COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2561 **Cir. Ct. No. 00-CV-839**

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

RUDOLPH S. RASIN,

PLAINTIFF-APPELLANT,

JOY PETERKIN RASIN,

PLAINTIFF,

V.

COUNTY OF WALWORTH, WALWORTH COUNTY LAND MANAGEMENT COMMITTEE AND RICHARD H. DRIEHAUS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded with directions*.

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

¶1 SNYDER, J. Rudolph S. Rasin and Joy Peterkin Rasin (the Rasins) appeal a judgment and order of the circuit court affirming a decision of the Walworth County Land Management Committee (Land Management Committee) granting Richard H. Driehaus a variance to side yard setback requirements. The Land Management Committee first granted Driehaus a conditional use permit to establish a planned residential development on his property on the condition that Driehaus obtain a variance to side yard setback requirements. The Land Management Committee later granted Driehaus that variance and the Rasins filed this appeal. The circuit court ruled that under applicable Walworth county zoning ordinances, a variance was unnecessary and thus affirmed the Land Management Committee's granting of the conditional use permit, striking the variance requirement as surplusage.

¶2 The Rasins first argue that applicable county ordinances require a variance and that the Land Management Committee lacked jurisdiction to grant the variance because the Walworth County Board of Adjustment has exclusive authority to grant variances. In addition, the Rasins argue that even if the Land Management Committee had jurisdiction, the record does not support a finding that a variance was justified. We agree that the variance should not have been granted and therefore reverse the judgment and order of the circuit court.

FACTS[1]

¶3 The Rasins own property in the Town of Linn, Walworth county, Wisconsin, contiguous to property commonly known as The Stenning; Driehaus owns The Stenning. The Stenning consists of 15.99 acres with approximately 600 feet of lake frontage on Geneva Lake and is zoned C-2, Upland Resource Conservation District. Three primary structures are located on The Stenning: a principal residence, a secondary residence and an eight-car garage. The garage was constructed in approximately 1906. The west side of the garage is located approximately three feet from the shared boundary line between the Rasins' property and The Stenning. The Walworth County Shoreland Zoning Ordinance (Shoreland Zoning Ordinance) requires a twenty-foot minimum side yard setback for all dwellings in a C-2 zoning district.

¶4 On or about May 14, 1999, Driehaus applied for a building permit to make certain improvements to the garage and convert the upper portion storage area to a single-family residence. The County issued this building permit on June 8, 1999. After the building permit was approved, the County issued a stop-work order to Driehaus on the grounds that conversion of the garage to a single-family residence violated § 2.5 of the Shoreland Zoning Ordinance, which allows only one principal structure to be located, erected or moved onto a lot.

¶5 After the stop-work order was issued, Driehaus filed a notice of appeal (First Appeal) with the Board of Adjustment, requesting a variance to § 2.5

[1] While the record documents in this case are numbered, the record documents do not contain any page numbers and are therefore difficult to utilize for reference. It is the appellant's responsibility to ensure that the record is sufficient to facilitate appellate review. *See* ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997).

of the Shoreland Zoning Ordinance. This First Appeal was considered by the Town of Linn Plan Committee (Town Plan Committee) at its August 2, 1999 meeting. After a public hearing, the Town Plan Committee found that the garage was located approximately four feet from the lot line and about twenty feet from the Rasins' residence. The Town Plan Committee found this setback "acceptable for a garage" but "not for a residence as provided" in the Walworth county zoning ordinances.

¶6 Driehaus then filed an application for a zoning permit to "rehab" the existing two-story garage with the Walworth County Department of Planning, Zoning and Sanitation, now known as the Department of Land Management (Land Management Committee) on August 6, 1999. The Land Management Committee denied this application on August 18, 1999, asserting that the permit application violated provisions of § 2.5 of the Shoreland Zoning Ordinance. On August 31, 1999, Driehaus filed an appeal (Second Appeal) of the Land Management Committee's denial of his zoning permit application with the Board of Adjustment.

¶7 Public hearings were held before the Board of Adjustment relating to the issuance of the stop-work order (First Appeal) on September 8 and 9, 1999. The Board of Adjustment voted to deny Driehaus's First Appeal, finding no exceptional circumstances or unnecessary hardship.

¶8 On October 8, 1999, Driehaus then filed an "Amended Notice of Appeal" (Amended Second Appeal) of the Land Management Committee's denial of his zoning permit application with the Board of Adjustment. A public hearing was held on this appeal by the Board of Adjustment on November 11, 1999. On November 18, 1999, the Board of Adjustment voted to "withdraw" Driehaus's

appeal "as the request has already been before the Board of Adjustment and a decision was filed on September 15, 1999." In "withdrawing" this appeal, the Board of Adjustment agreed to follow the recommendation of Assistant Corporation Counsel Michael P. Cotter; in a letter to the Board of Adjustment dated November 10, 1999, Cotter recommended that the Board of Adjustment refuse to hear this appeal because the issue

> has already been before you and you, as the Board of Adjustment, filed your decision on September 21, 1999. The issues involved are pending before the Honorable Michael S. Gibbs, Case No., 99-CV-00678. The record is closed on these issues.... I recommend that you do not take this appeal and refund the filing fee paid by the applicant.

Driehaus ultimately commenced certiorari proceedings seeking review of the First Appeal and the Amended Second Appeal.

¶9 On April 5, 2000, Driehaus and his corporation, The Stenning on Lake Geneva Conservancy Society (The Stenning Conservancy), filed an application with the Land Management Committee for the issuance of a conditional use permit for a Planned Residential Development. Driehaus filed the application "to facilitate the intended use of the three existing habitable dwellings.... [T]he landowner ... voluntarily requests a restriction that the three lots to be created on his parcel of land must be owned by one common owner and can never be sold separate and apart from each other."

¶10 On June 30, 2000, Driehaus filed an amended conditional use permit application with the Land Management Committee. A public hearing was held on the amended conditional use permit application by the Land Management Committee on August 18, 2000. The Land Management Committee voted to conditionally approve the amended conditional use permit application; one of the

conditions imposed by the Land Management Committee was that Driehaus and The Stenning Conservancy obtain all required zoning permits, including a variance to the twenty-foot lineal side yard setback requirement found in § 3.4 of the Shoreland Zoning Ordinance. The Land Management Committee then decided to hold further proceedings and to make its own decision on the variance request and did not refer the matter to the Board of Adjustment.

¶11 Driehaus filed a formal written request for the variance under the Shoreland Zoning Ordinance on August 25, 2000. The Land Management Committee held a hearing on this variance request on October 20, 2000. The Land Management Committee voted to grant Driehaus a variance to the twenty-foot lineal side yard setback requirement.

¶12 On November 17, 2000, the Rasins filed this declaratory judgment and writ of certiorari action challenging the Land Management Committee's decision to grant the variance. The Rasins argued that the Land Management Committee's decision to grant the variance was arbitrary, unreasonable, capricious, an abuse of discretion, illegal, erroneous and contrary to law; in addition, the Rasins argued that the decision to grant the variance was in violation of 42 U.S.C. § 1983, specifically that their equal protection rights were violated and that certain provisions of the Walworth County Code of Ordinances were unconstitutionally vague and overbroad.

¶13 After briefing, the circuit court held that no variance was necessary because the garage was an existing substandard structure as that phrase is defined under applicable zoning ordinances and the garage therefore did not require a variance. The circuit court therefore deleted the variance condition from the Land Management Committee's issuance of the conditional use permit. As a result, the

Land Management Committee subsequently reissued the conditional use permit without the variance condition. The Rasins did not appeal the Land Management Committee's subsequent decision to reissue the conditional use permit without the conditional variance.

¶14 The circuit court later held that since no variance was required, the Rasins' second cause of action, the civil rights claim based upon the grant of the variance, was moot. For that same reason, the circuit court denied the Rasins' motion to file a second amended complaint. Judgment was entered dismissing all of the Rasins' claims. The Rasins appeal.

DISCUSSION

¶15 We must first address the County's and Driehaus's argument that this case is moot because after the circuit court decision declaring the variance requirement surplusage, the Land Management Committee reissued the conditional use permit without the variance condition. We disagree that this rendered the Land Management Committee's variance decision moot; the Land Management Committee's postjudgment and order decision was merely in response to and in alliance with the circuit court's decision striking the variance condition as surplusage. The circuit court's decision had already eliminated the variance requirement and affirmed the conditional use permit without this requirement. The Land Management Committee's postjudgment and order decision basically redid what the circuit court had already done. It was, in essence, a gratuitous and unnecessary act. It would have been futile for the Rasins to appeal this decision as the status of the conditional use permit had been determined by the circuit court. The Rasins filed a timely appeal of the circuit

court's decision and the Land Management Committee's postjudgment and order decision did not render the previous decision moot.

¶16 We must also clarify and narrow the scope of the issues on appeal before us. The parties' briefs indicate that we are reviewing both the Land Management Committee's August 18, 2000 decision to conditionally approve the amended conditional use permit application which included a requirement that Driehaus obtain a variance to the twenty-foot lineal side yard setback requirement found in § 3.4 of the Shoreland Zoning Ordinance and the Land Management Committee's October 20, 2000 decision to grant Driehaus the said variance. However, the granting of the conditional use permit and the granting of the variance were two separate decisions addressed by the Land Management Committee two months apart and as the County correctly points out, all the claims in the Rasins' complaint arise solely from the granting of the variance, not the conditional use permit. The power to grant relief is limited to the grounds alleged in the pleadings. ***Berschens v. Town of Prairie du Sac***, 76 Wis. 2d 115, 122, 250 N.W.2d 369 (1977).

¶17 The record before us is replete with examples of all parties acknowledging, either implicitly or explicitly, that the sole issue before the court was the propriety of the granting of the variance. We are therefore hard pressed to understand why the record included, both upon original remittance and later upon motions to supplement the record, numerous documents outside the record relating not only to the Land Management Committee's conditional use permit decision but to past Walworth County Board of Adjustment decisions on similar issues. In evaluating the propriety of the granting of the variance, we will examine only the evidence in the record that relates to that decision. *See* ***Klinger v. Oneida County***, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989) (we do not review the

conclusion of the circuit court but rather review the record before the board and its decision).

¶18 We therefore do not address the issuance of the conditional use permit or the Land Management Committee's decision to make the conditional use permit contingent upon a variance; we are obliged to presume the validity of that decision as neither the Rasins nor Driehaus appealed that decision. The issue of whether the conditional use permit should have been granted with the variance requirement is not before us. *See* ***Goranson v. DILHR***, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980) (generally issues not raised before an administrative agency cannot be raised on appeal). We must conclude that the one appellate issue properly before us relates only to the Land Management Committee decision granting the variance and that is the only Land Management Committee decision we will review. We are not bound by the issues as presented by the appellants. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977).

¶19 In common law certiorari, the standard of review of the committee's record is (1) whether the committee kept within its jurisdiction; (2) whether it acted according to 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. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment***, 131 Wis. 2d 101, 119-20, 388 N.W.2d 593 (1986).

¶20 The Rasins first argue that the Land Management Committee lacked jurisdiction to grant the variance because the Board of Adjustment has the

exclusive authority to grant variances under the Shoreland Zoning Ordinance.[2] We agree.

¶21 All counties are statutorily required to enact a shoreland zoning ordinance. *See* WIS. STAT. § 59.692(1m) (2001-02).[3] Section 59.692(4)(b) mandates that "[v]ariances and appeals regarding shorelands within a county are for the board of adjustment for that county under s. 59.694, and the procedures of that section apply." Hence, state statutes indicate that the board of adjustment must hear requests for variances.

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[2] Driehaus's application for a variance indicates that it was filed pursuant to the Shoreland Zoning Ordinance. The Stenning consists of 15.99 acres with approximately 600 feet of lake frontage on Geneva Lake. Consequently the application, and thus our review, is governed by the Shoreland Zoning Ordinance. The Walworth County Subdivision Control Ordinance, upon which Driehaus extensively relies in his brief, is a general ordinance providing for review of plats and certified survey maps. While the Subdivision Control Ordinance may have applied to Driehaus's simultaneous request for waiver of preliminary and final condominium plat review, it does not apply to his request for a variance from side yard setback requirements. The only provision of the Subdivision Control Ordinance addressing variances states:

> Where, in the judgment of the Walworth County Land Management Committee, it would be inappropriate to apply literally the provisions of Section 7.0 and 8.0 of this Ordinance or the requirements to reference elevations to Mean Sea Level Datum because exceptional or undue hardship would result, the Walworth County Land Management Committee may waive or modify any requirement to the extent deemed just and proper.

However, sections 7.0 and 8.0 of the Subdivision Control Ordinance address design standards and improvement requirements and Driehaus did not seek a variance to these requirements; he sought a variance from the side yard setback requirements of § 3.4 of the Shoreland Zoning Ordinance. His written application makes no mention of the Subdivision Control Ordinance but mentions only the Shoreland Zoning Ordinance. Thus it is the provisions of the Shoreland Zoning Ordinance that exclusively apply.

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶22 Furthermore, there is no provision in the Shoreland Zoning Ordinance that indicates the Land Management Committee has authority to hear variance requests. While § 4.2 of the Shoreland Zoning Ordinance gives the Land Management Committee authority to grant conditional use permits, that same section mandates that all variances be granted only as provided in § 10 of the Shoreland Zoning Ordinance. Section 10 of the Shoreland Zoning Ordinance governs proceedings by the Board of Adjustment and specifically states that the Board of Adjustment's purpose is "hearing appeals and applications and granting variances to the provisions of this Ordinance in harmony with the purpose and intent of this Ordinance." Section 10 does not give the Land Management Committee any authority to take action regarding a variance request. We thus conclude that the Land Management Committee was without jurisdiction to grant Driehaus a variance to the side yard setback requirements.

¶23 The Rasins further argue that even if the Land Management Committee had jurisdiction, the record does not support a finding that a variance was justified. While we have previously found that the Land Management Committee did not have jurisdiction to grant the variance, we agree with the Rasins that even if it did, the granting of a variance is unsupported by the evidence of record.

¶24 WISCONSIN STAT. §§ 59.971 and 144.26 require counties to zone the shorelands of navigable waters. ***State v. Kenosha County Bd. of Adjustment***, 218 Wis. 2d 396, 399-400, 577 N.W.2d 813 (1998). The purpose of the shoreland zoning standards is to "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty." ***Id.*** at 406.

¶25 The State, through an enabling statute, WIS. STAT. § 59.694(7), has given county boards of adjustment the power to grant exceptions to zoning regulations known as "variances." ***Kenosha County***, 218 Wis. 2d at 406-07. The boards are empowered

> [t]o authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Id.; *see also* § 59.694(7)(c).

¶26 The Walworth County Shoreland Zoning Ordinance echoes this statutory standard and indicates that a variance can only be granted where, owing to special conditions, a literal enforcement of the Shoreland Zoning Ordinance's requirements "will result in practical difficulty or unnecessary hardship. Such variance shall not be contrary to the public interest and shall be so conditioned that the spirit and purposes of this Ordinance shall be observed and the public health, safety and welfare preserved and substantial justice done." Sec. 10.4 Shoreland Zoning Ordinance. The Wisconsin Supreme Court has previously ruled that there is no significant distinction between the meaning of "practical difficulty" and "unnecessary hardship." ***Kenosha County***, 218 Wis. 2d at 409.

¶27 The state statutes do not contain an express definition for the term "unnecessary hardship." "Unnecessary hardship" is, however, defined in the Shoreland Zoning Ordinance as

> circumstances where special conditions, which were not self-created, affect a particular property and make strict conformity with restrictions governing area, setbacks, frontage, height or density unnecessarily burdensome or unreasonable in light of the purposes of this Ordinance.

Sec. 13 Shoreland Zoning Ordinance.[4] The supreme court has noted that the statutory standard for "unnecessary hardship" is "no reasonable use." ***State ex rel. Spinner v. Kenosha County Bd. of Adjustment***, 223 Wis. 2d 99, 105 n.3, 588 N.W.2d 662 (Ct. App. 1998). An "unnecessary hardship" can be found only if the applicant has demonstrated that no reasonable use of the property exists without a variance. ***Id.*** at 107. In other words, the burden is on the applicant to demonstrate through the evidence that without the variance, he or she is prevented from enjoying any reasonable use of his or her property. ***Id.***

¶28 "Unnecessary hardship" requires proof that the hardship relates to a unique condition of the property; hardship does not include a condition personal to the landowner, such as personal inconvenience, nor may it be self-created. Whether a particular hardship is unnecessary is judged against the purpose of the zoning law. A variance may not be contrary to the public interest; in other words, "some hardships are 'necessary' to protect the welfare of the community." ***Arndorfer v. Sauk County Bd. of Adjustment***, 162 Wis. 2d 246, 256, 469 N.W.2d 831 (1991). Only when the applicant has demonstrated that he or she will have no reasonable use of the property, in the absence of a variance, is an unnecessary

[4] In ***State v. Kenosha County Board of Adjustment***, 218 Wis. 2d 396, 411 n.9, 577 N.W.2d 813 (1998), the Wisconsin Supreme Court examined a county shoreland zoning ordinance nearly identical to the one at hand and held that the ordinance does not conflict with WIS. STAT. § 59.694(7)(c). Thus, our analysis is limited to application of the statutory standards. *See* ***Kenosha County***, 218 Wis. 2d at 411 n.9.

hardship present.[5] ***County of Sawyer Zoning Bd. v. DWD***, 231 Wis. 2d 534, 540-41, 605 N.W.2d 627 (Ct. App. 1999).

¶29 Driehaus applied for a variance from the twenty-foot minimum side yard setback requirements.[6] The Land Management Committee voted to grant the variance, citing the following exceptional circumstances:

> 1. The structure is already existing.
>
> 2. The structure is 94 years old.
>
> 3. The structure has been used as living quarters.
>
> 4. It would be a hardship if the owner were required to remove it.
>
> 5. The structure existed prior to Countywide adoption of the Zoning Ordinance.

The Land Management Committee also noted that adequate open space would be provided so that the average intensity and density of land use would be no greater than that permitted for the district and that the neighbors' property is also in

[5] In ***State v. Outagamie County Board of Adjustment***, 2001 WI 78, ¶¶5, 33, 37, 244 Wis. 2d 613, 628 N.W.2d 376, three members of the supreme court voted to overrule this holding of ***Kenosha County*** and employ the less strict test for area variances as expressed in ***Snyder v. Waukesha County Zoning Board of Adjustment***, 74 Wis. 2d 468, 475, 247 N.W.2d 98 (1976): "[w]hether compliance with the strict letter of the restrictions ... would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." However, we conclude that because four justices did not join in the ***Outagamie County*** decision, the standard in ***Kenosha County*** remains binding precedent. We observe that this is the same conclusion reached by the majority decision in ***State ex rel. Ziervogel v. Washington County Board of Adjustment***, 2003 WI App 82, ¶25, No. 02-1618. We also observe that the differing views on ***Snyder/Kenosha/Outagamie*** among members of this court and the supreme court indicate that clarification by the supreme court would be helpful to provide guidance to the municipalities and lower courts.

[6] Side yard setback regulations "are intended to provide unoccupied space for several purposes, including to afford room for lawn and trees, to promote rest and recreation, to enhance the appearance of the neighborhood, and to provide access to light and air." ***Snyder***, 74 Wis. 2d at 479.

violation of the side yard setback. The Land Management Committee further noted that the "hardship" was not created by Driehaus, as he did not build the structure, and that Driehaus would have to move the building to meet the side yard setback requirements if the variance were not granted. Finally, the Land Management Committee commented that Driehaus had complied with the preservation intent of the Ordinance because his proposal met the Ordinance's intent for preservation of potential historical sites and state statutes direct preservation of potential historical sites.

¶30 The zoning code authorizes the Board of Adjustment to grant a variance from the terms of the zoning ordinances where owing to special conditions a literal enforcement of the zoning standards "will result in practical difficulty or unnecessary hardship." Sec. 10.4 Shoreland Zoning Ordinance. To demonstrate unnecessary hardship, Driehaus needed to prove he had no reasonable use of the property in the absence of a variance. *See* ***id.*** at 541. Our review of the record convinces us that the Land Management Committee disregarded the law governing variances when it granted Driehaus a variance.

¶31 The Land Management Committee appeared "singularly unconcerned in holding [Driehaus] to his burden of proof." *See* ***Kenosha County***, 218 Wis. 2d at 419. There is nothing in the record to indicate Driehaus would have to move the garage if the variance were denied. The garage could lawfully remain in its current location so long as its use remained a garage. Furthermore, there is nothing in the record to suggest that converting the potentially historic garage into a two-bedroom residence is essential to the preservation of historic sites. Driehaus still has reasonable use of the property without the variance as it is a completely functional eight-car garage. It cannot be credibly termed an "unnecessary hardship" for the structure to remain as such.

¶32 Driehaus argues that the garage constitutes an existing substandard structure under § 7.2 of the Shoreland Zoning Ordinance because the garage existed at the time the Shoreland Zoning Ordinance was adopted; thus, according to Driehaus, the garage may continue to exist despite lack of conformity to side yard setback requirements. While we agree that use of the garage as a garage may continue without necessitating a variance, we disagree with Driehaus's interpretation of § 7.2 of the Shoreland Zoning Ordinance.

¶33 Section 7.2 of the Shoreland Zoning Ordinance addresses substandard structures and reads:

> The use of a structure (principal and/or accessory) existing at the time of the adoption or amendment of this Ordinance may be continued although the structure's size and/or location does not conform to the required yard, height, parking, loading, access and lot area provisions of this Ordinance.

Driehaus argues that the phrase "existing at the time of the adoption or amendment of this Ordinance" modifies "structure" as opposed to "use." We agree with the Rasins that this makes no difference. It is only the "use" of the structure that "may be continued" despite the lack of conformity. Section 13 of the Shoreland Zoning Ordinance defines substandard structure as "any structure, legally constructed prior to the adoption or amendment of this Ordinance, *conforming in respect to use* but not in respect to frontage, width, height, lot area, yard, parking, loading or distance requirements of this Ordinance." (Emphasis added.) It is the use at the time of the adoption of the Ordinance that may be continued. Driehaus does not argue that the garage was used as living quarters at the time the Shoreland Zoning Ordinance was adopted; therefore its use at that time was as a garage. The use of the structure as a garage may continue despite the side yard setback violations.

¶34 When the record before the board demonstrates that a property owner has a reasonable use of his or her property without the variance, the variance request should be denied. ***County of Sawyer***, 231 Wis. 2d at 541. We agree that the "no reasonable use" standard imposes a high burden on variance applicants but ***Kenosha County*** neither limits application of the standard nor distinguishes its facts from those cases involving pre-existing nonconforming structures. Driehaus failed to establish no reasonable use of the property and hence did not establish unnecessary hardship in the absence of a variance.[7]

CONCLUSION

¶35 We conclude that the Land Management Committee had no jurisdiction to hear Driehaus's application for a variance. We further conclude that even if the Land Management Committee did have jurisdiction, Driehaus failed to establish unnecessary hardship in the absence of a variance. We therefore reverse the judgment and order of the circuit court and remand this matter to the circuit court to enter an order reversing the decision of the Land Management Committee granting Driehaus a variance.

By the Court.—Judgment and order reversed and cause remanded with directions.

[7] The Rasins also alleged a 42 U.S.C. § 1983 violation that was not addressed by the circuit court because it deemed the claim moot; the merits of this claim have not been addressed or briefed before us. This issue will have to be addressed at the circuit court level.

Not recommended for publication in the official reports.