

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 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 Nos. 03-2386
03-2387
STATE OF WISCONSIN**

**Cir. Ct. Nos. 02CV000184
02CV000185**

**IN COURT OF APPEALS
DISTRICT III**

TOWN OF BASS LAKE AND PHILIP NIES,

PLAINTIFFS-APPELLANTS,

v.

**SAWYER COUNTY BOARD OF APPEALS A/K/A BOARD OF
ADJUSTMENT,**

DEFENDANT-RESPONDENT.

APPEALS from judgments of the circuit court for Sawyer County:
JOHN H. PRIEBE, Judge. *Affirmed.*

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

¶1 PER CURIAM. The Town of Bass Lake and a town supervisor, Philip Nies, appeal judgments upholding variances granted to two applicants.¹

¹ Because the properties are similarly situated and the arguments are identical, we consolidate these appeals for decision.

The Board of Adjustment allowed the applicants to remove dilapidated buildings and replace them with new buildings that violate the lot size and setback restrictions contained in the Sawyer County Zoning Ordinances. The Town argues that the applicants failed to prove that there was no reasonable use of the land without a variance, that the property was unique and that the variance was not contrary to the public interest. It also argues that the Board considered improper factors when it approved the variances. We reject these arguments and affirm the judgments.

¶2 After the parties filed their briefs in this appeal, the supreme court issued two decisions that impact the law of zoning variances. In *Ziervogel v. Washington County Bd. of Adj.*, 2004 WI 23, ¶31, 269 Wis. 2d 549, 676 N.W.2d 401, the court concluded that the “no reasonable use of the property” standard for unnecessary hardship no longer applies to area variances. The court reaffirmed the holding of *Snyder v. Waukesha County Zoning Bd. of Adj.*, 74 Wis. 2d 468, 476, 479, 247 N.W.2d 98 (1976), that the applicant must establish a hardship that is unique to the property rather than the property owner and that the hardship cannot be self-created. *Ziervogel*, 269 Wis. 2d 549, ¶7. In *State v. Waushara County Bd. of Adj.*, 2004 WI 56, ¶24, ___ Wis. 2d ___, 679 N.W.2d 514, the court set forth principles that guide the courts when reviewing variance cases. The board’s decision is presumed correct; the court should focus on the purpose of the ordinance; the facts should be analyzed in light of the purpose; and the board must be afforded flexibility so that it may appropriately exercise its discretion. The board’s decision should be overruled only if it is unreasonable or irrational. *Id.*, ¶25.

¶3 Applying these principles, we conclude that the decision to grant the variances was not unreasonable or irrational. The purpose of the ordinance

appears to be primarily to promote aesthetics. Because these dilapidated buildings could not be substantially repaired without expending more than 50% of the structures' current estimated fair market value, which is prohibited under SAWYER COUNTY WIS. ZONING CODE §10.21 (2003), the buildings would remain in a dilapidated state unless a variance was granted. The new buildings would improve the appearance of the area, increase the property values and tax assessments and, in one case, would be set back further from the lake and a public easement. Although the board did not use the term "public interest" in reaching its decision, the decision reflects a rational consideration of matters of public interest.

¶4 The hardships related to these properties are not unique to the owners, but are a function of the properties themselves. The properties are very small and irregularly shaped and subject to setback restrictions from each direction that would prohibit building any reasonably sized structure. These conditions are unique to the property rather than the owners and are not self-created.

¶5 The board did not consider any improper factors in reaching its decision. Citing *Clark v. Waupaca County Bd. of Adj.*, 186 Wis. 2d 300, 303, 519 N.W.2d 782 (Ct. App. 1994), the town faults the board for noting that the area was initially subdivided long before the zoning ordinances went into effect. In *Clark*, this court upheld the board's refusal to grant a variance where the land was platted long before the zoning ordinance was enacted. In *Clark*, neither the board's decision nor this court's decision was based on that fact. *Clark* should not be read to preclude the board from considering the timing of the zoning ordinance if, in its discretion, the board finds that factor persuasive.

¶6 The town also argues that the board improperly considered whether failure to grant a variance would constitute a "taking" of the property. That

comment was made when a board member was reciting why there would be no reasonable use of the property without a variance. Because the “no reasonable use” factor has been rescinded, the comment was superfluous and provides no basis for relief.

By the Court.—Judgments affirmed.

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

