

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 23, 2004**

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. 03-0778  
STATE OF WISCONSIN**

**Cir. Ct. No. 02CV000193**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**OUTAGAMIE COUNTY BOARD OF ADJUSTMENT,**

**DEFENDANT-RESPONDENT,**

**WILLIAM E. GERRITS AND LYNN M. GERRITS,**

**INTERVENING DEFENDANTS-  
RESPONDENTS.**

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APPEAL from an order of the circuit court for Outagamie County:  
DEE R. DYER, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. This appeal comes to us on remand from our supreme court. The State appealed an order affirming the Outagamie County Board of Adjustment's decision to grant William and Lynn Gerritses' variance request. We reversed, concluding that the Board's decision was contrary to law and not reasonably supported by the evidence. *State v. Outagamie County BOA*, No. 03-0778, unpublished slip op. (WI App. Jan. 13, 2004). However, the supreme court summarily reversed our decision and remanded the case for further proceedings in light of its decisions in *State ex rel. Ziervogel v. Washington County BOA*, 2004 WI 23, 269 Wis.2d 549, 676 N.W.2d 401, and *State v. Waushara County BOA*, 2004 WI 56, 271 Wis.2d 547, 679 N.W.2d 514, in which it established standards for area zoning variance requests.

¶2 On remand, the Gerritses argue we should remand so that the Board may determine whether they meet the new variance standards. We agree. We reverse and remand to the circuit court with directions to remand to the Board for further proceedings.

## BACKGROUND

¶3 The Gerritses own a 1.3-acre lot adjacent to Apple Creek, a navigable body of water. The Gerritses obtained both a sanitary permit and building permit for a residence they intended to construct on the property. Although the applications included a hand-drawn map of the property, neither application showed Apple Creek nor the seventy-five-foot setback required by ordinance. The Gerritses ultimately constructed a residence on the property, a portion of which is 57.7 feet from the high-water mark of Apple Creek, in violation of the required setback.

¶4 A county official informed the Gerritses of the setback violation and ordered them either to bring the residence into compliance with the setback provisions or to apply for a variance. The Gerritses applied for a variance, which the Board granted. The Board concluded that the Gerritses “made a reasonable effort to comply with the setback requirement” and that town and county officials did not advise the Gerritses their home was in violation of the setback requirements before issuing permits. The circuit court affirmed the Board’s decision.

¶5 On our initial certiorari review, we reversed the circuit court’s order and remanded with directions to reverse the Board’s decision granting the variance. We concluded that the Board misapplied the law when it failed to use the “no reasonable use of the property standard” required by *State v. Kenosha County BOA*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998). The Gerritses petitioned the supreme court for review.

¶6 In the meantime, our supreme court revisited the issue of the appropriate test to be used in determining whether an unnecessary hardship exists to grant area zoning variances. It rejected the “no reasonable use test” established in *Kenosha County* in favor of the test articulated in *Snyder v. Waukesha County Zoning BOA*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976). See *Ziervogel*, 269 Wis. 2d 549, ¶7; *Waushara County*, 271 Wis. 2d 547, ¶2. Accordingly, it granted the Gerritses’ petition for review and summarily reversed and remanded our decision for us to reconsider in light of the new test.

## DISCUSSION

¶7 Our role on certiorari review is limited to whether a 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. *Ziervogel*, 269 Wis. 2d 549, ¶14. We accord a board’s decision a presumption of correctness and validity. *Id.*, ¶13. “A reviewing court may not substitute its discretion for that of the board, the entity to which the legislature has committed these decisions.” *Id.*

¶8 County zoning boards have the authority to grant a variance where literal enforcement of a zoning ordinance results in “unnecessary hardship.” WIS. STAT. § 59.694(7)(c).<sup>1</sup> In cases involving area zoning regulations, including minimum setbacks from navigable waters, the appropriate test for determining whether unnecessary hardship exists is:

whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

*Ziervogel*, 269 Wis. 2d 549, ¶7 (quoting *Snyder*, 74 Wis. 2d at 475) (internal quotes omitted). The factors to be considered in determining whether the test has been met include: “the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest.” *Id.* The hardship must also be unique to the property and not be self-created. *Id.*

¶9 The State argues that no evidence supports issuing the Gerritses’ variance under the *Snyder* test, and therefore we should reverse the Board’s grant

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

of a variance as a matter of law. The Gerritses argue that we should remand to the Board to take additional evidence and make findings in accordance with the *Snyder* test, considering the factors listed above. The *Snyder* test was not the law at the time the Board made its decision. We conclude the Board should have an opportunity to consider the Gerritses' variance application in light of the *Snyder* test.

¶10 Accordingly, we remand the case to the circuit court with directions to remand the matter to the Board. The Board may take additional evidence if it desires. In deciding whether to grant the variance, consistent with *Ziervogel* and *Waushara County*, the Board should make findings on the purpose of the setback requirement, the effect of the setback requirement on the property, the effect of a variance on the neighborhood and the larger public interest, whether any hardship to the Gerritses is unique to their property, and whether the Gerritses created their own hardship. See *Ziervogel*, 269 Wis. 2d 549, ¶7.

*By the Court.*—Order reversed and cause remanded with directions.

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

