COURT OF APPEALS
DECISION
DATED AND FILED

September 22 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1046

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

OUTAGAMIE COUNTY BOARD OF ADJUSTMENT,

DEFENDANT,

DAVID AND BARBARA WARNING,

INTERVENING DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed.*

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

HOOVER, J. The State appeals a judgment affirming the decision of the Outagamie County Board of Adjustment granting a variance to the

intervening defendants, David and Barbara Warning. The State claims that the Warnings did not meet the requirements for a variance under the applicable legal standard. The State further contends that WIS. ADM. CODE § NR 116.13(2) prohibits granting any variance that would result in a floor elevation below the regional flood elevation. We conclude that the Warnings have not met the requirements for a variance and that, in any event, § NR 116.13(2) forecloses issuance of a variance to allow a floor elevation below the regional flood elevation.

I. Background

David and Barbara Warning own a 1.77 acre parcel of land located in the Town of Bovina, Outagamie County. The land is located within the 100-year Flood Fringe District of Outagamie County and is regulated by the Outagamie County Shoreland-Floodplain-Wetland ordinance.

In 1980, the Outagamie County Zoning Committee granted a conditional use permit to place fill and a mobile home on this parcel. The mobile home complied with the flood proofing requirements. In 1984, the town issued a building permit to replace the mobile home with a stick-built three-bedroom ranch style home with an attached garage. The Outagamie County Zoning Department was not contacted at that time to obtain a shoreland zoning permit or sanitary permit for the construction of the new home. Consequently, the Warnings' basement floor elevation of 764.5 feet fell 3.7 feet below the 100-year regional flood elevation of 768.2 feet and 5.7 feet below the flood protection elevation in violation of the Outagamie County ordinance and the Wisconsin Administrative Code.

In 1995, the Warnings requested the zoning department to issue a permit for a proposed sun room addition to their residence. The department denied the request because their home did not meet the flood protection elevation requirements. The Warnings filed an application for a variance with the board of adjustment. The Warnings sought an "after-the-fact" variance for their nonconforming basement floor. A hearing was held on November 1, 1996, to consider the petition. The Wisconsin Department of Natural Resources appeared and opposed the variance. The board granted the Warnings a variance, reasoning that:

> [T]he hardship experienced by the Warnings was caused by the Town of Bovina and the negligence of the town building inspector for issuing a building permit for the three bedroom ranch style home in 1984. The hardship is not based solely on economic gain or loss, the loss would be substantial.

The State filed a complaint for certiorari to the circuit court seeking review of the board's decision. The circuit court affirmed the decision of the board. The State contends that the court erred by applying the "unnecessarily burdensome" test under ***State v. Kenosha County Bd. of Adjust.***, 212 Wis.2d 310, 569 N.W.2d 54 (Ct. App. 1997), and by finding that the hardship was unique to their property because "there are no other properties in the neighborhood that do not comply with basement depth requirements of the permit that was issued in error." The State further argues that WIS. ADM. CODE § NR 116.13(2) forbids the issuance of a variance for a basement floor below the regional flood elevation.

II. Analysis

We begin by emphasizing that the applicable law compels a harsh result we would have preferred to avoid. The State pursues this matter presumably motivated by principle, to promote the greater public good by protecting the integrity of certain zoning ordinances. For David and Barbara Warning, however, the practical effect of the State's efforts is that we order the *certain destruction* of their basement in order to avoid the *possibility* that it may be damaged in a flood. Nonetheless, we must agree with the State's assertion that the circuit court applied the incorrect standard of law.[1] Our role as judiciary limits our authority to follow the law, not to rewrite it. ***State v. Ozaukee County Bd. of Adjust.***, 152 Wis.2d 552, 564-65, 449 N.W 47, 52 (Ct. App. 1989).

This court's review of a certiorari action is limited to:

> (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 evidence was such that it might reasonably make the order or determination in question.

Brookside v. Jefferson County Bd. of Adjust., 131 Wis.2d 101, 120, 388 N.W.2d 593, 600 (1986).

The board's power to issue a variance is codified in the Wisconsin statutes under § 59.694(7)(c), STATS., which provides:

> To authorize upon appeal in specific cases variance from the terms of the ordinance that will not be contrary to the

[1] The trial court relied on a standard for "unnecessary hardship" set forth in ***State v. Kenosha Cty. Bd. of Adjust.***, 212 Wis.2d 310, 569 N.W.2d 54 (Ct. App. 1997).

> public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in *unnecessary hardship*, and so that the spirit of the ordinance shall be observed and substantial justice done. (Emphasis added.)[2]

The burden is on the applicants, the Warnings, to establish unnecessary hardship. *See* ***Arndorfer v. Sauk County Bd. of Adjust.***, 162 Wis.2d 246, 253, 469 N.W.2d 831, 833 (1991). In proving "unnecessary hardship" the Warnings must show: (1) no feasible/reasonable use can be made of the land; (2) "uniqueness" of the condition affecting the parcel; and (3) the variance will not be contrary to public interest. ***State v. Kenosha County Bd. of Adjust.***, 218 Wis.2d 396, 577 N.W.2d 813 (1998); ***State v. Winnebago County***, 196 Wis.2d 836, 843, 540 N.W.2d 6, 9 (Ct. App. 1995).

First, the Warnings must show that no reasonable use can be made of the land. Neither the board nor the circuit court made any findings in this regard. However, there is uncontroverted evidence that a reasonable use may be made of the Warnings' property. They previously had a mobile home on the property, which complied with the flood proofing requirements. There is also evidence that the Warnings could have built a single family residence on their property that complied with the code. Timothy Roach from the DNR testified at the hearing that if the Warnings' basement had been flood proofed, the County could have

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[2] Section 59.694(7)(c), STATS., is promulgated in the Outagamie County ordinances under § 16.40(2)(b), STATS., which provides:

> To authorize upon appeal such variance from the dimensional terms of this chapter which is not contrary to the public interest where, owing to special conditions unique to the property, a literal enforcement will result in unnecessary hardship, so that the spirit of the chapter shall be observed, public safety and welfare secured and substantial justice done.

issued a permit for the residence in 1984. Thus, it is possible for the Warnings to use their property for residential purposes as long as their residence is flood proofed.[3]

The trial court relied on our decision in ***Kenosha County***, 212 Wis.2d at 320, 569 N.W.2d at 59, which held that the test to prove unnecessary hardship was "unnecessarily burdensome" rather than "no feasible use." The Wisconsin Supreme Court, however, recently reversed this holding. *See* ***Kenosha County***, 218 Wis.2d at 413-14, 577 N.W.2d at 821-22, where the court emphasized:

> We agree that the State's definition of unnecessary hardship—no reasonable use of the property without a variance—is compatible with the concerns we expressed in ***Snyder***. This articulation is also consistent with the recent decision in ***Winnebago County***, 196 Wis.2d 836, 540 N.W.2d 6, where the court of appeals held that the proper test is not whether a variance would maximize the economic value of the property, but whether a feasible use is possible without the variance.
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> This definition also clarifies that in ***Snyder*** we did not mean that a variance could be granted when strict compliance would prevent the property owner from undertaking any of a number of permitted purposes. Rather, when the record before the Board demonstrates that the property owner would have a reasonable use of his or her property without the variance, the purpose of the statute takes precedence and the variance request should be denied. (Emphasis omitted.)

[3] The Warnings mistakenly argue that no reasonable use can be made of their property because if they fill in the basement of their home they will not be able to continue to reside in there. The standard, however, is not whether a reasonable use can be made of their home, which is in violation of the code, but whether a reasonable use can be made of the land on which the home sits.

We are bound by the supreme court's interpretation and must therefore follow the "no reasonable use" standard in our decision.

Second, the Warnings must show "uniqueness" of the condition affecting their parcel. The trial court concluded that the hardship was unique to the Warnings' property because "there are no other properties in the neighborhood that do not comply with basement depth requirements of the permit that was issued in error." For a condition to be "unique," however, it must not be shared by nearby *land*. *See* ***id.*** at 420, 577 N.W.2d at 824. "Practical difficulties or unnecessary hardship do not include conditions personal to the owner of the land, but rather to the conditions especially affecting the lot in question." ***Snyder v. Waukesha County***, 74 Wis.2d 468, 479, 247 N.W.2d 98, 104 (1976). A condition is not unique to property if it applies equally to all lots of similar size. ***Id***. at 477, 247 N.W.2d at 103. Here, the Warnings have failed to allege that the condition is unique to their property. Roach testified that "[e]verybody has the same requirements to follow and there has been a couple of homes built in recent years [and] they are going to follow the same requirements." Because the restriction does not especially affect the Warnings' property, it does not constitute a hardship. *See* ***id***.

When a hardship is shared by nearby land, relief should be addressed through the legislature. ***Arndorfer***, 162 Wis.2d at 256, 469 N.W.2d at 834. We stress again, it is not for this court or the board to rewrite the law, but rather, to follow it. ***Ozaukee County Bd. of Adjust.***, 152 Wis.2d at 564-65, 449 N.W.2d at 52. If property owners located in the flood fringe district want to change the effect of the law, they should petition the legislature rather than individually seek variances from the board. ***Winnebago County***, 196 Wis.2d at 846, 540 N.W.2d at 10.

Third, the Warnings must show that the variance will not be contrary to public interest. Neither the trial court nor the board made findings regarding whether granting the variance would be contrary to public interest. Because the issue was not raised below, we will not address it on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1983).

In addition, the board incorrectly relied on what the Warnings proposed as a new "exception" to the hardship requirement.[4] The Warnings assert that they should be entitled to a variance because their hardship was caused by the negligence of the town's building inspector and was not self-created. The supreme court has previously rejected this argument in ***Snyder***, 74 Wis.2d at 476-77, 247 N.W.2d at 103. The court held that a municipality is not estopped from enforcing its zoning ordinance when an inspector issues a permit for a structure the ordinance forbids. ***Id***. At 477, 247 N.W.2d at 103. A building permit does not give the Warnings a vested right to an unlawful use of the property. *See* ***Jelinski v. Eggers***, 34 Wis.2d 85, 93, 148 N.W.2d 750, 755 (1967). Consequently, the Warnings cannot argue hardship due to the negligence of the town's building inspector. *See* ***id***.

Alternatively, even if the Warnings could meet the above requirements, we conclude that WIS. ADM. CODE § NR 116.13(2) forecloses the

[4] The sole reason the board granted the Warnings' variance was that "the hardship experienced by the Warnings was caused by the Town of Bovina and the negligence of the town building inspector …."

issuance of a variance to the Warnings for a basement that is below the regional flood elevation.[5] Section NR 116.13(2) provides:

> RESIDENTIAL USES. (a) Any structure or building used for human habitation (seasonal or permanent), which is to be erected, constructed, reconstructed, structurally altered or moved into the floodfringe area shall be placed on fill with the finished surface of the lowest floor, excluding basement or crawlway, at or above the flood protection elevation. If any such structure or building has a basement or crawlway, the surface of the floor of the basement or crawlway shall be at or above the regional flood elevation and shall be floodproofed to the flood protection elevation in accordance with s. NR 116.16. *No variance may be granted to allow any floor below the regional flood elevation*. An exception to the basement requirement may be granted by the department, but only in those communities granted such exception by the federal emergency management agency (FEMA) on or before March 1, 1986. (Emphasis added.)

The Warnings' basement falls 3.7 feet below the regional flood elevation level. The law is unambiguous: *No* variance may be granted to allow *any* floor below the regional flood elevation. The only exception is for those communities that have been granted exception by FEMA. Unfortunately, the Town of Bovina is not one of those communities. Therefore, while the result is distasteful, legal precedent compels us to conclude that the board was prohibited from granting the Warnings a variance under WIS. ADM. CODE § NR 116.13(2).

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[5] The State did not raise this issue before the board. The State argues, disingenuously, that it did not waive its argument under WIS. ADM. CODE § NR 116.13(2) because it was not a party at the administrative level. Although perhaps not a party in form, it certainly was in substance. The State appeared before the board and advanced arguments in objection to the Warnings' request for a variance. Generally, issues not raised before the agency cannot be raised on judicial review, *see* ***Goranson v. DILHR***, 94 Wis.2d 537, 545, 289 N.W.2d 270, 274 (1980). The Warnings, however, have failed to respond to the waiver argument and, therefore, it is deemed conceded. *See* ***Charolais Breeding Ranches v. FPC Secs.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.