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DISTRICT II

October 13, 2021

To:

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Circuit Court Judge
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Kristina Secord
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1745

Donald Duda v. Village of Williams Bay Zoning Board of Appeals
(L.C. #2018CV654)

Before Gundrum, P.J., Neubauer and Reilly, 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).

Donald and Patricia Duda appeal a circuit court order affirming, on certiorari review, the decision of the Village of Williams Bay Zoning Board of Appeals (the Board) granting neighbor William Yoss Sr.'s request for an area variance from setback requirements. 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 affirm.

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

Yoss purchased property in the Village of Williams Bay. Wanting to tear down the existing house and build a new single family residence, Yoss requested side-yard variances of 8.0 feet and 8.4 feet (the Village ordinance requires a ten-foot setback), and a street-yard variance of 16.8 feet (the Village ordinance requires a twenty-two-foot setback). The zoning administrator recommended that the Board grant Yoss's application.

At a public hearing, Yoss identified the existing house's structural deficiencies as a hardship. It did not have a foundation and the previous owners did not disclose this condition. The previous owners sided over rotted wood, and the hoists underneath the house varied in size. The existing house did not comply with the governing building code, and it would be virtually impossible to make it building-code compliant through repairs. The lot's significant grade change would make it difficult to rebuild a new house in the existing footprint.

The zoning administrator identified as a second hardship the location of mature trees on the property, noting that the proposed variance would ensure their preservation. The Board stated, "We're a tree city, and we're always sensitive to the trees." Additionally, Yoss's proposed plan would create more distance between the new house and existing trees, and between the new house and the Dudas' property, both of which the Board considered to be improvements.

The Dudas objected to Yoss's variance application. Their objection did not relate to the setback variances at issue. Instead, they complained that Yoss failed to provide elevations for the proposed improvements.²

The Board approved Yoss's application. The Dudas petitioned for a writ of certiorari in the circuit court, and the court affirmed the Board's decision granting Yoss's variance application. The Dudas appeal.

On appeal, this court reviews the decision of the Board, not the circuit court. *Driehaus v. Walworth Cnty.*, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343. Because the legislature delegated zoning issues to local zoning boards, we “must accord a presumption of correctness and validity” to the Board's decision and “may not substitute” the Board's discretion with our own. *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. Our review is limited to: (1) whether the Board kept within its jurisdiction; (2) whether the Board proceeded on a correct theory of law; (3) whether the Board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the Board might reasonably make the determination in question, based on the evidence. *Id.*, ¶14.

The legislature has delegated to local zoning boards substantial discretion to grant variances “where the literal application of zoning regulations would result in unnecessary hardship not justified by the underlying purposes of the ordinance in question.” *Id.*, ¶19; WIS.

² As in the circuit court, the respondents argue that the Dudas lack standing to bring this action. We choose not address this issue, and instead decide this case on the merits, applying our deferential standard of review.

STAT. § 62.23(7)(e)7.b. In the context of an area variance, an “unnecessary hardship” exists where “compliance with the strict letter of the restrictions governing area[] setbacks ... would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *State ex rel. Ziervogel*, 269 Wis. 2d 549, ¶¶24, 33 (citation omitted). In determining whether this standard is met, the Board considers the purpose of the zoning restriction, its effect on the property, and the effect of the proposed variance on the neighborhood and larger public interest. *Id.*, ¶33. Unnecessary hardships “cannot be self-created” and “must be based on conditions unique to the property.” *Id.*, ¶20.

We conclude that the Board reasonably determined that the strict application of the Village’s setback requirements to Yoss’s proposed rebuild plans would create an unnecessary hardship. The existing house was not code compliant and had numerous structural deficiencies. Given factors such as the location of mature trees on Yoss’s property and the slope and grade of his lot, forcing compliance with setback requirements would be unnecessarily burdensome and would unreasonably prevent Yoss from building his new house. Strict compliance would change the character of Yoss’s proposed home and endanger mature trees. Granting the variance would not change the neighborhood’s character or block other properties with respect to street lines and, given the plan’s increase in permeable surfaces, might actually benefit the neighborhood after a heavy rainfall. The Board considered Yoss’s application under the proper legal standard in *Ziervogel*, and its decision reflects a reasoned and rational application of that standard to the evidence presented at the hearing. Its decision was not arbitrary or oppressive.

The Dudas argue that Yoss has not shown an inability to build a new home that would meet the Village's setback requirements. That is not the standard. The question for the Board was whether strict compliance with the setback requirements would *unreasonably* prevent Yoss from building the new home, or render the proposed use *unnecessarily* burdensome. The Board was not required to find that it was impossible to build within the setback requirements in order to grant the variance.

We also reject the Dudas' argument that the existing house's structural deficiencies and the location of trees on Yoss's lot are self-imposed and not unique. While the structural issues might have been self-imposed by the previous owners, they were not self-imposed by Yoss. Similarly, the structural deficiencies and the location of trees are not personal to Yoss. Both are unique to the property and would have affected any purchaser.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to 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