

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 26, 1997

NOTICE

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

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

No. 96-0387

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RACINE COUNTY BOARD OF ADJUSTMENT,

Defendant-Respondent,

TIMOTHY CHRISTENSEN,

Intervening Defendant-Respondent.

APPEAL from an order of the circuit court for Racine County:
DENNIS FLYNN, Judge. *Reversed.*

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

PER CURIAM. The State of Wisconsin appeals from a circuit court order affirming the Racine County Board of Adjustment's decision to grant a variance to

Timothy Christensen with regard to improvements made to his nonconforming residence situated along the Root River in Racine County. Because we conclude that the board erred in granting Christensen a variance, we reverse.

Christensen's residence was a nonconforming structure located within the shoreland setback of the Root River. RACINE COUNTY, WIS., ZONING CODE § 20-188(3) (1992), prohibits "alterations, additions and expansions" to nonconforming structures if the cost of such improvements exceeds 50% of the "current estimated equalized assessed value" of the structure. In 1994, Christensen made extensive improvements to his residence. The cost of those improvements exceeded the structure's estimated equalized assessed value. The improvements were made without obtaining necessary permits and a zoning variance. After the project was substantially completed, Christensen applied to the board for a zoning variance and permits.

As grounds for the variance request, Christensen stated that he started remodeling to correct sinking footings, mildewing walls and a rodent problem. He conceded that the project expanded to include reconfiguring the living area from four bedrooms to two by taking down existing walls and opening up the living space. The latter improvements were unrelated to the aforementioned problems. Christensen also expanded the outside deck. The deck improvement was not included in his request for permits and a variance. Christensen further conceded that he improved his home in 1988 before seeking proper permits and that he was advised at that time that permits would have been required.

The Department of Natural Resources objected to Christensen's variance request on the grounds that the alterations increased the structure's footprint and decreased the shoreyard setback. The DNR noted that expanding a nonconforming structure negatively impacts river water quality, scenic beauty and wildlife habitat. The

DNR noted that this was Christensen's second attempt to obtain a variance and permits after completing alterations which would have required such authorizations.

The board debated whether to approve Christensen's alterations even though he failed to seek a variance or appropriate permits beforehand. It debated the hardship to Christensen if the board denied a variance and permits. The board found that (1) Christensen needed to alter and increase the structure's size "to preserve [his] substantial property rights"; (2) granting the variance was not contrary to the purpose and spirit of the ordinance because Christensen had demonstrated a need for alterations to maintain the structural integrity of the building; (3) the alterations did not further encroach upon the shoreyard setback; and (4) there did not appear to be a substantial detriment to adjacent property because no abutting property owners objected at the public hearing on the variance application. The board imposed a number of conditions on the variance, including reducing the size of the deck, soil testing to determine whether the sewage system to the property was adequate and completing certain exterior work.

On certiorari review commenced by the State of Wisconsin,¹ the trial court affirmed the board. The court found that the board's decision was based upon credible and substantial evidence in the record that Christensen would suffer unnecessary hardship without a variance. The court found that the hardship was due to special conditions unique to Christensen's property and was not solely caused by Christensen.

We review the record before the board to determine: (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was

¹ Under § 59.99(10), STATS., a person aggrieved by a decision of the board of adjustment may seek certiorari review. The State of Wisconsin is aggrieved by the board's decision because under §§ 59.971 and 144.26, STATS., the DNR has responsibility to require adherence to specific standards and criteria for the protection of the shorelands of navigable waters.

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 determination in question. *See State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis.2d 101, 119-20, 388 N.W.2d 593, 600 (1986).

Our review of the record convinces us that the board disregarded the law governing variances and nonconforming uses when it granted Christensen a variance. The zoning code authorizes the board to grant a variance from the terms of the zoning ordinances where “owing to special conditions, a literal enforcement of the provisions of [the code] will result in unnecessary hardship ...” RACINE CODE § 20-35(2). A variance may not be granted “solely on the basis of economic gain or loss. Self-imposed hardships shall not be considered as grounds for the granting of a variance.” RACINE CODE § 20-41(d).

In ruling on Christensen’s request for a variance, the board was required to apply the law. *See State v. Ozaukee County Bd. of Adjustment*, 152 Wis.2d 552, 564-65, 449 N.W.2d 47, 52 (Ct. App. 1989). Section 20-35(2) of the Racine Code states that “[s]elf-imposed hardships shall not be considered as grounds for the granting of a variance.” Normally, the word “shall” connotes a mandatory directive. *See Ozaukee County Bd.*, 152 Wis.2d at 562, 449 N.W.2d at 51. This language is plain. It is apparent from the record that the board did not consider evidence that Christensen’s hardship was self-imposed because he undertook improvements to his property before he sought the necessary variance and permits. This conclusion is further buttressed by the fact that Christensen took the same approach in 1988--improving the property and then seeking the necessary permits. The only possible inference is that Christensen knew in 1994 that board approval was necessary prior to altering the structure and that he elected to proceed without it. The board failed to find “beyond a reasonable doubt,” as it was required to do

under RACINE CODE § 20-41(a), that Christensen’s request for a variance did not arise from a self-imposed hardship.

“[A] hardship which has been self-created by the act of the property owner does not qualify as a hardship from which a board of appeals can grant relief by granting a variance.” *State ex rel. Markdale Corp. v. Board of Appeals*, 27 Wis.2d 154, 159, 133 N.W.2d 795, 797 (1965). In granting Christensen a variance and ignoring the requirement that variances should not be granted to ameliorate a self-imposed hardship, the board failed to follow the law regarding nonconforming uses.

By the Court.—Order reversed.

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