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**DISTRICT II**

June 8, 2022

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

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2021AP808

Bay Colony Condominium Association, Inc. v. Village of Williams  
Bay Zoning Board of Appeals (L.C. #2020CV115)

Before Neubauer, Grogan and Kornblum, 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).**

Bay Colony Condominium Association, Inc. (Bay Colony) appeals from an order dismissing its certiorari challenge to a setback variance granted by the Village of Williams Bay Zoning Board of Appeals (the board). 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).<sup>1</sup> Because the board did not err in granting the variance, we affirm the order dismissing Bay Colony's complaint.

The dispute arises from the proposed construction of a residence in place of three cottages, a garage, and a shed. Rosa Batista-Lopez, Melba Batista, and William T. Hogan, III (hereafter the applicants) requested a reduction to four feet from the ten-foot side yard setback requirement on the south side of the property to address the presence of a fifteen-foot storm sewer easement (the easement). In 1994, the village required an additional twelve feet of easement in response to a request from the predecessors in title that the village maintain a storm sewer outlet. The resulting fifteen-foot easement restricted the building envelope (the width) of the property to approximately thirty-four feet and rendered not possible the applicants' proposed residential construction.<sup>2</sup>

Over the opposition of Bay Colony, the board granted the requested variance. In their comments approving the variance, the board members recognized that the village imposed the easement, and the easement posed a hardship to developing the property as proposed.

On certiorari review, the circuit court concluded that Bay Colony was not aggrieved by the variance. The circuit court did not address the board's decision to grant the variance. Bay Colony appeals.

On appeal, the parties dispute whether Bay Colony was aggrieved and had standing to challenge the variance. We need not address this issue because we conclude that the board did

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

<sup>2</sup> In addition to the storm sewer easement and the ten-foot side yard setback for which a variance was sought, the property also had other zoning restrictions: a thirty-foot street yard setback and a 150-foot shore yard setback.

not err when it granted the variance. See *Village of Slinger v. Polk Props., LLC*, 2021 WI 29, ¶26 n.12, 396 Wis. 2d 342, 957 N.W.2d 229 (“We decide cases on the narrowest possible grounds” and do not reach issues we need not reach.).

We turn to Bay Colony’s challenge to the variance. We review the board’s decision to grant the variance. See *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶42, 362 Wis. 2d 290, 865 N.W.2d 162.

Bay Colony argues that the applicants’ predecessors in title imposed the easement and created a self-imposed hardship that would not be a basis for a variance under the Walworth County Zoning Ordinances. Additionally, the hardship, if any, was solely economic and arose from the applicants’ failure to understand the restrictions on the property before the residence was designed.

The village is authorized to address situations in which “literal enforcement of the” zoning provisions “would result in practical difficulty or unnecessary hardship[.]” Village of Williams Bay, Wis. Zoning Ordinance, § 18.1215A.<sup>3</sup> When a variance is sought, the village considers the following: that the hardship “shall be peculiar to the subject property[.]” and the property will not “accommodate a structure of reasonable design for an allowed use” if all “setback requirements are observed.” Village of Williams Bay, Wis. Zoning Ordinance, § 18.1215D(2)(a)1. Neither pecuniary hardship nor “[s]elf-imposed hardship” is grounds for a

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<sup>3</sup> The ordinances are found in the appendix to the appellant’s brief. However, we have not been provided with an effective date for the ordinances. We assume that these ordinances were in effect at all times relevant to this proceeding.

variance. *Id.*, § 18.1215D(2)(a)2-3. A self-imposed hardship is further defined as a “deed restriction[] imposed by the owner’s predecessor in title[.]” *Id.*

The record contains the 1994 Easement Agreement, which shows that the predecessors in title wanted the village to maintain the storm sewer outlet that, at that time, ran over a much narrower easement on the property. The village agreed to maintain the storm sewer outlet provided the village received an additional twelve feet of easement that would permit large maintenance equipment to traverse the property. In the case before us, neighbors supported the applicants’ request for a variance because of the benefit their properties receive from the storm sewer management made possible by the fifteen-foot easement.

Under the circumstances surrounding the easement’s creation and purpose, we disagree with Bay Colony that the easement was imposed by the predecessors in title. The easement was required by the village and conferred a benefit on the applicants’ property and neighboring properties. The easement did not constitute a self-imposed hardship, and the property was eligible for a variance.

We turn to the board’s decision to grant the variance based on other hardship evidence. Bay Colony argues that the board’s decision was arbitrary and not reasonable based on the evidence.

On review, we determine:

- (1) whether the municipality kept within its jurisdiction;
- (2) whether it proceeded on a 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 evidence was such that it might reasonably make the order or determination in question.

*Oneida Seven Generations*, 362 Wis. 2d 290, ¶41 (citation omitted).

Bay Colony objected to the over fifty-foot height of the proposed residence, which would block the views for several floors of Bay Colony residences, and to a reduced setback that would permit no screening between the residence and Bay Colony residences facing the residence.

The board chair person noted that the height of the proposed residence was within applicable zoning limits and was not a reason to deny the variance. The board chair person also noted that a four-foot setback would offer more landscaping space than the current actual setback on the property.

The board determined that the easement posed a hardship and warranted a variance, a reasonable decision based on the evidence. The record shows that of the structures on the property at the time the applicants sought the variance, the largest setback was three and one-half feet. The proposed residence would have a four-foot setback. The applicants' builder indicated that once it was clear what impact the fifteen-foot easement would have on the residence's design, options to reduce the residence's footprint were considered, but nothing was compatible. The builder stated that a variance would not be necessary if the fifteen-foot easement were not in place. Neighbors supported the variance because their properties benefit from the storm sewer management made possible by the easement and because the residence would enhance property values and lower density by replacing three cottages with one residence.

The evidence before the board reasonably supported its decision to grant the variance due to hardship. *See Oneida Seven Generations*, 362 Wis. 2d 290, ¶41. The board's decision was neither arbitrary nor unreasonable.

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.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*