COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1297 **Cir. Ct. No. 2010CV415**

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

HAMILTON LIVING TRUST,

PLAINTIFF-APPELLANT,

V.

WALWORTH COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

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

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. The Hamilton Living Trust appeals an order entered by the circuit court upon certiorari review of a Walworth County Board of Adjustment decision. The Board denied Hamilton's petition for an area variance

to construct a garage within the shoreyard setback. Hamilton argues that the Board proceeded on an incorrect theory of law and that the denial was arbitrary, oppressive and unreasonable and represented its will rather than its judgment. Because of the highly deferential standard of review employed on certiorari review, we affirm the Board's decision.

¶2 Hamilton owns property on Mill Lake in the Town of LaGrange. The property is bordered on the north, roughly speaking, by the lake, a public right-of-way ("the road") on the south, another owner's lot on the east, and an undedicated easement on the west, and is subject to a shoreland zoning ordinance. The "Purpose" section of the ordinance provides in relevant part:

> The purpose of this ordinance is to promote the comfort, health, safety, prosperity, aesthetics, and general welfare of the county and its communities and to protect the natural and agricultural resources, as identified and mapped in the County Land Use Plan, the Regional Natural Areas and Critical Species Habitat Protection and Management Plan for Southeastern Wisconsin, the County Park and Open Space Plan, and/or on the County Zoning Map.

WALWORTH COUNTY, WIS., ORDINANCES ch. 74, art. III, div. 1, § 74-153 (2011).

¶3 In keeping with that purpose, the ordinance requires a seventy-five-foot shoreyard setback and a ten-foot right-of-way setback. An existing residence, winterized but not a year-round home, is situated within the shoreyard setback. Hamilton petitioned the Board for an area variance to construct a two-story, twenty-two-by-twenty-four-foot garage, with space for two cars on the upper level and for another car or storage on the lower.

¶4 The petition proposed two alternate sites. Option One, Hamilton's preferred option, placed the garage directly behind the existing residence, between the house and the road. This option required variances for both a shoreyard

setback and a right-of-way setback. Option Two required a single right-of-way setback variance but placed the garage in a corridor which currently offers an unobstructed view of the lake from the road and the first tee of the nearby golf course. A hypothetical third option, a one-car garage, would require no variance, but Hamilton did not want that option.

¶5 At the hearing on the petition, Hamilton presented letters from neighboring landowners and a recommendation from the Town Board and Plan and Zone Commission, all favoring Option One. There was no opposition.

¶6 The Board voted to deny the petition. Hamilton filed a writ for certiorari with the circuit court pursuant to WIS. STAT. § 59.694(10) (2009-10).[1] The court upheld the Board's decision. Hamilton appeals.

¶7 On certiorari review, we review the Board's decision, not that of the circuit court. ***Block v. Waupaca Cnty. Bd. of Zoning Adjustment***, 2007 WI App 199, ¶7, 305 Wis. 2d 325, 738 N.W.2d 132. Boards of adjustment exercise discretion when determining whether a request for a variance should be granted. ***State v. Waushara Cnty. Bd. of Adjustment***, 2004 WI 56, ¶13, 271 Wis. 2d 547, 679 N.W.2d 514. A reviewing court accords a presumption of correctness to the Board's decision. ***Id.*** We may not disturb the Board's findings if any reasonable view of the evidence sustains them, and we may not substitute our discretion for that of the Board's, as committed to it by the legislature. ***Id.***

¶8 When the circuit court takes no additional evidence, our review is limited to whether: (1) the Board kept within its jurisdiction; (2) it proceeded on a

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

correct theory of law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the Board reasonably might make the determination it did based on the evidence. ***State ex. rel. Ziervogel v. Washington Cnty. Bd. of Adjustment***, 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401. Hamilton challenges the second and third aspects, both of which present questions of law that this court reviews de novo. *See* ***Driehaus v. Walworth Cnty.***, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343.

¶9 In denying the variance, the Board made these findings:

> [T]he property owner did not prove exceptional or unique circumstances to the property not generally found on other neighboring properties. The Board found the request to be personal to the property owner. The Board found no unnecessary hardship. The Board found compliance with the strict requirements of the zoning ordinance would not unreasonably prevent the owner from using the property for a permitted purpose. The Board found the owner has the option to construct a smaller accessory structure without need for a variance. The Board found to approve the variance request would undermine the purpose and intent of the zoning ordinance. The Board found the owner did not meet the criteria necessary to allow the Board to grant approval.

¶10 Hamilton asserts that the Board proceeded on an incorrect theory of law because it failed to adequately consider the effect of a variance on the public's interest in an unobstructed lake view. *See* ***Ziervogel***, 269 Wis. 2d 549, ¶7 (board should weigh purpose of zoning restriction and its effect on the property against effect of variance on neighborhood and larger public interest). Hamilton further asserts that, in finding that it could build a smaller garage without needing a variance, the Board imposed a requirement that, to be granted a variance, an applicant first must show that code compliance is an impossibility. We disagree.

¶11 A Board of Adjustment may grant a variance where a literal application of zoning regulations would result in unnecessary hardship. WIS. STAT. § 59.694(7)(c). The onus is on the property owner to prove unnecessary hardship. ***Ziervogel***, 269 Wis. 2d 549, ¶20. To be granted a variance through this appeal, Hamilton shoulders a dual burden: it first must overcome the presumption of correctness of the Board's decision, and then must establish that it will suffer unnecessary hardship if a variance is not granted. *See* ***Arndorfer v. Sauk Cnty. Bd. of Adjustment***, 162 Wis. 2d 246, 253, 469 N.W.2d 831 (1991).

¶12 An unnecessary hardship may be found to exist when compliance with the strict letter of the restrictions "would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." ***Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 475, 247 N.W.2d 98 (1976) (citation omitted). The hardship must be based on conditions unique to the property, not to the property owner, and cannot be self-created. ***Ziervogel***, 269 Wis. 2d 549, ¶20. Whether the hardship standard is met in the individual case depends upon a consideration of 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.***, ¶7.

¶13 Hamilton's petition identified the unnecessary hardship as "accommodating public interests in shoreland properties with permitted uses by owners of such properties" and asserted that the hardship is unique to the property because the easement on the one side of the lot, which limits where a garage could be built, "does not significantly affect the neighboring lots."

¶14 Hamilton essentially argues that obstructed lake views outweigh the purpose of the setback restrictions. Granting the variances Option One requires would allow a second structure within the shoreyard setback. Also, Wisconsin law does not recognize deprivation of a view as an unnecessary hardship, but more as a condition personal to the owner of the land. *See* ***State v. Ozaukee Cnty. Bd. of Adjustment***, 152 Wis. 2d 552, 563, 449 N.W.2d 47 (Ct. App. 1989).

¶15 Moreover, Hamilton fails to show that a garage needs to be built at all. The transcript of the proceedings[2] reveals a Board member's statement that, although a garage is a permitted use, it is "not the highest necessary permitted use. And sometimes garages have been denied … [b]ecause it isn't necessary for use of the property."[3] The Board did not proceed on an incorrect theory of law.

¶16 Hamilton also contends the Board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment because other property owners have "regular-size garages" and because all of the evidence and testimony taken by the Board supported granting the variance. There is nothing in the record, however, regarding whether the other garages required variances when and where they were built. In addition, an applicant is not entitled to have its petition allowed merely because no witnesses appear in opposition. *See*

[2] We may consider a transcript of the Board's proceedings when ascertaining the rationale for the Board's decision. *See* ***Block v. Waupaca Cnty. Bd. of Zoning Adjustment***, 2007 WI App 199, ¶¶7-8, 305 Wis. 2d 325, 738 N.W.2d 132.

[3] The transcript also hints that a compromise may be possible. A Board member commented that she did not think Hamilton had done "much work … with option three with staff," and she hoped Hamilton would "go back up and … revisit this." On this record, Hamilton's asserted hardship of diminished views for the public may be self-created.

Arndorfer, 162 Wis. 2d at 254. A petitioner still must establish that applying the ordinance will result in unnecessary hardship. Hamilton failed to do so.

¶17 All zoning restrictions are burdensome to some degree. The question is whether refusing to allow Hamilton to construct a garage of the desired size and in the desired location *unreasonably* prevents use of the property for a permitted purpose or renders conformity with the restrictions *unnecessarily* burdensome. *See* ***Snyder***, 74 Wis. 2d at 475. The Board's findings that the variance request was personal to Hamilton, that there was no unnecessary hardship, that compliance with the strict requirements of the zoning ordinance would not unreasonably prevent the owner from using the property for a permitted purpose and that Hamilton has the option of constructing a smaller structure without needing a variance are sustained by the evidence. And even though the relief requested was consistent in some respects with the public interest, the Board determined that granting the variance would unacceptably undermine the purpose of the zoning restriction. That conclusion is not arbitrary or unreasonable.

By the Court.—Order affirmed.

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