COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2123 **Cir. Ct. No. 2009CV1733**

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

LAUDERDALE LAKES LAKE MANAGEMENT DISTRICT,

PLAINTIFF-APPELLANT,

V.

WALWORTH COUNTY AND WALWORTH COUNTY BOARD OF ADJUSTMENT,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. The Walworth County Board of Adjustment (the Board) denied the variance request of Lauderdale Lakes Lake Management District (the District). On petition for a writ of certiorari, the circuit court upheld

the Board's denial. The District contends it demonstrated its entitlement to a variance and that the Board's decision is contrary to the evidence and to controlling law, such that the decision reflects the Board's will and not its judgment. We disagree and affirm the order of the circuit court.

¶2 The District, a municipal corporation, owns real property primarily consisting of the Lauderdale Lakes Country Club and a 6.8-acre waterfront wetland area. The wetland is zoned C-4 "Lowland Resource Conservation District." The primary purpose of C-4 zoning is "to preserve, protect, and enhance" the county's lakes, streams and wetland areas and provides that proper regulation of these areas "will serve to maintain and improve water quality, both ground and surface; prevent flood damage; protect wildlife habitat; prohibit the location of structures on soils which are generally not suitable for such use; protect natural watersheds; and protect the water[-]based recreational resources of the county." *See* WALWORTH COUNTY, WIS., ORDINANCES ch. 74, art. III, div. 3, § 74-179 (2010) (hereafter, "ORD. art xxx, div. x, § 74-xxx").

¶3 The District purchased the wetland in 2000 to prevent further development and in 2003 placed the property into a perpetual conservation easement overseen by the Kettle Moraine Land Trust. The District permits its weed-harvesting boat and Water Safety Patrol boats to be docked on the property's piers, opens the property to school and scout groups and members of the general public, and continues to allow an area water-ski team to use the property for its practices and performances, as the team had done since before the District purchased the property. All are permitted uses.

¶4 The District filed a request with the Walworth County Land Use and Resource Management Department for a zoning permit to construct raised

walkways and decks on its property. The project proposed to expand an existing boardwalk from six to seven feet wide and to construct a new 4-foot-by-252-foot boardwalk and three decks, one 530 square feet, one 640 square feet and the third 950 square feet.[1] The Board contended the project would promote the current permitted uses while protecting the fragile soil. The structures would fall within the seventy-five-foot shoreyard setback and as close as zero feet from the ordinary high-water mark. The Department interpreted the Shoreland Zoning Ordinance (the Ordinance) as prohibiting all structures within the setback, except for one walkway not to exceed forty-eight inches wide where necessary for pedestrian access to the shoreline. *See* ORD. art. III, div. 2, § 74-167. The Department denied the permit.

¶5 The District appealed to the Board by filing a petition for a variance. At the public hearing, a District representative explained that the walkways would allow the Water Safety Patrol and weed-harvesting workers to transport fuel and equipment to their docked boats without driving golf carts through the soft wetland; would promote better public access for school and youth group visits and the water-ski shows without having the public come in across the golf course; would promote public safety by facilitating the motorized transport of injured boaters from the lake; and simultaneously would prevent damage to the wetland from pedestrian and vehicular traffic. He stated that the District did not realize at the time of purchase that the wetland should not be driven on and the soft soil had become marked with ruts. Because the "wear and tear on the land" conflicted with the environmental easement, the Land Trust favored the project.

[1] An amended survey scaled down the 530-square-foot deck to 318 square feet and eliminated the 640-square-foot deck.

¶6 County residents also appeared at the hearing to speak on both sides of the issue and the Board indicated that it received letters from various entities both for and against the variance. A letter from the DNR stated that the DNR did not oppose a variance for the walkway alone but that the decks were contrary to the public interest and do not protect natural resources.

¶7 The Board's written decision gave a number of reasons for denying the District's request for a variance: (1) the District did not prove exceptional circumstances unique to the property, rather than considerations personal to the owner; (2) the property was a wetland and in a floodplain; (3) the Ordinance authorizes only one four-foot-wide walkway which allows use of the property for a permitted purpose while preserving the native flora; (4) the hardship was self-created; (5) granting the variance would affect the property, the neighborhood, the entire community and the general public; (6) approving such a large increment of relief would set a precedent; (7) approving the request would undermine the purpose and intent of the zoning ordinance; (8) the request did not meet the criteria necessary for granting a variance; and (9) approving the request would create additional impervious surfaces and increased runoff, and thus would not protect the public's interest in navigable waters. The Board denied the District's request. The District then filed a complaint in certiorari with the circuit court. The court sustained the Board's decision. The District appeals.

¶8 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, 721 N.W.2d 499. The Board's decision is presumptively correct and valid. ***State ex rel. Ziervogel v. Washington County Bd. of Adjustment***, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. As we may not substitute our discretion for that committed to the Board by the

legislature, we will not disturb the Board's findings if any reasonable view of the evidence sustains them. ***Id.***

¶9 On certiorari review our inquiry is limited to whether the Board (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted in a way that was arbitrary, oppressive or unreasonable and that represented its will, not its judgment; and (4) reasonably might have made the order or determination in question, based on the evidence. ***Roberts***, 295 Wis. 2d 522, ¶11.

¶10 The District does not, and could not, challenge the Board's jurisdiction to decide the variance application. *See* WIS. STAT. § 59.694(1), (7); *see also* ORD. art. II, div. 10, § 74-108. Rather, it argues that the Board exceeded its jurisdiction by making findings regarding particulars of the construction that are outside its expertise or unsupported by the evidence. For example, the Board expressed concerns that the boardwalks would be unstable due to sinkage and piling depth, that the four-foot-wide boardwalk would not be wide enough for a golf cart to safely drive on and that spacing the boards so as to allow sufficient sunlight to reach the plants below could pose a safety hazard for pedestrians.

¶11 The Board is charged with interpreting, applying and enforcing the Ordinance. Moreover, it had the benefit of the parties' pro and con positions on the matter, including "testimony" and written submissions. The District has not convinced us that the Board's interpretation of its own Ordinance is incorrect. *See* ***Roberts***, 295 Wis. 2d 522, ¶16. We conclude the Board acted within its legislatively granted authority.

¶12 We next consider whether the Board proceeded on a correct theory of law. Through WIS. STAT. § 59.694(7)(c), the legislature has delegated to local boards of adjustment substantial discretion to grant variances where literally

applying zoning regulations would result in "unnecessary hardship not justified by the underlying purposes of the ordinance in question." ***State ex rel. Ziervogel***, 269 Wis. 2d 549, ¶19. The hardship cannot be self-created, must be proved by the property owner and must be based on conditions unique to the property rather than considerations personal to the property owner. ***Id.***, ¶20. The variance must observe the spirit of the ordinance and may not be contrary to the public interest. Sec. 59.694(7)(c). "Permitted uses" in areas zoned C-4 are subject to general shoreland zoning regulations in art. III, div. 2, § 74-167 of the Ordinance. ORD. art. III, div. 2, § 74-179.

¶13 The District argues that the Board misinterpreted and misapplied the law. It contends that compliance with the strict letter of the Ordinance would result in the unnecessary hardship of forcing it into an "artificial Hobson's choice" of either using its land for its current permitted purposes or pursuing its preservation aims.[2] We disagree.

¶14 The ninety-one-page hearing and decision meeting transcript establishes that the Board considered the sections of the Ordinance relating to setback requirements and to its purpose and intent. It also considered whether the property was unique such that complying with the Ordinance would pose an unnecessary hardship and, if so, whether it was self-created. The Board found that this wetland property was not unique over others that are subject to the same C-4 zoning. The Board also found that, especially in view of the District's statement that it purchased the property to preserve it, its claimed hardship was self-created

[2] If so, that would be a dilemma, not a Hobson's choice. The "choice" in a Hobson's choice is to take the thing offered or nothing at all.

by its desire to expand upon the permitted uses in a wetland where structures, other than the walkway, are not allowed. Finally, the Board considered the impact on the public interest. It found that granting a variance for structures that would "basically allow larger groups of people to congregate there and to tromp all over the land" did not honor the spirit of the Ordinance, the intent of which is wetland preservation, and would be contrary to the public interest.

¶15 These all are appropriate considerations. *See* WIS. STAT. § 59.694(7)(c); *see also* ***State ex rel. Ziervogel***, 269 Wis. 2d 549, ¶¶19-20. In applying and interpreting the Ordinance, its provisions "shall be liberally construed in favor of the county." ORD. art. III, div. 1, § 74-156. The Board proceeded on a correct theory of law. *See* ***Kraemer & Sons v. Sauk County Bd. of Adjustment***, 183 Wis. 2d 1, 8-9, 515 N.W.2d 256 (1994).

¶16 The District also complains that the Board's decision was arbitrary and represented its will, not its judgment, because it denied the variance based on its disapproval of the use to which the property was being put and made only "conclusory" written findings.

¶17 The Board's written decision cited numerous reasons for denying the District's request for a variance. The lengthy transcript fleshes out those findings. Even under the amended survey, the District's proposal entailed significant encroachment into the setback area by structures not allowed by the Ordinance. Reading the written decision and transcript together, the Board adequately set forth both the criteria under which it rejected the District's variance request and the grounds for the denial. *See* ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, ¶¶26-27, 284 Wis. 2d 1, 700 N.W.2d 87. A determination

that has a rational basis is not arbitrary. ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

¶18 Finally, we consider whether the Board's decision was reasonable and based upon the evidence. On certiorari, we apply the highly deferential substantial evidence test to determine whether the evidence is sufficient. ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). "Substantial evidence" is evidence of such convincing power that reasonable persons could reach the same decision as the board. ***Id.***

¶19 The District suggests that the Board disregarded solid evidence in support of the variance. It is the Board, not the reviewing court, that determines the weight to be given to the evidence. ***Roberts***, 295 Wis. 2d 522, ¶32. We do not reweigh witness credibility or conflicts in the evidence. *See* ***L&H Wrecking Co. v. LIRC***, 114 Wis. 2d 504, 509, 339 N.W.2d 344 (Ct. App. 1983).

¶20 The Board found that the property was a wetland and in a floodplain, that the Ordinance permits only one four-foot-wide walkway, which still allows access for permitted uses, and that the requested structures would allow larger groups of people to congregate, "possibly destroy[ing] native vegetation by the shading, by the compaction of the soil, by the people." The evidence reasonably supports a conclusion that the proposed project is not in the public interest because it would adversely affect the wetland the Ordinance is meant to protect. Despite evidence supporting the opposite conclusion, we conclude that there was credible evidence to sustain the finding made. We therefore must affirm. *See* ***id.***

By the Court.—Order affirmed.

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