant a zoning variance. The variance gives Roger Heineck authorization to improve a structure that lies close to the Black River. The State contends that the board used an erroneous legal standard to approve Heineck’s petition. We agree and therefore reverse with instructions to remand the matter to the board for a re-determination under the proper legal standard.

¶2 In 1967 Heineck built a Jackson County vacation residence within twenty-four and one-half feet of the ordinary high water mark of the Black River, a navigable waterway. In 1969, Jackson County passed a shoreline zoning ordinance that bars structures lying within seventy-five feet of a navigable waterway. For prior nonconforming structures, such as Heineck’s, the ordinance bars any additions or repairs if their cost exceeds fifty percent of the structure’s 1969 fair market value.

¶3 The 1969 fair market value of Heineck’s residence was \$8,000. In 2001 Heineck applied for a variance that would allow him to build a \$110,000 addition to his residence, with virtually all of the addition lying within the seventy-five-foot setback zone.

¶4 The board of adjustment granted the variance upon concluding that denying it would deprive Heineck of the “full beneficial and legal use of the property.” In so ruling, the board relied on the lead opinion in *State v. Outagamie County Board of Adjustment*, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376, in which three members of the supreme court declared that an area variance should be granted “when it is shown that strict compliance with an area restriction would unreasonably prevent the property owner from using the property for a permitted

purpose or is otherwise unnecessarily burdensome.” *Id.* at ¶68. The trial court affirmed the board’s decision, resulting in this appeal. The dispositive issue is whether it was proper for the board to apply the review standard set forth in the *Outagamie County* lead opinion. In deciding this question of law, we owe the trial court’s decision no deference. See *Board of Regents v. Dane County Bd. of Adjustment*, 2000 WI App 211, ¶¶10-11, 238 Wis.2d 810, 618 N.W.2d 537, review denied, 2001 WI 43, 242 Wis.2d 544, 629 N.W.2d 784 (Wis. Mar. 6, 2001) (No. 99-2662).

¶5 WISCONSIN STAT. § 59.694(7)(c) (1999-2000)¹ grants county zoning boards the authority to grant variances where literal enforcement of a zoning ordinance works an “unnecessary hardship.” Such hardship exists in cases involving minimum setbacks from navigable waters only where a property owner demonstrates that without the variance the owner has no reasonable use of the property. *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 398, 577 N.W.2d 813 (1998).

¶6 The less restrictive test for unnecessary hardship applied in this case derives from a standard which three justices of the supreme court believe should replace the test set forth in *Kenosha County*. See *Outagamie County*, 2001 WI 78, ¶5. However, four justices in *Outagamie County*, a majority, declined to overrule *Kenosha County*. *Id.* at ¶147 (Abrahamson, C.J., dissenting). Consequently, the test for unnecessary hardship set forth in *Kenosha County*

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

remains the law in Wisconsin. *Id.* We therefore reverse the circuit court's judgment and remand to the Jackson County Board of Adjustment to apply the standard for "unnecessary hardship" to Heineck's application.

By the Court.—Judgment reversed and cause remanded with directions.

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

