

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2524

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JANA PAULSON,

PLAINTIFF-RESPONDENT,

v.

ST. CROIX COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Reversed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. The St. Croix County Board of Adjustment appeals a trial court order reversing the board's refusal to grant Jana Paulson a ninety-five-foot setback variance for home construction. Paulson wanted to build a home five feet from the St. Croix River bluff line. This would have violated the County's 100-foot bluff-line setback ordinance that implements state and federal legislation

designed to save the St. Croix River's natural splendor. Paulson claimed that the bluff-line and lot-line setbacks, together with the lot's size and configuration, pressed the homesite from all sides, leaving her with no buildable area on her one-acre lot. These combined factors, she contended, made it physically necessary to build the home five feet from the bluff line. The board ruled that the "footprint" of Paulson's proposed home—its outer horizontal dimensions—was too large, and that her ninety-five-foot setback variance was excessive. The trial court ruled that the board acted arbitrarily and that Paulson needed a variance of that size to avoid unnecessary hardship.

The board claims on appeal that the trial court misjudged the facts and the board's decision. In its view, the trial court wrongly interfered in the enforcement of local zoning laws, something the legislature had entrusted to the board. Paulson sees the case from a different standpoint. She perceives an unjust and unreasonable intrusion by local zoning officials upon a landowner's use of private property. She makes three basic claims in support of the trial court's ruling: (1) the board misjudged the advisability of a setback variance; (2) the board's "footprint" method was a mechanistic, two-dimensional way of judging what was really a three-dimensional problem, relying entirely on a home's width and depth, while ignoring entirely the largest threat to a bluff line's scenic beauty—a home's height, her one-story home being hardly noticeable; and (3) the board ignored the fact that other homes already stood only five feet from the bluff line. We conclude that the trial court exceeded its powers of review and that the board issued a rational decision. We therefore reverse the trial court's order and reinstate the board's decision.

The trial court's narrow scope of review is well established; the court must uphold the board's decision as long as it was reasonable, nonarbitrary,

noncapricious, within the board's jurisdiction, and supported by the evidence. *See Snyder v. Waukesha County Zoning Bd.*, 74 Wis.2d 468, 475, 247 N.W.2d 98, 102-03 (1976). For its part, the board could grant bluff-line setback variances under the following conditions: (1) the variance would not offend the public interest; (2) special conditions made the zoning code's literal enforcement an unnecessary hardship; (3) the variance observed the spirit of the ordinance; and (4) the variance did substantial justice. *See* § 59.694(7)(c), STATS. Justice Holmes warned long ago of the "natural tendency of human nature" to extend government's police power "more and more until at last private property disappears." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Mindful of this, the St. Croix River legislation gives counties the flexibility to make some exceptions, to strike a balance of landowners' rights in private property with the public interest in saving the river's natural splendor. *See* § 30.27(3), STATS.

Here, the board faced a difficult tradeoff. Paulson wanted 95% of the bluff-line setback waived. This was a substantial variance request by any measure, and the board used a two-part analysis to address it. First, the board sought to measure Paulson's home's size by reference to its "footprint"—its horizontal outer dimensions. Second, the board related the size of the home to the size of the desired variance. In essence, the board ruled that Paulson could shrink her home's size without unnecessary hardship but that the public interest would suffer gravely if the board shrunk the 100-foot bluff-line setback by 95%. This decision struck a reasonable balance of private property rights and the public interest. The board did not bar Paulson from seeking a variance. It did not ask for the same 95% downsizing of her home that she asked of the bluff-line setback. It simply turned down the size of the variance she sought. It left her free to ask

again for a smaller one with an amended home design. The board thought that some lesser variance would meet Paulson's needs and still protect the public interest in scenic preservation. We cannot find fault with the board's judgment.

We also conclude that the board's "footprint" formula was a rational, straightforward way to judge home size. It took into account ground-level square footage as it related to important variables like lot size, setbacks, and lot configuration. Ground-level square footage was the heart of the problem, for setbacks are inherently a horizontal affair. We accept Paulson's point that a home's height may sometimes pose a bigger scenic threat than its ground-level square footage. Paulson has not shown, however, that the board had a duty to use a three-dimensional analysis, and the two-dimensional "footprint" has the advantage of both simplicity and reasonable accuracy.

The board was also free to ignore the fact that some existing homes stood five feet from the bluff line. These homes predated the 100-foot setback law and evidently stood as nonconforming uses; Paulson has not identified a single homeowner who received a ninety-five-foot variance. In short, Paulson has not shown that the board made an arbitrary decision. We therefore reverse the trial court order and reinstate the board's ruling. Paulson must submit a new plan requesting a smaller variance.

By the Court.—Order reversed; the board's decision is reinstated.

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

