COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3170

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

DENNIS G. OHLSON,

PLAINTIFF-RESPONDENT,

V.

ADAMS COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Adams County: JAMES M. MASON, Judge. *Reversed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. The Adams County Board of Adjustment appeals from a circuit court order reversing the board's decision denying Denis Ohlson a variance from the setback requirements of the Adams County Shoreland Protection Ordinance. Because we conclude that the board did not err in denying Ohlson a variance, we reverse.

Denis Ohlson owns three lots on Lake Sherwood in Adams County. When Ohlson purchased the property in 1981, it had a house with a stairway leading down to the lake. The house sits on top of a hill that slopes to the water line. The stairway consists of several staircases of varying length connected by landings. In 1991, Ohlson refurbished the stairway from the house to the lake. Section 3.22(8) of the ADAMS COUNTY SHORELAND PROTECTION ORDINANCE provides that "landings for stairways or docks are permitted only where required by safety concerns and shall not exceed 40 square feet in area." The landings on Ohlson's lots exceed the forty square foot requirement.

Sometime in the first half of 1995, Adams County advised all owners with nonconforming structures to bring them into compliance with the ordinance. Ohlson applied for a variance for his oversized landings. In his application, Ohlson stated that the staircase and landings are larger than the size required by the ordinance but that without this structure, access to the lake would be impermissible, and altering the existing structure would compromise its safety.

The Department of Natural Resources[1] objected to Ohlson's variance request on the ground that Ohlson had not demonstrated that compliance with the ordinance would cause unnecessary hardship because there was still reasonable use of the property if the landings were reduced in size to comply with the ordinance.

At the hearing before the board on his request, Ohlson argued:

[1] The State's administrative code gives the DNR the responsibility of monitoring the administration and enforcement of shoreland zoning ordinances. *See* ***DNR v. Walworth County Bd. of Adjustment,*** 170 Wis.2d 406, 489 N.W.2d 631 (Ct. App.1992).

> First reason they talk about denying access or rendering your property useless. If this staircase has to go to code, with 40 square feet only of decking, that staircase is gonna be a hazard and extremely dangerous. It's gonna effectively deny [me] lake access cause (sic) [I] ha[ve] the highest point on that entire lake. It is really steep. . . . Number two, they say [I] am not unique. If there is any lot out there that is unique, it's this one. This is a very steep bank.

The board's discussion on whether to grant the variance included this exchange:

> Heofle: The ordinance is specific, each deck is a minimum [sic] of 40 square feet. Also for verification I did – I did calculate the slope out there and the slope is 26 degrees, which comes up to 54 percentage [sic] of slope so it is a steep slope.
>
> Walker: Well there is no question that he has to have stairway on that steep a slope and a railing would be a safety factor but the decking can be brought down to code without any hardship, other than financial and that is not a factor.

The board decided to deny Ohlson's request for a variance. It concluded:

> Unnecessary hardship is not present in that a literal enforcement of the terms of the zoning ordinance would not deny [Ohlson] all reasonable use of the property because decks could be brought into compliance of 3.22 of shoreland protection ordinance.

Ohlson appealed to the circuit court for certiorari review under § 59.694(10), STATS.[2] The court reversed the board's decision. The court found that: (1) the oversized landings served as a resting point; (2) the landings

[2] This statute was renumbered and amended by 1995 Wis. Act 201, § 479. It was formerly numbered § 59.99(10), STATS.

facilitated the transportation of equipment and supplies up and down the stairway and provided a place where passage up and down the stairway could occur safely; and (3) Ohlson offered a prima facie case of unnecessary hardship and the board offered no evidence to rebut Ohlson. The trial court then remanded the cause to the board for further proceedings consistent with the court's decision. The board appealed.

On certiorari review, this court reviews the board's decision, not the trial court's decision, using the same standard as the trial court. ***State v. Winnebago County***, 196 Wis.2d 836, 842, 540 N.W.2d 6, 8 (Ct. App. 1995). In reviewing the board's decision to deny the variance, the court is limited to deciding: (1) whether the board stayed 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 is judgment; and (4) whether the evidence was such that the board might reasonably make the decision in question. ***State ex rel. Brookside v. Jefferson Bd.,*** 131 Wis.2d 101, 120, 388 N.W.2d 593, 600-01 (1986).

We first address Ohlson's argument that the board's action was arbitrary because there was no evidence in the record to support the board's decision. Section 62.23(e)7, STATS., made applicable to the board by § 61.35, STATS., allows the board to grant a variance "when literal enforcement of the provisions of the ordinance will result in unnecessary hardship." Unnecessary hardship exists when complying with the strict letter of the zoning ordinance would unreasonably prevent the property owner from using the real estate for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. *See* ***Arndorfer v. Board of Adjustment***, 162 Wis.2d 246, 255, 469 N.W.2d 831, 835 (1991). An applicant for a zoning variance must overcome the

presumption of correctness accorded the board's decision. ***Id.*** at 253, 469 N.W.2d at 833. Thus, Ohlson carries a dual burden on this appeal as he must overcome the presumption of correctness accorded to the board's decision and establish that he will suffer unnecessary hardship if a variance is not granted. ***Id.***

The record shows that the board considered evidence about the uniqueness of Ohlson's property. Board member Heofle stated that he calculated the slope on Ohlson's property and it is a steep slope. Board member Walker noted that "there is no question that he has to have [a] stairway on that steep a slope and a railing would be a safety factor." While the board recognized that Ohlson needed a stairway with railings because of the steepness of the slope, it rejected Ohlson's argument that the landings needed to be larger than the forty square foot requirement.

Although Ohlson argued to the board that compliance with the ordinance would render the staircase "a hazard and extremely dangerous," he did not present any specific reasons or evidence to show that the landings would be unsafe if he reduced their size to the forty square foot requirement. The issue was not whether Ohlson could have any landings at all, but whether they could exceed the size specified in the ordinance. There is also nothing in the record that shows that the landings must be larger than the size required by the ordinance for Ohlson to have reasonable use of his property. Indeed, the testimony and exhibits presented to the board showed that the landings can be reduced in size. Although a board member recognized that Ohlson would suffer financial hardship if he reduces the size of the landings, the member noted that financial hardship is not a factor. *See* ***Snyder v. Waukesha County Zoning Bd.,*** 74 Wis.2d 468, 247 N.W.2d 98 (1976). Therefore, we conclude that the board reasonably concluded that

Ohlson failed to show that he would suffer unnecessary hardship if the landings were reduced to comply with the ordinance.

Ohlson also argues that the board denied the variance simply because the landings did not conform to the ordinance without considering the proper issue—the question of unnecessary hardship caused by compliance. We disagree. While the board recognized that the landings were non-conforming structures, that was not its reason for denial. The board denied Ohlson's request for a variance because he did not show unnecessary hardship, that is, denial of reasonable use of the property, if the variance were denied and the landings had to conform to the ordinance.

In arguing that there was no evidence to support the board's decision of no unnecessary hardship, Ohlson is impermissibly shifting the burden to the board. He did not present evidence to show that conforming landings would cause an unnecessary hardship. Therefore, we conclude that the board's decision is based on permissible considerations and is supported by the record.

By the Court.—Order reversed.

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