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DISTRICT IV

January 8, 2018

To:

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You are hereby notified that the Court has entered the following opinion and order:

2017AP661

Lewis Bellile, Kay Bellile and KBLZ, LLC v. Waupaca County
and Waupaca County Board of Adjustment (L.C.#2015CV252)

Before Sherman, Blanchard and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lewis and Kay Bellile appeal an order of the circuit court dismissing the Belliles' action for declaratory relief and certiorari review of a decision of the Waupaca County Board of Adjustment denying the Belliles' application for a variance in order to construct a vertical addition to their existing nonconforming cottage. Upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition because the Belliles fail to present us with any argument, applying certiorari review standards, that the Board of

Adjustment improperly denied the request for an ordinance variance. *See* WIS. STAT. RULE 809.21(2015-16).¹ We summarily affirm.

The Belliles, through KBLZ, LLC, own a cottage located near Bear Lake in Waupaca County. The cottage is a pre-existing non-conforming structure in that the cottage does not comply with Waupaca County roadway setback requirements.

The Belliles would like to construct a vertical addition to their cottage. In 2015, Lewis contacted the Waupaca County Planning and Zoning Office and inquired about obtaining a building permit for the construction of the addition.² Lewis was advised by a representative of that office that he was not entitled to a building permit and that he should instead file an application for an ordinance variance because expansion of the cottage was prohibited by Waupaca County Shoreland Zoning Ordinance Ch. 32³ §§ 8.31(3) and (8). Those provisions provide:

8.31 General Provisions

....

(3) A principal structure that is nonconforming as to structural or dimensional standards may not be expanded or enlarged so as to

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² There is no evidence in the record that the Belliles filed an application for a building permit and Waupaca County does not contend that a formal application for a building permit was ever filed by the Belliles.

³ The Waupaca County Shoreland Zoning Ordinance Ch. 32 was repealed on September 20, 2016. At that time, the Waupaca County Shoreland Protection Ordinance was created. Waupaca County Shoreland Zoning Ordinance Ch. 32 §§8.31(3) and (8), or language substantially similar to those provisions, is not contained in the Waupaca County Shoreland Protection Ordinance. However, language substantially similar to those provisions is contained in Waupaca County Zoning Ordinance Ch. 34. *See* Waupaca County Zoning Ordinance Ch. 34 §2.12(1).

increase its dimensional nonconformity, except as provided in Section 8.33(1).

....

(8) Except as provided for in Section 8.32 and 8.33[,] structural alterations to nonconforming structures are prohibited.

The Belliles filed an application for a variance from Waupaca County Shoreland Zoning Ordinance Ch. 32 §§ 8.31(3) and (8), as well as § 4.23, which addressed setback requirements. The Waupaca County Board of Adjustment denied the Belliles' application. The Board of Adjustment determined that the Belliles' application should be denied because their request for a variance: (1) is not due to any physical limitations of the property, but instead due to their personal circumstances; (2) the variance does not "abid[e] by the Waupaca County Shoreland Zoning Ordinance" and the Belliles' request for a variance "would increase the nonconformity"; and (3) the Belliles "already have reasonable use of the property."

The Belliles filed a complaint with the circuit court seeking certiorari review of the Board of Adjustment's decision and declaratory judgment that the Board of Adjustment should have granted their application for a variance. The circuit court, on Waupaca County's motion, dismissed the Belliles' complaint with prejudice.

The Belliles have framed their arguments on appeal as challenging the circuit court's dismissal of their petition for certiorari review. However, on certiorari review, this court reviews the Board of Adjustment's decision, *not* the decision of the circuit court. *Roberts v. Manitowoc Cty. Bd. Of Adjustment*, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. Thus, the question before this court on certiorari review is not whether the circuit court erred in its decision, but instead whether the challenged action or inaction by the Board of Adjustment was proper.

Our review on certiorari is limited to the following four questions: (1) whether the Board kept within its jurisdiction; (2) whether the Board proceeded on the correct theory of law; (3) whether the Board's action was arbitrary, oppressive, or unreasonable, and represented the will of the Board rather than its judgment; and (4) whether the evidence such that the Board could have reasonably reached the determination under review. *Id.*, ¶11. The Belliles do not argue on appeal that the Board of Adjustment's decision to deny their application for a variance from Waupaca County Shoreland Zoning Ordinance Ch. 32 §§ 4.23, 8.31(3), and 8.31(8) ran afoul of any of these four certiorari review standards. The Belliles argue instead that they do *not need* a variance from §§ 4.23, 8.31(3), and 8.31(8) in order to proceed with their expansion project.

The argument that the Belliles advance in this appeal is that a state statute bars Waupaca County from enforcing the ordinances at issue, at least as to the vertical expansion that they contemplate.⁴

The Belliles do not argue in this appeal that they are entitled to a variance. Indeed, it appears that the Belliles agree that a variance is not warranted under the circumstances. In any case, however, they have not presented this court with a developed argument addressing whether the Board's denial of their application for a variance was erroneous for one of the four reasons set forth above, and therefore we affirm the Board's decision.

⁴ The Belliles point to WIS. STAT. § 59.692(1k)(a)4., which provides:

... a county may not impair the interest of a landowner in shoreland property by enacting or enforcing a shoreland zoning ordinance, that does any of the following ... otherwise prohibits or regulates, the vertical expansion of a nonconforming structure ... unless the vertical expansion would extend more than 35 feet above grade level.

The Belliles devote substantial argument to their concern that the circuit court's dismissal of their petition for certiorari review with prejudice prohibits them from applying for a building permit. However, they did not seek certiorari review of a decision by the Board of Adjustment to deny an application from them for a building permit, but instead sought certiorari review of the decision to deny their application for a variance. At least based upon the record before this court, it appears the Belliles never actually applied for a building permit and, as best we can tell, nothing forecloses the Belliles from applying for a building permit now, whatever their prospects might be for obtaining a valid permit.

Accordingly, for the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. Rule 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals