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March 30, 2021

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

2019AP1719 Charles Landis v. City of Glendale Board of Appeals
(L.C. # 2018CV4329)

Before Brash, P.J., Dugan and White, 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).

Charles Landis appeals from a circuit court order affirming a decision of the City of Glendale Board of Appeals (the Board) to grant two variance requests made by Christopher and Jennifer Daood. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We further conclude: the Board proceeded on a correct theory of law; its action was not arbitrary, oppressive, or unreasonable such that it represented its will and not its judgment; and its determination was reasonable. Therefore, we summarily affirm.

This appeal stems from a 2018 petition request by the Daoods for two variances to allow for construction of a hybrid deck/balcony and gazebo structure to replace an existing deck. One variance was requested to accommodate the proposed height of the structure: eighteen feet ten inches as compared to the fifteen-feet maximum height allowed under the code.[2] The other variance related to the number of accessory structures allowed on the Daoods' property: this structure would be the third and the code only allows two.[3]

At a public hearing,[4] the Daoods testified that they would have preferred to construct an addition to their home. However, because their lot is situated in the flood plain, both they and the flood plain administrator for the City of Glendale testified to regulatory limitations that

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] *See* GLENDALE, WIS., ZONING CODE § 13.1.140(c)(3) (2021) ("Garages and other detached accessory buildings shall be less than fifteen (15) feet in height.").

[3] *See* GLENDALE, WIS., ZONING CODE § 13.1.140(c)(1) (2021) ("In any residential district, in addition to the principal building, a detached garage or attached garage and one (1) additional accessory building or structure and one (1) children's play structure may be placed on a lot.").

[4] This hearing followed a remand order from the circuit court. The Board conducted an initial hearing in March 2018, and granted the variances. Landis sought certiorari review in the circuit court, and the circuit court remanded the matter back to the Board for a new public hearing because the one that occurred in March was neither recorded nor transcribed. The certiorari action was stayed pending the hearing on remand.

impacted their ability to do so. As a result, the Daoods testified that they sought to build a stand-alone structure to replace their deck.

Landis, the Daoods' neighbor, testified in opposition to the petition. He argued, among other things, that his privacy would be compromised by the Daoods' proposed structure, the structure would diminish the value of his property, and what the Daoods really wanted was a view of the Milwaukee River across his yard.

After listening to the testimony that was presented, the Board reaffirmed its earlier determination that the zoning restrictions unreasonably prevented the Daoods from using their property for a permitted purpose and made conforming with those restrictions unnecessarily burdensome. The Board granted the variances. On certiorari review, the circuit court affirmed the Board. This appeal follows.

When reviewing a circuit court order on certiorari, we review the record of the Board, not the decision of the circuit court, although we may benefit from the court's analysis. *See* ***Hillis v. Village of Fox Point Bd. of Appeals***, 2005 WI App 106, ¶6, 281 Wis. 2d 147, 699 N.W.2d 636; *see also* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) ("When the [circuit] court's decision was based upon a written opinion … that adequately express[es] the panel's view of the law, the panel may incorporate the [circuit] court's opinion … or make reference thereto, and affirm on the basis of that opinion.").[5] Our review of the Board's decision is deferential, and we must accord a presumption of correctness and validity to its decision. *See* ***Sills v. Walworth Cnty.***

[5] The circuit court reviewed the action of the Board, which is our charge on appeal, and addressed the same arguments that are before us.

Land Mgmt. Comm., 2002 WI App 111, ¶6, 254 Wis. 2d 538, 648 N.W.2d 878. We should not disturb the Board's findings if they are supported by any reasonable view of the evidence. *See* ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, ¶25, 284 Wis. 2d 1, 700 N.W.2d 87.

Our review of the Board's action is limited to the following issues:

> (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on the correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the Board might reasonably make the order or determination in question, based on the evidence.

See ***State v. Waushara Cnty. Bd. of Adjustment***, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. Landis does not argue that the Board acted outside its jurisdiction. Therefore, we focus our attention on the remaining three prongs.[6]

(a) ***The Board proceeded on the correct theory of law.***

WISCONSIN STAT. § 62.23(7)(e)7.b. authorizes the Board to grant variances from zoning restrictions that are not "contrary to the public interest, where, owing to special conditions, a literal enforcement ... will result in practical difficulty or unnecessary hardship[.]" The purpose of a variance is to ensure that injustice is not caused by applying zoning restrictions so harshly that it creates difficulty and hardship for property owners. *See* ***State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment***, 2004 WI 23, ¶25, 269 Wis. 2d 549, 676 N.W.2d 401.

[6] We address Landis's arguments in a different order than they are presented in his brief.

Area zoning regulations, such as those involved in this case, create an unnecessary hardship if they unreasonably prevent a permitted purpose or are unnecessarily burdensome. *See* ***id.***, ¶7. The hardship must be based on the property's unique conditions and not the property owner's personal concern or due to a problem created by the property owner. ***Id.***, ¶20. When determining whether a variance is warranted, a zoning board must consider the purpose of the pertinent zoning restriction, the effect of the restriction on the property, and the effect that a variance would have on the neighborhood and larger public interest. ***Id.***, ¶7.

Landis argues that the Board did not proceed on the correct theory of law insofar as it focused on hardship and not *unnecessary* hardship and did not properly consider the test for variances. Landis's arguments are not supported by the hearing transcript.

Although there were references to hardship as opposed to unnecessary hardship in the transcript of the hearing, it is also worth noting that on more than one occasion, the city attorney specifically elaborated on the applicable definition. Therefore, despite the omissions, the transcript reflects that the Board properly focused on unnecessary hardship.

Landis additionally contends that the Board did not describe that the unnecessary hardship was due to unique property limitations or otherwise discuss the effect of the variances on the public interest. The hearing transcript, however, reflects that the Board accounted for the fact that the Daoods' property was unique insofar as it was subject to flood plain regulations. Additionally, this court agrees with and adopts the circuit court conclusion detailed in its own written decision that the Board was not required to use "magic words" of statutes in its decision. *See* WIS. CT. APP. IOP VI(5)(a); *see also* ***Ashleson v. LIRC***, 216 Wis. 2d 23, 34, 573 N.W.2d 554 (Ct. App. 1997).

The circuit court explained that it could be inferred from the record that the Board considered the public interest when it granted the variances: "Mr. Landis'[s] testimony demonstrates that the Board had testimony of the public interest at stake. Accordingly, given the presumption of regularity, it can reasonably be inferred that the Board did indeed consider the public interest." *See* WIS. CT. APP. IOP VI(5)(a). We agree and conclude that the Board proceeded on the correct theory of law.

(b) ***The Board's action was not arbitrary, oppressive, or unreasonable such that it represented its will and not its judgment.***

According to Landis, the Board's decision represented its will and not its judgment, insofar as "the hearing represented a concerted effort to thwart [Landis's] objections." He submits that "the variance application was groomed to be successful regardless of whether the application conformed with the law" and highlights the "abundance of focus on the fact that the Daoods had been working with the City to design a stand-alone structure that would satisfy the City's concerns should the variances be granted." This, Landis contends, prompted the Board "to act as a rubber stamp during the variance application process[.]"

The hearing lasted approximately ninety minutes during which the Board heard testimony offered by multiple witnesses. Namely, testimony was provided by the Daoods, the flood plain administrator for the City of Glendale, Landis, and a realtor who testified on Landis's behalf. The Board asked questions and considered the pertinent legal criteria before arriving at its conclusion to grant the variances. The Board's decision represented its judgment.

(c) ***The Board's determination was reasonable.***

Landis asserts that the Board's determination that variances were warranted was not reasonable because it was not supported by substantial evidence. "Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." ***Sills***, 254 Wis. 2d 538, ¶11. In applying the substantial evidence test on certiorari review, a court does not reweigh the evidence; certiorari is not a *de novo* review. *See* ***Roberts v. Manitowoc Cnty. Bd. of Adjustment***, 2006 WI App 169, ¶32, 295 Wis. 2d 522, 721 N.W.2d 499. Rather, we consider only whether the Board made a reasonable decision based upon the evidence before it. *See* ***id.***

On this point, Landis asserts: "There is absolutely no hardship here, let alone an unnecessary hardship as required by the law." He also argues there is no evidence to show that the hardship the Daoods claimed was related to the unique property limitations, nor were there any references to the Board's consideration of the public interest.

To the extent we have not already resolved these claims above, we note that Landis's argument appears to primarily hinge on his dissatisfaction with the weight afforded to the evidence he presented and with the ultimate outcome. Our review, reveals that the Board's decision was supported by substantial evidence in the form of testimony and exhibits that were submitted during the hearing. Landis's frustration that the Board did not attach greater weight to his evidence is not enough to compel this court to interfere with the Board's exercise of its discretion.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals