**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

January 31, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-0864**

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

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**WILBERT ERICKSON,**

**PETITIONER-RESPONDENT,**

**V.**

**GREEN LAKE COUNTY BOARD OF ADJUSTMENT,**

**RESPONDENT-APPELLANT,**

**STATE OF WISCONSIN,**

**INTERVENING-APPELLANT.**

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APPEAL from an order of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Reversed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. The Green Lake County Board of Adjustment (the board) has appealed from a circuit court order issued in a certiorari review. The circuit court reversed a decision by the board denying a variance to the respondent, Wilbert Erickson. Pursuant to an order issued by this court on May 17, 2000, the State of Wisconsin was permitted to intervene in this appeal. Like the board, the State seeks reversal of the circuit court's decision.

¶2 Erickson sought the variance to permit him to maintain a retaining wall he had constructed on his property, which abuts Green Lake. A variance was required because the wall was located within seventy-five feet of the ordinary high-water mark of Green Lake, in violation of GREEN LAKE COUNTY SHORELAND PROTECTION ORDINANCE, No. 303-85 § 5.1 (1999)[1] and WIS. ADMIN. CODE § NR 115.05(3)(b)1. We reverse the circuit court's order.

¶3 Our review of the circuit court's decision is de novo. *See* ***State ex rel. Spinner v. Kenosha County Bd. of Adjustment***, 223 Wis. 2d 99, 103, 588 N.W.2d 662 (Ct. App. 1998). We are limited to determining: (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 could reasonably make the decision in question. ***Id.*** We accord a presumption of correctness and validity to the decision of the board and will not disturb the board's findings if any reasonable view of the evidence sustains them. *See* ***id.*** at 104.

[1] All references to GREEN LAKE COUNTY SHORELAND PROTECTION ORDINANCE, No. 303-85, are to the 1999 version.

¶4 The board is authorized to grant a variance to the shoreland setback requirements, provided it gives proper consideration to the purposes underlying the state shoreland zoning regulations. *See* ***id.***; WIS. STAT. § 59.694(7)(c) (1997-98).[2] Before it may grant a variance, the board must also determine that literal enforcement of the provisions of the shoreland setback ordinance would result in unnecessary hardship to the property owner seeking the variance due to special conditions unique to his or her property, and that such a variance is not contrary to the public interest. *See* GREEN LAKE COUNTY SHORELAND PROTECTION ORDINANCE, No. 303-85 § 10.5.

¶5 The party seeking a variance has the burden of proving that an unnecessary hardship will result if the variance is not granted. *See* ***Spinner***, 223 Wis. 2d at 104. The hardship must be unique to the property and may not be self-created or merely a matter of personal convenience. *See* ***id.*** "[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." ***State v. Kenosha County Bd. of Adjustment***, 218 Wis. 2d 396, 414, 577 N.W.2d 813 (1998). "Only 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.

¶6 The board rejected Erickson's request for a variance after determining that he had proven neither uniqueness nor an unnecessary hardship. The record supports the board's decision. It indicates that after Erickson

[2] All references to the Wisconsin Statutes are to the 1997-98 version.

constructed a home on his property, a neighbor complained about water runoff. Erickson testified that he then constructed the concrete retaining wall to contain storm water in a retention area, and to prevent it from running onto his neighbors' property. The wall ranges from one to two feet high, and essentially encloses the shoreland side of the property. It intrudes into the seventy-five foot setback area, and at its closest point is approximately thirty-five to forty feet from Green Lake. Erickson indicated that he intends to construct a dry well within the area enclosed by the retaining wall to drain the collected storm water.

¶7 Erickson presented testimony by James Smith, a civil and environmental engineer, indicating that Erickson's property represented a topographical high point in relation to the surrounding lots. Smith testified that a drainage system was necessary to prevent storm water from draining unreasonably from Erickson's property onto the neighboring lots. He testified that the retaining wall ended at the top of a steep bluff which dropped down to the lake and would reduce erosion of the bluff and runoff into the lake. He testified that intrusion into the setback area was necessary to provide an adequate retention area. He testified that he considered the retaining wall to be the minimum intrusion necessary to achieve the goals of the water drainage system. When asked if there were other methods available, he testified:

> Earthen berm along there would probably take up most of the space to try to—try to—you have to, see, raise it up to about 3 to 1 slope, and figure come up couple feet high, you're talking about 12 feet along the side—you would actually—it's still not going to help the front erosion problem.
>
> ….
>
> Rock or riprap, water can basically go right through. It's not going to actually stop it and retain it.

¶8 No other testimony on the subject of alternative drainage methods was offered.

¶9 Erickson contends that without the retention wall drainage system, he will have no reasonable use of his property, and that he therefore has met his burden of proving unnecessary hardship. This argument fails because nothing in the record provides a basis to conclude that absent the retaining wall, Erickson will be unable to maintain a residence on the property or will be required to remove the dwelling he has already built. Because he is able to maintain a residence, he may make reasonable use of the property. Although denial of a variance and removal of the retaining wall may require him to find an alternative method of dealing with storm water runoff, including installing a more sophisticated or expensive system, that fact alone does not deprive him of a reasonable use of the property.

¶10 In making this determination, we reject Erickson's contention that he presented uncontroverted evidence which established that the retaining wall system was the only method to deal with storm water runoff, and that the retaining wall was thus essential to permit him to maintain a residence on the property.[3] Although no expert testimony was offered in opposition to the testimony by Smith, a board may not find unnecessary hardship or uniqueness merely because no one objects to the granting of the variance or because the objectors fail to present evidence to refute the evidence of the applicant. *See* ***Kenosha County Bd.***, 218 Wis. 2d at 416. Moreover, as set forth above, Smith's discussion of possible

[3] In his brief on appeal, Erickson also relies on what he refers to as the "testimony" of his attorney at the hearing before the board. He contends that his attorney "specifically testified that no reasonable use of the property could be made without the drainage system and the encumbering of the setbacks." However, counsel was not a witness at the hearing, and his statements were made in the context of argument and questioning of the witnesses. They cannot be considered as evidentiary support for a claim that no alternative drainage system existed.

alternative methods of dealing with the storm water runoff, including the possible use of earthen berms, was vague and confusing. The board was not required to accept it as credible or to find, based upon it, that no alternative methods of dealing with the storm water existed, and that Erickson could reside on his property only if he was permitted to maintain the retaining wall within the setback area.

¶11 We also uphold the board's determination that Erickson failed to meet his burden of proving that his property is unique. In alleging the uniqueness of his property's topography, Erickson contends that it sits atop a large hill, with steep bluffs on at least two sides, causing unreasonable storm water drainage onto neighboring properties and into the lake absent the retaining wall. However, the record does not establish that Erickson's property is the only hilltop property in the area. When the hardship imposed on the applicant's land is shared by nearby land, a variance is not the appropriate relief. *See* ***id.*** at 420. Moreover, the steep slopes and erosion concerns do not, standing alone, provide a basis to conclude that special conditions unique to the property necessitate a variance. *See* ***id.*** As already pointed out, Erickson was required to present evidence demonstrating that no other drainage system could incorporate the setback requirement on his property. Because he failed to prove that the retention wall drainage system was essential to his ability to reasonably use his lake home, a reasonable use for his property without a variance remains a possibility, and the board properly denied his request for a variance.[4] *See* ***Spinner***, 223 Wis. 2d at 107.

[4] Because the board reasonably found that Erickson failed to establish unnecessary hardship due to unique conditions of the property, it was not required to address whether granting a variance would be contrary to the public interest.

¶12 In reversing the circuit court's order, we also briefly address the argument that the circuit court improperly enlarged the record by inspecting the site and relying on its own observations in reversing the board's decision. We agree with the argument as propounded by the State and the board. The record indicates that prior to making its decision in the certiorari review, the circuit court visited the site and made observations which it ultimately incorporated as findings in its decision. It did so without notice to the parties and without giving them any opportunity to participate in the on-site visit.

¶13 This procedure was improper. Certiorari review proceedings are generally limited to the record made before the administrative body. *See* ***Ledger v. Waupaca Bd. of Appeals***, 146 Wis. 2d 256, 261, 430 N.W.2d 370 (Ct. App. 1988). Although WIS. STAT. § 59.694(10) permits the taking of evidence in the circuit court "[i]f necessary for the proper disposition of the matter," it is clear that the circuit court was not acting pursuant to this provision in inspecting the site. The taking of additional evidence contemplates notice to the parties and participation by the parties in the presentation of the evidence. An unannounced, unaccompanied, and unrecorded view of a scene by a trial court judge, even when the judge is acting as the trier of fact at a trial, constitutes error. *See* ***Am. Family Mut. Ins. Co. v. Shannon***, 120 Wis. 2d 560, 569, 356 N.W.2d 175 (1984). The circuit court was not acting as the trier of fact in this case, and, even if it had been, it committed error by viewing the scene without the knowledge of the parties.

*By the Court.*—Order reversed.

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