COURT OF APPEALS
DECISION
DATED AND RELEASED

June 13, 1996

NOTICE

No. 94-2281

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

DONALD A. THOMPSON
AND DOROTHY THOMPSON,

Petitioners-Appellants,

v.

LA CROSSE COUNTY BOARD OF ADJUSTMENT,

Respondent-Respondent.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

SUNDBY, J. Donald Thompson and Dorothy Thompson, husband and wife, appeal from an order entered June 9, 1994, affirming a decision of the La Crosse County Board of Adjustment denying their request that the Board reconsider its decision granting them a limited variance from the setback requirement of the La Crosse County Shoreland Zoning Ordinance (SZO). We affirm.

ISSUES AND DECISION

The Thompsons present the following issues:

(1) Did the circuit court erroneously exercise its discretion when it refused to take further evidence or allow the record to be supplemented to show that the Board refused to reconsider its grant of only a limited variance from the SZO to "teach [their builder] a lesson"? We conclude that it did not.

(2) Did the circuit court erroneously exercise its discretion when it permitted the Board to redraft its decision to add the specific findings required by the ordinance? We conclude that it did not.

(3) Was the Board's finding that the Thompsons' deck did not conform with § 20.33 of the Shoreland Zoning Ordinance based upon a misinterpretation and misapplication of the ordinance? We conclude that it was not.

(4) Was the Board's decision supported by sufficient evidence? We conclude that it was.

(5) Was the Board's decision arbitrary, capricious and unreasonable, representing its will and not its judgment? We conclude that it was not.

BACKGROUND

The Thompsons employed Ross Builders to construct a home for them near the Black River. Their lot was within the floodplain of the river and subject to the La Crosse County Shoreland Zoning Ordinance. Ross obtained a building permit. After the home was built, Ross applied to the zoning supervisor, Michael Weibel, for an occupancy permit. On September 17, 1993, Weibel informed Ross that a deck which extended from the house exceeded the

limits for reduced building setbacks as set forth in § 20.33 of the SZO. He informed Ross that a variance would be required before an occupancy permit could be issued. On September 21, 1993, Ross applied for the variance on behalf of the Thompsons. The Board heard Ross on November 1, 1993. On November 3, 1993, Weibel informed Ross in writing that the Board had conditionally approved the Thompsons' request for an after-the-fact variance. However, he informed Ross that the deck could not project more than four feet beyond the building setback line. The Board ordered: "Those portions of the existing deck which do not meet this requirement shall be removed." On November 18, 1993, Ross asked that the Board reconsider its decision. The Board heard the request on December 13, 1993, and on December 14, Weibel advised Ross in writing that the Board had denied the Thompsons' request for reconsideration. No evidence was presented at the December 13, 1993 hearing.

When the Board first heard the Thompsons' application on November 1, 1993, Ross stated that the original plan showed a patio, not a deck, all the way around the house. He told the Board that when he substituted a deck for the patio, he did not realize that a permit was necessary because the patio was already shown. He argued that there was no change from the original plan except that the patio was now two and one-half feet in the air instead of being flush with the lawn. He also argued that the deck did not extend any farther than "anyone else over there."

Weibel explained to the Board that because there was no shoreland zoning in effect at the time most of the homes in the area were built, not many of them complied with the seventy-five foot setback requirement. Therefore, new construction was required to comply with an established building line, rather than the seventy-five foot setback. Weibel stated:

> If you look at the drawing that is on the back of the notice, we have a building line shown there and what we're looking at is the deck extending, actually, a little bit ahead of that building line. If the deck had been within the building line it would have been a matter of amending the permit to show the deck.

The deck extended approximately eight feet beyond the building line. Ross argued that the house was still farther from the river than a neighbor's.

The Department of Natural Resources objected to the proposed variance on the grounds that the Thompsons had not demonstrated hardship, no unique characteristics of the property justified the variance, and the proposed variance was contrary to the public interest as expressed in the SZO because it would adversely affect natural shoreline esthetics.

The Thompsons filed their amended petition for writ of *certiorari* January 13, 1994. They alleged that:

> If the setback requirements apply to the deck on the petitioners' home, then the `existing buildings setback ...' as referred to in section 20.33 must also apply to the deck on [a neighboring] building. The [zoning] commissioner erroneously[,] arbitrarily and capriciously excluded the deck on the neighboring structure which [led] to an erroneous decision by the Board that wronged the petitioners.

The Thompsons also alleged that at all times during the appeal process, Ross represented them "and though it became apparent that interpretation of the ordinance language would become an issue, the petitioners were never informed that representation by legal counsel may be advisable at the initial hearing on appeal or regarding the request for reconsideration." They alleged that the Board in its original decision made a decision based on an erroneous interpretation of the law and its decision not to reconsider the original appeal violated due process, was erroneous, arbitrary and capricious, and was contrary to § 20.33, SZO.

On March 16, 1994, the Thompsons moved the circuit court to take additional evidence pursuant to § 59.99(10), STATS. "As grounds [therefor], the petitioner states that the Board's record fails to present the previous hearings in sufficient scope to determine the merits of the appeal and further that new evidence has been discovered after the close of the hearings." The affidavit of the Thompsons' attorney filed in support of their motion deposed that another

contractor had a conversation with one of the Board members who told him that,

> because of builder L.R. Ross'[s] prior problems, there was no way that the Board was going to reconsider this case on its merits and that unfortunately the Thompsons were paying the price in this case for Ross'[s] prior transgressions in constructing variations from Building Permits he had received.

The Thompsons' attorney further deposed that the "other contractor" informed him that he had been at the December 13, 1993 hearing and shortly after the Thompsons' motion for reconsideration was called, he heard the Board members discuss that they had thoroughly considered this matter at the earlier hearing and there was nothing further to be said. Later, the "other contractor" had a discussion with one of the members of the Board who told him that because of Ross's prior actions, "the Board was going to teach him a lesson so that there would be no further variances by him from the building permits granted unless a variance was granted before the construction was commenced ...." The Thompsons' attorney deposed that it was necessary to adversely examine members of the Board to establish the accuracy of the statements made by the "other contractor."

In a further affidavit, one of Thompsons' attorneys deposed that Ross had a conflict of interest in pursuing petitioners' interests and did not make a complete factual presentation to the Board at the original hearing. He further deposed that the building line was not accurately determined and that aerial photos "tend[ed]" to show that the Thompsons' home did not extend beyond the setback requirement, or was at most "negligibly" beyond the setback line.

On May 2, 1994, the Board filed its findings, conclusions and decision, *nunc pro tunc* November 1, 1993. The Board reiterated its decision that the Thompsons were authorized to construct a deck which would not project more than four feet from the back of the existing home, beginning at the northeast corner of the home, extending southerly to the intersection of the deck with the established building line. The deck could then follow the established building line after its point of intersection. Any portion of the deck not meeting

this requirement "shall be removed." On March 23, 1994, the trial court heard the Thompsons' motion that the court take additional evidence under § 59.99(10), STATS. The court allowed additional evidence solely to show how the building setback line was established. The court concluded that the Thompsons were given a full opportunity to present to the Board whatever evidence they had and that it appeared that Ross did present the evidence that the Thompsons wished to present.

On May 31, 1994, the court heard argument as to the merits of the Thompsons' appeal and an explanation as to how the building setback line was established. The Board did not present evidence on this point, relying on the minutes of the initial hearing to show how the building line was arrived at.

I.

ADDITIONAL EVIDENCE

Section 59.99(10), STATS., provides in part:

> If necessary for the proper disposition of a matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made....

Whether it is "necessary" for the circuit court to take evidence to supplement the record on *certiorari* is discretionary with the court. ***Klinger v. Oneida County***, 149 Wis.2d 838, 846, 440 N.W.2d 348, 351 (1989). The Thompsons argue that their attorney's affidavit raised the issue that the Board did not act on the merits of the Thompsons' request but denied their request for a variance solely to teach their builder a lesson. According to their attorney's affidavit, a confidential source informed him that a member of the Board had stated that Ross engaged in the practice of requesting after-the-fact variances and the Board was annoyed by this abuse of the process. Apparently, the Thompsons would have caused this confidential source to testify to this effect in the circuit court. The Thompsons argue that the circuit court "is a watchdog of

due process." They contend that without additional evidence, the court could not determine whether the Board had acted arbitrarily in that its decision was not based on the merits of the Thompsons' request. The circuit court denied the Thompsons' motion that it take additional evidence in this respect, expressing its opinion that the Thompsons were given a full opportunity to present to the Board whatever evidence they had.

The Board argues that the allegations of the Thompsons' attorney's affidavit are based on hearsay information from an anonymous contractor, and therefore not entitled to "significant credence or weight." However, the trial court did not exercise its discretion on that basis; it concluded that the Thompsons had been given a full opportunity to present whatever evidence they had and, therefore, the Board had not denied them the right to present any evidence. We may independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983). We conclude that the trial court reached the correct conclusion when it denied the Thompsons the right to present evidence that the Board, or members thereof, acted to punish the Thompsons' builder. It is fundamental that the motives of members of a quasi-judicial body may not be inquired into. *See* ***Wasserman v. City of Kenosha***, 217 Wis. 223, 226, 258 N.W. 857, 858 (1935). To subject individual members of a quasi-judicial body to cross-examination as to their motives would discourage lay people from serving on citizen boards. An examination of individual members of the Board which the Thompsons propose would raise questions as to the ethics and honesty of such members. Such inquiries are not tolerated. *See* ***id***.

While public policy is the transcendent reason for refusing to allow such attacks upon the honesty and integrity of members of quasi-judicial boards, there is a less dramatic reason why such inquiries are not permitted. The motives of members of a quasi-judicial body for their decision are wholly irrelevant to the decision itself. We examine the record to determine whether the denial of a variance caused the applicant unnecessary hardship unique to the applicant's land. *See* ***Arndorfer v. Sauk County Board of Adjustment***, 162 Wis.2d 246, 254-55, 469 N.W.2d 831, 834 (1991). We conclude that the Thompsons failed to show an entitlement to a variance which renders the Board's decision arbitrary and capricious.

II.

"REDRAFT" OF BOARD'S DECISION

On March 23, 1994, the court heard the Thompsons' motion that it take additional evidence. It permitted the Board to explain how the building line was arrived at. Thereafter, the Board redrafted its resolution accordingly. The Board adopted the new resolution *nunc pro tunc* November 1, 1993. The Thompsons claim that the original decision of the Board violated § 20.762(3), SZO, which required that the decision "shall state the specific facts which are the basis of the board's determination ...." Clearly, the Thompsons would have been deprived of due process if the Board based its decision on evidence not presented to the Board. *See* ***Schalow v. Waupaca County***, 139 Wis.2d 284, 289, 407 N.W.2d 316, 319 (Ct. App. 1987). However, the building setback line was presented to the Board at its November 1, 1993 hearing. The zoning supervisor called the Board's attention to a drawing on the back of the notice of hearing which showed the building setback line. The only additional information in the April 26, 1994 resolution connected up the setback line to the buildings located adjacent to the Thompsons' property. The Thompsons were not entitled to a further hearing before the Board because this evidence was presented to the circuit court and accepted by the court as part of the record. The redrafted resolution merely clarified the Board's decision. The Thompsons had an opportunity to be heard as to the evidence supporting the Board's decision.

The Thompsons also argue that the redrafted resolution was not approved by one of the original Board members and was signed by an additional Board member who was not involved in the original hearing. The Thompsons cite no authority for the proposition that the action on a motion to reconsider the action of a local government agency can only be taken by the members of the body who made the initial decision. Terms of office expire; members of the body may be absent; or a member may abstain from voting. In this case, there is no question that a majority of the members of the Board voted on the matter before the Board. The Thompsons received notice of the original action of the Board by a letter from the zoning supervisor to their builder. They were informed of the Board's action denying their reconsideration request by a letter from the zoning supervisor to their builder dated December 14, 1993. The minutes of the Board's meetings show that the zoning supervisor correctly advised the Thompsons' agent as to the action taken by the Board. When the Thompsons requested that the circuit court take additional evidence, it was not improper for the Board to clarify its initial decision. Its decision shows that it was signed by a majority of the existing members of the Board. A note to the decision states that because of health reasons, a member of the Board who had

participated in the first decision was not able to serve "at this time." The Thompsons sought to present additional evidence; having done so, they cannot complain because that evidence was considered by the Board as it was constituted at that time. We therefore reject the Thompsons' claim that the Board denied them due process in the consideration and execution of the amended decision.

III.

MISINTERPRETATION OF § 20.33, SZO

The Thompsons argue that the zoning supervisor and the Board misinterpreted § 20.33, SZO, which permits reduced building setbacks where existing buildings do not conform, because of protected nonconformity, with the setback established by the ordinance. Section 20.33 provides that where that situation exists, "the setback shall be the average of the setbacks of the nearest main building on each side of the proposed site or, if there is an existing main building on only one side, the setback shall be the average of the existing building's setback and the required setback."

The zoning supervisor informed the Board at its initial hearing that the ordinance required a setback of seventy-five feet from the ordinary high water mark (OHWM), but because there was no shoreland zoning in effect at the time most of the homes in the area were built, the setback was established by a building line.

The Thompsons' representative did not contradict the zoning supervisor's measurement that the setback from the OHWM was fifty-six feet or the statement of a member of the Board that the deck was about eight feet over the building line. However, the Thompsons now seek to attack the zoning supervisor's calculation of the building line claiming that he should have measured from the patio of the residence on the north adjacent lot to the OHWM, and from the deck on the residence on the south adjacent lot to the OHWM, using the average of the two measurements as the minimum setback requirement. The zoning supervisor construed "main building" to exclude patios and decks in determining the shoreland setback. We conclude that this is not an unreasonable interpretation of the ordinance. Clearly, it was rational for the zoning supervisor to exclude the patio of the north residence from the

definition of "main building." A patio does not intrude into the setback area as does a deck or the main building itself. We therefore conclude that the zoning supervisor's determination of the building line and the Board's adoption of that interpretation were not irrational interpretations of § 20.33, SZO.

IV.

SUFFICIENCY OF THE EVIDENCE

The Thompsons claim that a close look at the minutes of the hearing of November 1, 1993, reveals that "no significant hearing on the merits took place." The minutes summarize the presentation of the Thompsons' builder as follows:

> Ross states that a permit was acquired for this home after a variance had been granted. He states there was a basement on the property but [because] New Home had to meet existing elevation requirements, the house ended up being higher than originally wanted. Original plan showed a patio all the way around the house. When the house was raised we didn't realize we had to get a permit for a deck because the patio was already shown and the deck was built in [the] same configuration as the patio. Deck shown off the master bedroom, and patio shown off dining room and living room. When the house was erected the owner was out there and didn't want a lot of stairs going down from that much height so we just created a deck where the patio was to be. But, as I said, I didn't realize I had to get a permit for a deck because we already had a deck on the house. There were two decks involved. We're not any further out than anyone else over there, in fact when we called the Zoning Dept. we asked about that, they said just so we're not any closer to the water than anyone else is, any of the neighbors, so we felt it was ok. But then this came up that we should have had a permit.

Ross referred to a variance granted by the Board September 9, 1991, from the street setback. That variance is not involved in this case.

Upon questioning by a member of the Board, Ross stated that the deck was no different from the patio--"there were no changes made other than the fact that it is up in the air about 2 [and] 1/2 feet instead of being flush with the contour, with the grass."

The position of the Thompsons' builder was that the deck was no different from the patio which had been shown on their original application. Ross was an experienced builder and demonstrated that he understood the function of a shoreland setback. His attempt to equate the deck with the patio shown on the building application is disingenuous.

The Thompsons argue that the Board did not have sufficient evidence before it to determine whether by granting the variance application, "the spirit of the ordinance shall be observed and substantial justice done." Section 59.99(7)(c), STATS. They argue:

> It must be noted that no comment regarding environmental impact was made. It can only be assumed that no comment was made because the deck would not have a significant effect. But, just as importantly, no photographs of the setting were submitted to demonstrate the aesthetic features of the house, or how the house blended with the neighboring structures or how the remainder of the neighborhood appeared so that the Board could make a decision[] with the purposes of the ordinance, aesthetic and environmental, in mind. The Board simply applied the Zoning Commissioner's interpretation of the ordinance with only rough, incomplete measurements and an informal plat to guide them. Thus there was insufficient evidence to reasonably make the determination the Board was asked to make....

The Thompsons apparently believe that the Board was required to show that they are not entitled to a variance from the Shoreland Zoning Ordinance. However, an applicant for a zoning variance must overcome the presumption of correctness accorded the Board of Adjustment's decision. ***Arndorfer***, 162 Wis.2d at 253, 469 N.W.2d at 833. Second, the applicant for a variance from a zoning regulation must establish that the applicant will suffer unnecessary hardship if a variance is not granted. ***Id***. In ***Arndorfer***, the Wisconsin Supreme Court explained why it is necessary to place the burden upon the applicant to prove unnecessary hardship:

> A party applying or appealing for relief to a zoning board of adjustment or review has the burden of proof of facts entitling him to that relief. Since a hearing before a board is not necessarily an adverse proceeding, the applicant is not entitled to have his petition allowed merely because no witnesses appear in opposition, but the applicant must comply with the proof required by statute and ordinance whether there is or is not opposition to his petition .... Unless an applicant is required to establish by proof all the essential elements of his right to relief, a board of review would have the power to nullify the zoning ordinance under the guise of exceptions or variances.

Id. at 254, 469 N.W.2d at 833-34 (citing MCQUILLIN, MUNICIPAL CORPORATIONS § 25.167, at 337 (3d ed. 1983) (footnotes omitted)).

The Board and the circuit court were correct that the Thompsons had a full opportunity to be heard. Their complaint that their representative did not adequately represent them does not entitle them to a new hearing or relief from this court; nor does their complaint that the Board did not advise them that legal representation would be advisable.

V.

REASONABLENESS OF BOARD'S DECISION

The Thompsons complain that their builder convinced them to build the deck "without presenting the potential difficulties to them." They state:

> The whining tone of his words reveals he knew the difficulty in which he placed the Thompsons in this after-the-fact request for a variance. Given the fact that other variances have been approved in that neighborhood, the contractor's approach and tone reveal that the decision was probably directed at him and his after-the-fact appeal rather than on the merits of an otherwise minor nonconformity.

It is evident that the Thompsons' principal complaint is with the representative they chose to present their position to the Board. We find it surprising that they advance their representative's incompetence to support their argument that the Board acted arbitrarily and capriciously.

The Thompsons' complaint that the Board "probably" acted on the basis of impermissible considerations is speculative and not supported by the record; they simply failed to show the kind of unique hardship which the law requires. *See* ***Arndorfer***, 162 Wis.2d at 254, 469 N.W.2d at 834. The ***Arndorfer*** court noted that it had held in ***Snyder v. Waukesha County Zoning Board of Adjustment***, 74 Wis.2d 468, 474-75, 247 N.W.2d 98, 102 (1976), that "the question of whether unnecessary hardship ... exists is best explained as `[w]hether compliance with the strict letter of the [zoning] restrictions ... would unreasonably prevent the owner from using the property for a permitted purpose and would render conformity with such restrictions unnecessarily burdensome.'" 162 Wis.2d at 255, 469 N.W.2d at 834 (quoting 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 45-28 (3d ed. 1972)).

Rathkopf notes that zoning regulations are frequently compromised by the too frequent grant of variances by local boards of adjustment or appeals, principally because lay boards are reluctant to deny relief to their friends and neighbors. *See* 3 RATHKOPF, THE LAW OF ZONING AND PLANNING 38-4 (4th ed. 1996). The Thompsons admit that their representative was well known for his practice of "build first, then ask" approach. It should be remembered that a zoning ordinance is only sustainable because landowners

give up their right to use their land as they choose in consideration that their neighbors also give up that right in the interest of the common good. *See* ***State ex rel. Carter v. Harper***, 182 Wis. 148, 154, 196 N.W. 451, 453 (1923). The *quid pro quo* which sustains the constitutionality of a zoning regulation is compromised if the local board of adjustment routinely grants variances because of political considerations rather than zoning considerations. We therefore reject the Thompsons' "everybody-else-does-it" argument. Requiring a landowner seeking a variance to show unique hardship is not arbitrary and capricious.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.