**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

August 16, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**No. 99-2940**

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

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**AUGUST E. FABYAN AND DONA FABYAN,**

**PETITIONERS-APPELLANTS,**

**V.**

**TOWN OF DELAFIELD, TOWN OF DELAFIELD BOARD OF APPEALS AND AL HAUBNER,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Waukesha County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. August E. Fabyan[1] appeals from a judgment which affirmed the Town of Delafield's denial of a variance request and dismissed his cause of action under 42 U.S.C. § 1983. On appeal, Fabyan contends that notice to the attorney general was not required to challenge the constitutionality of a municipal ordinance, that the Town's setback requirement is unconstitutional, that the Town's Board of Appeals violated the open meetings law, that the Board failed to make findings on the record, that the evidence does not support denial of the variance request, and that the complaint stated a viable § 1983 action. We reject these claims and affirm the judgment.

¶2 The Town zoning ordinance requires lake district lots to be 100 feet minimum width and buildings on such lots to be set back from the lake 150 feet. *See* TOWN OF DELAFIELD ZONING ORDINANCE § 17.35(2)(b)1, (5)(b)2 (1995). Fabyan owns a home on Pewaukee Lake. The lot is only 50 feet wide and the house is 114 feet from the lake.[2] Fabyan wants to construct an addition on the lake side of the home. The proposed two-story addition would be approximately 98 feet from the lake and 6 1/2 feet from the east lot line. Fabyan sought a variance from the Town, claiming that the lake side presented the only viable option for creating usable space and connecting the proposed second-story bathroom to the existing sewer. On January 8, 1997, the Board denied the variance. An appeal was taken and the circuit court ruled that the denial was not supported by sufficient evidence. The Board was directed to make a new decision on the evidence presented or conduct a new hearing.

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[1] The caption of the appeal includes Dona Fabyan because her name was included on the notice of appeal. The summons and complaint name only August Fabyan as the plaintiff. We refer to a singular appellant.

[2] The home was built prior to the adoption of the zoning ordinance.

¶3 A new hearing on Fabyan's variance request commenced on December 17, 1997, and was continued on several dates. After Fabyan concluded his presentation in support of his request at the Board's March 3, 1998 meeting, the Board convened a closed session to confer with legal counsel. Back in open session a motion to deny the variance for "the reasons that we discussed in closed session" passed. A written order which included the Board's findings and conclusions of law was issued on March 26, 1998.

¶4 Fabyan appealed to the circuit court. In addition to claims relevant to certiorari review, Fabyan alleged that the 150-feet setback requirement is arbitrary and capricious and that the denial of his variance request was discriminatory and a violation of his right to equal protection under 42 U.S.C. § 1983. The circuit court affirmed the Board's decision and dismissed Fabyan's complaint.

¶5 Fabyan challenges the constitutionality of the 150-feet setback in the zoning ordinance. The circuit court refused to address this claim because the attorney general was not given notice of the constitutional challenge. *See* ***Town of Walworth v. Fontana-On-Geneva Lake***, 85 Wis. 2d 432, 435, 270 N.W.2d 442 (Ct. App. 1978). Fabyan argues that he was not required to give the attorney general notice as a jurisdictional predicate. We agree.

¶6 ***Town of Walworth*** was a declaratory action under WIS. STAT. § 806.04(11) (1997-98).[3] Fabyan's challenge is not raised in a declaratory action but in a certiorari review. The notice rule applies in nondeclaratory actions as

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

well. *Cf.* ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979).

¶7 ***Estate of Fessler***, 100 Wis. 2d 437, 444, 302 N.W.2d 414 (1981), explains that the rule requiring notice to the attorney general in nondeclaratory actions is a judicially mandated rule of procedure. "Lack of compliance with this rule will not preclude review of a constitutional issue because of a failure of jurisdiction." ***Id.*** The purpose of the notice rule is to allow the State to defend the validity of its statutes and afford the court a broader analysis. *See* ***id.*** If these purposes are fulfilled, there is no reason for the court to refuse to consider the constitutional claim on the merits. *See* ***id.***

¶8 Here, the ordinance challenged does not merely adopt a requirement mandated by state law. It requires a greater setback. The State's interest in the matter is minimal, if any. The attorney general was given notice of the pending issue on appeal.[4] The late notice is sufficient to permit this court to address the constitutional challenge on the merits. *See* ***id.***

¶9 The constitutional validity of a zoning ordinance presents a question of law. *See* ***Northwest Properties v. Outagamie County***, 223 Wis. 2d 483, 487, 589 N.W.2d 683 (Ct. App. 1998). Ordinances are presumed to be constitutional. *See* ***id.*** Doubts as to the constitutionality must be resolved in favor of sustaining the ordinance as valid. *See* ***id.*** "The burden is on the challenger to prove unconstitutionality beyond a reasonable doubt." ***Id.***

[4] The appellant's brief was filed on February 3, 2000. On February 7, 2000, Fabyan forwarded a copy of the brief and notice of the constitutional challenge to the attorney general. By a letter of February 16, 2000, the attorney general indicated that it would not appear in the appeal.

¶10 Fabyan contends that the 150-feet setback requirement is illusory and that the formula exceptions adopted elsewhere in the ordinance consume the desired effect of setback uniformity.[5] He complains that the ordinance cannot afford equal protection because the setback for each property is dependent on the setback compliance of neighboring properties. In support of his claim he cites the standards set forth in ***Boerschinger v. Elkay Enterprises, Inc.***, 32 Wis. 2d 168, 172, 145 N.W.2d 108 (1966) (citation omitted):

> (1) All classification must be based upon substantial distinctions which make one class really different from another.

[5] TOWN OF DELAFIELD ZONING ORDINANCE § 17.11(2)(d) (1995), establishes an averaging formula for determining setback compliance. It provides:

> No principal building or its accessory buildings shall be hereafter erected, altered or placed so that any portion or projection thereof is closer to the base setback line than the setback distance hereinafter specified by the regulation for the district in which such building is located with the following exceptions applicable only where the setback requirements of the properties involved are identical:
>
> 1. Where the nearest existing building on one side of the building is within 500′ and has less than the required setback, the average between such existing setback and the required setback shall apply.
>
> 2. Where the nearest buildings on both sides of the building are within 500′ of the building, but not closer than 300′ to each other and have less than the required setback, the average of such existing setbacks and the required setback shall apply.
>
> 3. Where the nearest building on both sides of the building are within 300′ of each other and have less than the required setback, the average between such existing setbacks shall apply.
>
> 4. In the case of a proposed addition to an existing building which has less than the required setback, such existing building may be considered the "nearest existing building" in order to apply the aforesaid exceptions in determining required setback for the proposed addition.
> 5.

> (2) The classification adopted must be germane to the purpose of the law.
>
> (3) The classification must not be based upon existing circumstances only.
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

¶11 There can be little doubt that lakefront property is substantially distinct from other types of property within the town. The Town's adoption of the 150-feet lakeshore setback requirement is related to aesthetics, light and air access, fire safety, convenience of access, and the need to stabilize shoreline building. These goals fall within the Town's authority to legislate in favor of the public health, safety, morals or general welfare. That exceptions are permitted does not render the requirement unconstitutional because all persons have an equal opportunity to apply the exceptions.[6] Indeed, the formula "averaging" exceptions provide neighbors with approximately the same lake view while attempting to gradually increase setbacks on all the lake lots for compliance with the 150-feet setback. We cannot invalidate the ordinance simply because it might be deemed

[6] In support of his claim that the 150-feet setback was the exception, not the rule, Fabyan raised the location of homes on 66 properties in the lake district. He surmises that 92% of the new homes constructed in the last twenty years were built closer to the lake than the 150-feet setback. The Board addressed each property Fabyan raised. The Board explained how many of the homes did not require variances because they were built in a conforming area under the ordinance and averaging setback formula. The remainder of the properties were distinguished from Fabyan's circumstances either because the variances were for decks, necessitated by the unusual shape or size of the lots, or conditioned on the removal of other buildings or older nonconforming homes. Fabyan does not challenge the Board's findings with respect to the relevance of the properties he raised. Moreover, the variances granted to other property owners and whether Fabyan's proposed addition is aesthetically compatible with the surrounding homes are not relevant to the determination before the Board. *See* ***State v. Kenosha County Bd. of Adjustment***, 218 Wis. 2d 396, 416-17, 577 N.W.2d 813 (1998).

more restrictive than necessary. *See* ***Schmidt v. City of Kenosha***, 214 Wis. 2d 527, 538-39, 571 N.W.2d 892 (Ct. App. 1997). We are not persuaded that the ordinance fails to bear a rational relationship to its essential purpose. Fabyan has not overcome the presumption of validity.

¶12 Fabyan next claims that public policy demands that the Board's decision be reversed because at it's March 3, 1998 meeting, the Board violated the open meetings law. *See* WIS. STAT. § 19.83. He contends that the Board was aware that under the holding in ***State ex rel. Hodge v. Turtle Lake***, 180 Wis. 2d 62, 74, 508 N.W.2d 301 (1993), it could not conduct a closed meeting to decide Fabyan's variance request. He suggests that the Board's closed meeting to confer with counsel, an exception to the open meetings requirement under WIS. STAT. § 19.85(1)(g), was a subterfuge and precluded recording of the actual deliberations on his request. He also suggests that the Board's concern that the decision would draw it into litigation, the stated reason for meeting with legal counsel in a closed session, raises an inference that the Board went into deliberations with the predetermined decision to deny Fabyan's variance.

¶13 We do not address Fabyan's claim. The complaint did not include a cause of action brought pursuant to WIS. STAT. § 19.97(4), and there is no showing in the record that the district attorney or attorney general refused to commence an enforcement action. On April 16, 1999, Fabyan commenced a separate action, Waukesha county case number 99-CV-773, for the open meetings violation. That action was not consolidated with this one. Even if the Board's closed session violated the open meetings law, the decision to deny the variance would stand because the vote was held in an open session. *See* ***State ex rel. Epping v. City of Neillsville***, 218 Wis. 2d 516, 524 n.4, 581 N.W.2d 548 (Ct. App. 1998) (only actions taken during closed session would be voidable); § 19.97(3).

Further, the Board's detailed written findings and conclusions of law negate any prejudice Fabyan suggests from the absence of deliberations in open session.

¶14 We turn to consider whether the Board's decision is supported by the evidence. When conducting statutory certiorari judicial review, our standard of review of the circuit court's ruling is de novo. *See* ***Nielsen v. Waukesha County Bd. of Supervisors***, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993). The Board's decision is entitled to a presumption of validity. *See* ***Edward Kraemer & Sons, Inc. v. Sauk County Bd. of Adjustment***, 183 Wis. 2d 1, 8, 515 N.W.2d 256 (1994). The substantial evidence test applies and if any reasonable view of the evidence would sustain the Board's findings, the findings are conclusive. *See* ***State v. Kenosha County Bd. of Adjustment***, 218 Wis. 2d 396, 416, 577 N.W.2d 813 (1998).

¶15 Fabyan imbues his argument with suggestions that the Board's written findings are fabricated, that he did not get a fair hearing and that there was a "cover-up" about the Board's findings having been drafted by the Town's attorney. We reject the notion that there were procedural infirmities in the Board's proceeding. Fabyan was given adequate opportunity to present evidence to the Board. The Board's consultation with counsel was appropriate in light of the past litigation and Fabyan's declared intent to appeal the decision again. There is no requirement that the oral findings be given. The extensive written findings cure any claim that findings were not made.

¶16 A variance is justified "where, owing to special conditions, a literal enforcement of the [zoning ordinance] will result in practical difficulty or unnecessary hardship ...." TOWN OF DELAFIELD ZONING ORDINANCE § 17.45(3)(a)2 (1995). The applicant for a variance bears the burden of proving

that literal application of the zoning ordinance results in unnecessary hardship. *See* ***Kenosha County***, 218 Wis. 2d at 410. ***Kenosha County*** teaches that proof of unnecessary hardship includes the burden of proving "uniqueness" and that there would be no reasonable use of the property without a variance. *See* ***id.*** at 410, 413, 421. "[W]hen the record before the Board demonstrates that the property owner would have a reasonable use of his or her property without the variance, the purpose of the [ordinance] takes precedence and the variance request should be denied." ***Id.*** at 414.

¶17 The evidence was that Fabyan could build the desired addition on the back of the house without the need for a variance from setback requirements. The reasons advanced for building on the front of the house were personal in nature. Personal convenience is not a sufficient basis for a variance. *See* ***id.*** at 418. Since Fabyan has reasonable use of his property, unnecessary hardship does not exist. The Board's denial of the variance must be sustained.[7]

¶18 Fabyan argues that his complaint states a viable cause of action under 42 U.S.C. § 1983 and should not have been dismissed. Because we affirm the validity of the ordinance and the Board's decision, we need not address this claim. The § 1983 action has no basis.[8]

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[7] Fabyan argues that in the first appeal the circuit court reversed the Board's determination on the same evidence before the Board the second time around. We note that ***Kenosha County***'s affirmation of the hardship standard came after the first appeal.

[8] To sustain a cause of action against a municipality under 42 U.S.C. § 1983, the plaintiff must "identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." ***Selerski v. Village of West Milwaukee***, 212 Wis. 2d 10, 17, 568 N.W.2d 9 (Ct. App. 1997). The complaint does not establish a deprivation of property, a policy or custom with respect to Fabyan's claim that he was denied due process, or that he is a member of a particular class or group for the purpose of sustaining the claim that he was denied equal protection.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.