COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2010AP2530 **Cir. Ct. No. 2008CV660**

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

STATE OF WISCONSIN EX REL. MARK MUELLER AND BARBARA MUELLER,

PETITIONERS-RESPONDENTS,

V.

CHIPPEWA COUNTY ZONING BOARD OF ADJUSTMENT,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Chippewa County Zoning Board of Adjustment appeals a circuit court judgment reversing its decision to deny Mark and Barbara Mueller an after-the-fact area variance. The Board contends the

Muellers did not make the unnecessary hardship showing required to obtain an area variance because: (1) the alleged hardship is not unique to their property; (2) the hardship was self-created; and (3) there were alternative means of alleviating the hardship that would not have required a variance. We conclude the Board could not reasonably make these findings based on the evidence before it. We also conclude the Board proceeded on an incorrect theory of law when it denied the Muellers' variance based in large part on the after-the-fact nature of their request. We therefore affirm the circuit court.

BACKGROUND

¶2 The Muellers reside on 189th Street, a Class C highway in Chippewa County. The Chippewa County Code requires all structures to be set back at least thirty feet from a Class C highway.[1] In 2001, the Muellers sought a variance from the thirty-foot setback requirement so that they could build a covered porch over their house's front steps, with support posts twenty-five feet from the centerline of 189th Street. They contended that, without the covered porch, ice and snow accumulated on their front steps during winter, creating a dangerous condition that had caused at least one family member to slip and fall. In August 2001, the Board granted the Muellers a variance, subject to certain conditions. The Muellers, who

[1] *See* CHIPPEWA COUNTY, WIS., CODE § 70-109(a)(3)a. (Sept. 2009), *available at* http://www.co.chippewa.wi.us/images/stories/ordinancecode/ch70zoning.pdf.

were not represented by counsel, asked the Board to void the variance because they believed the conditions were too restrictive.[2]

¶3 In January 2003, a county zoning specialist discovered that the Muellers had erected a porch over their front steps without a variance. The Muellers then sought an after-the-fact variance for the porch. The Board denied their request in March 2003, apparently because the Muellers again rejected the Board's proffered conditions. County zoning administrator Douglas Clary subsequently issued an order to remove the porch. However, Clary did not follow up on the removal order until 2008, at which point he set a July 11, 2008 deadline for removal of the porch.

¶4 The Muellers did not remove the porch by July 11. Instead, they once again requested an after-the-fact variance from the setback requirement. The Board held a hearing on the Muellers' request. Barbara Mueller testified that, before the Muellers built the porch, the angle of their house's roofline caused ice and snow to build up on the front steps during the winter. She testified that, even with routine salting and sanding, the uncovered steps were treacherously icy. She also testified that, before the porch was erected, the roofline created "huge icicles hanging off the front of the house." She asserted, "It's an extreme hardship for us as a family not to be able to have safe access into our home." She admitted it is possible to enter the home through the attached garage, but she pointed out that "it is not reasonable to expect that when people would come to your home they're

[2] The Muellers mistakenly believed one of the variance conditions would prevent them from rebuilding any structure on the property if their current home were destroyed by fire or other natural disaster. They also misunderstood a condition requiring them to maintain a shoreland buffer zone. The Muellers now assert that they are willing to accept the variance conditions proposed by the Board.

going to go through the garage .... If strangers are going to be coming to the house … they wouldn't go to the garage door[,] they would come to the front door." The Muellers' attorney confirmed that the Muellers were willing to accept the conditions the Board had proposed in the previous variance proceedings. At the close of the hearing, the Board voted to deny the Muellers' variance.

¶5 The Muellers requested certiorari review in the circuit court, pursuant to WIS. STAT. § 59.694(10).[3] The court remanded the matter to the Board for reconsideration, after concluding the Board did not adequately explain its reasons for denying the variance. On remand, the Board made findings of fact and determined the Muellers had not shown that application of the thirty-foot setback requirement to their property created an unnecessary hardship.

¶6 The Muellers once more sought certiorari review, and the circuit court reversed the Board's decision. The court concluded that the Muellers had met their burden of showing unnecessary hardship and that the Board proceeded on an incorrect theory of law in denying their request. The court remanded to the Board with directions to grant the variance. The Board now appeals.

DISCUSSION

¶7 On appeal, we review the Board's decision, not the circuit court's. *See* ***Roberts v. Manitowoc Cnty. Bd. of Adjustment***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. Where, as here, the circuit court took no additional evidence, our review is limited to:

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

> (1) whether the board 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 board might reasonably make the order or determination in question based on the evidence.

State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment, 2004 WI 23, ¶14, 269 Wis. 2d 549, 676 N.W.2d 401. We accord the Board's decision a presumption of correctness and validity, and we may not substitute our own discretion for the Board's. ***Id.***, ¶13.

¶8 A board of adjustment must grant a variance if it determines that "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." WIS. STAT. § 59.694(7)(c). For an area variance,[4] unnecessary hardship exists when "compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." ***Ziervogel***, 269 Wis. 2d 549, ¶33 (quoting ***Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 475, 247 N.W.2d 98 (1976)). Unnecessary hardship must be based on conditions unique to the property rather than considerations unique to the property owner, and it cannot be self-created. ***Id.***, ¶20. Furthermore, the hardship must be evaluated in light of the purpose of the zoning restriction at issue, and a variance cannot be contrary to the public interest. ***Id.***

[4] An area variance provides an exception from physical requirements like setbacks, lot area limits, and height limits, while a use variance permits a landowner to put property to an otherwise prohibited use. ***State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment***, 2004 WI 23, ¶21, 269 Wis. 2d 549, 676 N.W.2d 401. The hardship showing a landowner must make differs depending on whether the landowner seeks an area variance or a use variance. *See* ***id.***, ¶¶23-26, 33. Here, it is undisputed that the Muellers are seeking an area variance.

¶9 Here, the Board relied on four grounds to deny the Muellers' variance: (1) the hardship is not unique to the property; (2) the hardship was self-created; (3) the Muellers could have alleviated the hardship by alternative means; and (4) the Muellers' variance request was after the fact. We reject each of these grounds in turn.

¶10 First, the Board's finding that the hardship is not unique to the Muellers' property is wholly unsupported by the evidence. Barbara Mueller testified that, before the Muellers built the porch, the roofline of their house caused ice and snow to accumulate on their front steps. She testified that this dangerous condition persisted despite routine salting and sanding and caused at least one family member to slip and fall. There was no evidence before the Board that the icy condition of the Muellers' front steps was not unique to their property. In its findings of fact, the Board simply stated the hardship was not unique, without pointing to any evidence supporting that conclusion. However, as the circuit court noted, "Most buildings don't have a buildup of ice creating a hazard. In other words, this is a situation that would ordinarily not exist in a home." The Board could not reasonably conclude, based on the evidence, that the hardship is not unique to the Muellers' property.

¶11 Second, the evidence does not support the Board's finding that the hardship was self-created. In its findings of fact, the Board identified the Muellers' hardship as the cost of removing the porch if the variance were not granted. The Board argues the Muellers created this hardship by building the porch without a variance, thus subjecting themselves to a removal order. However, the Muellers have never contended that the hardship entitling them to a variance is the expense of removing the existing porch. Rather, they argue that, without the porch, ice and snow accumulate on their front steps, creating a

dangerous condition that prevents them from safely using their front door. There is no evidence that the Muellers created this hardship; instead, the evidence shows that winter weather and the house's roofline cause ice and snow to accumulate on the steps.[5]

¶12 Third, the Board could not reasonably find, based on the evidence, that the Muellers could have alleviated the hardship without building the porch. The Board identified two alternatives to the porch. It first suggested that the Muellers and their guests could enter the house through the attached garage, instead of using the front door. However, there was no evidence before the Board that this was a feasible alternative. While family members may feel comfortable going through the garage, visitors to the house will likely attempt to use the front door. Furthermore, it is unreasonable to expect visitors to enter the house through the garage because the garage doors will not always be open, especially in winter. The Board also suggested the Muellers could have poured a heated sidewalk instead of building a porch. Again, there was no evidence before the Board about the feasibility of installing a heated sidewalk. The Board therefore had no basis to conclude a heated sidewalk was a feasible alternative.

¶13 Fourth, the Board improperly based its denial of the Muellers' variance on the after-the-fact nature of their request. It is readily apparent from the hearing transcript and the Board's findings of fact that the Board primarily

[5] The Board contends that, even if the accumulation of ice and snow is the relevant hardship, this hardship is also self-created because it is attributable to the design of the Muellers' house, not the condition of the unimproved property. The Board does not provide any legal authority for the proposition that an unnecessary hardship must be attributable to the condition of the unimproved property. "Arguments unsupported by references to legal authority will not be considered." *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

denied the Muellers' variance because their request was after the fact. At the hearing, most of the questions the Board asked Barbara Mueller had to do with the Muellers' decision to build the porch without a variance. Similarly, the majority of the Board's findings of fact focus on the after-the-fact nature of the Muellers' variance request. Moreover, the Board granted the Muellers an identical variance in 2001. The only difference between the Muellers' 2001 variance request and their 2008 request is that the 2008 request was after the fact. As the circuit court noted, "[T]he Board, other than not wishing to approve the after-the-fact variance request, has not explained why the Muellers qualified [in 2001] for a variance but not this time." Additionally, the Board has apparently granted similar, before-the-fact variances to the Muellers' neighbors.

¶14 All of this evidence suggests that the Board denied the Muellers' variance in large part because their application was after the fact. However, after-the-fact variances are not illegal. Neither Wisconsin case law nor WIS. STAT. § 59.694(7)(c) distinguishes between before-the-fact and after-the-fact variances. By denying the Muellers' variance for this reason, the Board proceeded on an incorrect theory of law.

¶15 The Board argues it properly considered the after-the-fact nature of the Muellers' request because granting them an after-the-fact variance would "unduly undermine the zoning code's requirement of needing a permit or variance before beginning any construction" and would therefore be contrary to public interest. *See* ***Ziervogel***, 269 Wis. 2d 549, ¶20 (variance must not be contrary to public interest). The Board argues that granting an after-the-fact variance is contrary to public interest when the applicant knowingly violated the ordinance, but is permissible in cases where the violation was unintentional. If the Board's reasoning were correct, no applicant who knowingly violated a zoning ordinance

would ever be able to receive an after-the-fact variance. However, the Board has not cited any authority for the proposition that an applicant's knowing violation is sufficient reason to deny an after-the-fact variance request.

By the Court.—Judgment affirmed.

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