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DISTRICT II

May 4, 2016

To:

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

2015AP404

Pat Nauth v. Village of Pewaukee Board of Appeals
(L.C. # 2014CV953)

Before Neubauer, C.J., Hagedorn and Stark, JJ.

Pat Nauth appeals from a circuit court order affirming a decision of the Village of Pewaukee Board of Appeals (the board) to grant a variance from the zoning ordinance's setback requirements to Pattie Pearson Revocable Living Trust and Crowne Stephens Contracting (hereafter Crowne) to replace a dilapidated residence with a newly constructed residence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14). We agree with the circuit court that the board acted properly and its decision to grant the variance was supported by substantial evidence. We adopt the circuit court's decision and affirm. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) (court of appeals may adopt circuit court opinion).

An existing village residence was dilapidated and beyond repair. Crowne proposed razing the residence and building a new home on the lot. Due to the small size of the lot, Crowne sought a variance from the side and front yard setback requirements. Nauth objected to the requested variance.

After a hearing on the variance request, the board found that the existing residence on the lot did not conform with current setback requirements and if all of the setback requirements were enforced, the lot would have overlapping setbacks with a neighboring property, rendering the lot unusable. The board granted a variance on the following grounds: (1) the setback requirements were unreasonably burdensome and would render the lot essentially unusable; (2) the small size of the lot, when compared with others in the R5 residential zoning district, made it impossible to construct a building on the lot that would meet the R5 setback standards; and (3) new construction on the lot would be consistent with other parcels in the area, would represent a significant upgrade to the neighborhood and would have a positive impact when compared with the existing uninhabited and dilapidated residence.

Nauth filed a certiorari petition in circuit court to obtain review of the board's decision. The circuit court affirmed the board. Nauth appeals.

We review the board's decision, not the circuit court's decision. *Driehaus v. Walworth Cty.*, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343. The board's decision enjoys "a presumption of correctness and validity." *Id.*

Whether to grant a variance was discretionary with the board. *State v. Waushara Cty. Bd. of Adjustment*, 2004 WI 56, ¶13, 271 Wis. 2d 547, 679 N.W.2d 514. In deciding whether to grant a variance, the board considers whether the property owner would suffer an unreasonable hardship, i.e., whether compliance with the setback requirements "would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Id.*, ¶¶30, 32, 35 (citation omitted).

“Whether the Board acted in excess of its powers, applied an incorrect theory of law, or made an arbitrary, oppressive or unreasonable decision are each questions of law that this court reviews de novo.” *Driehaus*, 317 Wis. 2d 734, ¶13. The board’s findings will be upheld if they are supported by “any reasonable view of the evidence.” *Waushara Cty. Bd. of Adjustment*, 271 Wis. 2d 547, ¶13.

On appeal, Nauth argues that the board acted outside of its jurisdiction and usurped the role of the Planning Commission, which, in Nauth’s view, had the sole authority to grant the requested variance. Nauth also argues that there was no evidence upon which the board could reasonably rely to grant a variance. Nauth contends that the board acted arbitrarily, unreasonably and its decision reflected its will, not its judgment.

The circuit court reviewed the action of the board, which is our charge on appeal. *Driehaus*, 317 Wis. 2d 734, ¶13. The circuit court addressed all of Nauth’s arguments, and Nauth does not raise any new arguments on appeal. The circuit court’s decision on certiorari review is extremely thorough and well-considered. Accordingly, we adopt the circuit court’s decision as the decision of this court. *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 14, 2003) (court of appeals may adopt circuit court opinion).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals