

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 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. 97-3358-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

DOOR COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Door County:
JOHN D. KOEHN, Judge. *Reversed and remanded with directions.*

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

PER CURIAM. The State of Wisconsin, through its Department of Natural Resources (DNR), appeals a trial court order that upheld a decision of the Door County Board of Adjustment.¹ The board granted a landowner a setback

¹ This is an expedited appeal under RULE 809.17, STATS.

variance for a wooden, octagonal, six-to-nine-foot diameter gazebo he had erected thirty-two feet from the shoreline high-water mark, in violation of the county's shoreline preservation ordinance's seventy-five-foot setback requirement for "structures." Although neither the county, the landowner's neighbors, nor Door County residents opposed the gazebo, the DNR claimed the gazebo violated the public interest, filing suit to force the gazebo's removal after the board rejected its protests. The DNR argues that the board misread the word "structure" as excluding the gazebo. It also argues that the board misapplied the standards controlling the issuance of setback variances. In its view, the seventy-five-foot setback requirement caused the landowner no "unnecessary hardship" under standard zoning doctrine. We conclude that the board misapplied the ordinance. We therefore set aside the board's decision, void its setback variance, and remand the matter to the board for further proceedings.

The board concluded, evidently in the alternative, that the gazebo was not a "structure" within the meaning of the shoreline preservation ordinance. Our narrow scope of review is well established; we must uphold this 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 Board*, 74 Wis.2d 468, 475, 247 N.W.2d 98, 102-03 (1976). Here, however, the board clearly misread and misapplied the ordinance's definition of the term "structure." The board had a duty to apply the ordinance's plain meaning. *See City of Madison v. Lange*, 140 Wis.2d 1, 4-5, 408 N.W.2d 763, 764 (Ct. App. 1987). The ordinance broadly defined "structure" as "anything constructed, erected, or manufactured, the use of which requires a more or less permanent location on or in the ground." This all-encompassing language described the gazebo in all material respects: the gazebo was constructed, erected,

and used on a more or less permanent location. In short, the setback provision covered the gazebo by its plain terms, and the gazebo cannot remain absent a duly issued setback variance.

The board could grant such a setback variance 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.; WIS. ADM. CODE § NR 115.05(6)(e) (1995); *see also* DOOR COUNTY ZONING ORDINANCE § 11.06(3) (1995). Here, the board made some findings that could be consistent with these standards, including the following: (1) a variance was reasonable; (2) the ordinance's strict enforcement did not promote the county's best interests; and (3) the zoning violation was frivolous, in the sense of being trivial. However, the board stopped short of a critical factor: it made no finding on the issue of "unnecessary hardship." This omission, together with its misdirected finding that the gazebo was not a "structure," makes its overall decision defective. We therefore set aside the board's decision, void the setback variance, and remand the matter to the board. To issue a valid setback variance, the board must make specific, fact-supported findings on the above-cited statutory, administrative, and municipal standards, especially the "unnecessary hardship" standard.

By the Court.—Order reversed; the board's decision is set aside and the variance voided; the cause is remanded to the board for proceedings consistent with this opinion.

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

