COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2406

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAWYER COUNTY BOARD OF APPEALS,

DEFENDANT-RESPONDENT,

V.

STACEY A. RAYMOND,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Stacey Raymond appeals a judgment reversing the Sawyer County Board of Appeals' decision to grant her an "after-the-fact" variance. We agree with the circuit court that the Board considered improper factors in granting the variance and affirm the judgment.

¶2 In July 1997, Raymond purchased what is now the Virgin Timber Resort Lodge, a restaurant and bar that partially extends over the bed of Moose Lake. Within less than a year of purchasing the property, Raymond substantially remodeled the structure. Although the lodge stands on the same "footprint" as the structure that had existed since approximately 1937, as one Board member stated, "there is absolutely no resemblance" to the previous structure.

¶3 On May 21, 1998, a Sawyer County zoning administrator inspected Raymond's property while investigating a construction complaint. In his inspection report, the administrator indicated that Raymond had added a second story, replaced almost every part of the exterior walls and the roof and a portion of the foundation. The administrator sent Raymond a copy of the report along with a letter dated May 23. The letter notified Raymond that she was responsible for a number of violations of the county zoning ordinance and advised her that, after resolving the ordinance citations, she should apply to the Board for an after-the-fact variance.

¶4 Raymond eventually applied for and received the variance. The Board found that Raymond's restructuring of the building was necessary because the structure was "in such a deteriorated condition there was nothing to do but to reinforce the basic structure of the building in the manner as described." The State sought certiorari review of the Board's decision pursuant to WIS. STAT.

§ 59.694(10).[1] The circuit court reversed, concluding that the Board had based its decision on an erroneous interpretation of the law regarding setback variances.

¶5 Sections 59.69, 59.692 and 281.31 of the Wisconsin Statutes require counties to zone the shorelands of navigable waters. The standards required by statute are to promote "the efficient use, conservation, development and protection of this state's water resources." WIS. STAT. § 281.31(1). Pursuant to those provisions, the Sawyer County Zoning Ordinance was adopted. Section 4.49 of the ordinance requires that structures be no less than seventy-five feet away from the ordinary high-water mark of any navigable water. This provision tracks WIS. ADMIN. CODE § NR 115.05(3)(b)1 (1985), a statewide provision applying to unincorporated areas and requiring a minimum setback of seventy-five feet from the ordinary high-water mark of an adjacent body of water to the nearest part of a building or structure, except piers, boathouses, and boat hoists.

¶6 There is no dispute that Raymond's building does not conform to § 4.49 of the county ordinance. As mentioned above, the building actually extends partially over the lakebed. Section 10.21 of the ordinance provides that "No structural alteration, addition or repair to any … nonconforming building or structure, over the life of the building or structure, shall exceed 50 percent of its current estimated fair market value unless it is permanently changed to conform to the requirements of this ordinance." Section 10.22 of the ordinance provides the exceptions to the general rule. Only subsection (2) is relevant to this appeal

[1] WISCONSIN STAT. § 59.694(10) permits aggrieved persons to seek certiorari review of Board decisions. The State of Wisconsin has standing to seek review because of its role as trustee of the state's navigable waters. *See* ***DNR v. Walworth County Bd. of Adjust.***, 170 Wis. 2d 406, 412, 489 N.W.2d 631 (Ct. App. 1992). All statutory references are to the 1997-98 edition.

because it allows a property owner to make further improvements to nonconforming buildings upon obtaining a variance from the Board.

¶7 Our role on certiorari review is limited. When, as here, the circuit court does not take additional evidence, we will only consider: (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 Board might reasonably make the order or determination in question, based on the evidence. *See* ***State v. Kenosha County Bd. of Adjust.***, 218 Wis. 2d 396, 410, 577 N.W.2d 813 (1998).

¶8 The State's challenge focuses on the second criteria, claiming that the Board acted contrary to law. The Board has the power

> [t]o authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the 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.

WIS. STAT. § 59.694(7)(c). The State asserts that the Board incorrectly applied the legal standard for what constitutes unnecessary hardship.[2] Our supreme court defined unnecessary hardship in ***Kenosha County*** as an owner having "no reasonable use of the property without a variance." ***Id.*** at 413. The court

[2] Citing ***Waukesha County v. Seitz***, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App. 1987), the Board also concluded that Raymond's alterations constituted the continuation of a nonconforming use. However, "[a] nonconforming use is a use of land for a purpose not permitted in the district in which the land is situated." ***Id.*** at 114-15. The State notes that the SAWYER COUNTY, WI, ZONING ORDINANCE, § 17.2(B)(3) (1996), already conditionally authorizes the use of Raymond's property for a resort. The question here is whether Raymond should be granted a variance for her nonconforming structure.

explained 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." ***Id.***

¶9 In ***Kenosha County***, the court overturned a variance granted to a resident who desired a variance of the shoreland setback requirement to build a deck on her home. *See* ***id.*** at 401. Due to the dangerous and "steep incline from the waters edge to the subject residence," the Board found an "unnecessary hardship" on the landowner and approved the variance request. ***Id.*** at 402, 404. Finding that the Board applied an improper legal standard, the court stressed that the Board's proper focus when considering a variance request should be on the purpose of the zoning regulation. *See* ***id.*** at 413. "[W]hen 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." ***Id.*** at 414. Accordingly, the court concluded that "[o]nly when the applicant has demonstrated that he or she will have no reasonable use of the property, in the absence of a variance, is an unnecessary hardship present." ***Id.*** at 421.

¶10 Here, Raymond has not argued and there is no indication that she has no reasonable use of her property without a variance. The basis for her application was that she had already restructured the building and needed a variance to avoid the rule against improving the building by fifty percent of its fair market value. The Board's conclusion that Raymond needed to make significant repairs to the building because it was in a deteriorated state is not a proper consideration for undue hardship. *See* ***id.***

¶11 Raymond argues that the Board never specifically found that she improved the value of the building by over fifty percent. However, she resolves her own argument by explaining that a variance is only required if the repairs exceed fifty percent of the building's value. The State does not dispute Raymond's contention that she did not need a variance if she did not exceed the fifty percent improvement rule. The issue we decide is a narrow one: Did the Board properly grant a variance to Raymond based on her claim of undue hardship? We answer this question in the negative. The consequences for Raymond restructuring her building without a variance are issues for a different case.

By the Court.—Judgment affirmed.

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