COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2554

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

DONIVAN MOLITOR AND KAREN MOLITOR,

PLAINTIFFS-APPELLANTS,

V.

RUSK COUNTY BOARD OF ADJUSTMENT, JODI OMAN, VERLYN FISER, DENNIS LELM AND RUSK COUNTY, A WISCONSIN MUNICIPAL CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rusk County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Vergeront, JJ.

¶1 HOOVER, P.J. Donivan and Karen Molitor appeal a judgment that affirmed the Rusk County Board of Adjustment's decision to deny their request for a side yard setback variance. They argue that the board failed to follow proper

procedure, its decision was not supported by the evidence and it erroneously applied the law. We disagree and affirm the judgment.

STATEMENT OF THE CASE

¶2 The Molitors own a parcel of land sixty-feet wide located on the Lake Holcombe Flowage. The County concedes that the ordinance governing setbacks and permissible lot widths was amended after the Molitors' property was created.[1] The ordinance now requires the side yards to be a minimum of fifteen feet each, and the combined side yards must equal thirty-five feet. RUSK COUNTY, WIS., REV. ORDINANCES 17.57 SW-1 § 4.02 (1998). The minimum lot width is now 100 feet. ***Id.*** at § 4.01. The County does not dispute that these amendments made the entire subdivision, of which the Molitor property was a part, nonconforming.

¶3 On August 6, 1998, the Molitors applied for and were issued a land use permit to build an addition to their home and a garage. Because the structure/house was a prior nonconforming use, the zoning technician, Yvonne Johnson, issued the permit under § 10.15, which provides:

> No structural alteration, addition or repair to any building or structure with a nonconforming use or any nonconforming building or structure, over the life of the building or structure, shall exceed 50 percent of its current real estate tax equalized fair market value for that year to

[1] The Molitors refer to significant legislative history of the ordinance, the proof of which is not in the record. However, we address only what is in the record. *See* WIS. STAT. RULE § 809.15(2); ***In re Eberhardy***, 102 Wis. 2d 539, 571, 307 N.W.2d 881 (1981). Moreover, the legislative history would only be relevant if the current ordinances were ambiguous. ***Landis v. Physicians Ins. Co.***, 2001 WI 86, ¶15, ___ Wis. 2d ___, 628 N.W.2d 893; ***State v. Ozaukee Cty. Board of Adj.***, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989). We are satisfied that the setback ordinance is not ambiguous.

> be applied to all future improvements, unless it is permanently changed to conform to the requirements of this ordinance.

Johnson reasoned:

> According to my calculations, your fair market value on the home is $52,395. This makes your 50% dollar amount 26,197. Using the estimates that you have provided me, I have calculated that the amount of the proposed improvement will be $4,039. This amount will be applied to the 50% that you are allowed to spend which will leave you $22,158 to use for future additions or structural improvements.
>
> If there are changes to the project which will affect the 50% amount, please contact the zoning office so I can make the necessary changes to the permit on file.

¶4 On September 14, 1998, the Molitors sought to modify their permit because they decided to enlarge the addition to their house. The new zoning administrator, CeCe Teske, reviewed the request. She discovered that a previous addition had been added to the nonconforming structure in 1995 and concluded that the base line for the 50% value should have been established in 1995 instead of 1998. She found that the 1995 permit erroneously listed the addition and house as meeting the fifteen-foot setbacks. Teske testified that the Molitors, and not a survey, provided the previous zoning administrator with the property line landmarks. The board found the same fact. Teske visited the site and measured the distances. She determined that the actual distance from the lot line to the house was at or less than thirteen feet. The survey that was later completed confirmed that the building was 12.2 feet from the property line. She also found that the 1995 addition was twice as large as permitted.

¶5 After discussing the situation with Donivan, Teske reported that he suggested removing the additions from the house and adding them to the garage he

planned to build on the property. Teske approved this solution on October 26, 1998.

¶6 The Molitors later decided that they were not satisfied with this solution and applied for a variance. After a public hearing, the Rusk County Board of Adjustment denied the request. The board applied the standards found § 11.5 of the ordinance:

> The board of adjustment may grant upon application a variance from the dimensional standards of this ordinance where an applicant convincingly demonstrates that:
>
> 1. Literal enforcement of the provisions of the ordinance will result in unnecessary hardship on the applicant;
>
> 2. The hardship is due to special conditions unique to the property;
>
> 3. Such variance is not contrary to the public interest ….

The board unanimously concluded that enforcement of the ordinance would not result in unnecessary hardship and that the hardship claimed was not due to unique conditions of the property.[2]

¶7 The Molitors appealed the decision to the circuit court and requested that the court take evidence or appoint a referee to take evidence. The court remanded the case to the board for it to hold a public hearing and take evidence in response to certain specific questions. The board issued findings of fact for circuit court review.

[2] The majority of the board also determined that a variance would be contrary to the public interest.

¶8 The circuit court affirmed the variance denial. The Molitors now appeal.

STANDARD OF REVIEW

¶9 Our scope of review of the board's decision is limited to four questions: (1) whether the board stayed within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will instead of its judgment; and (4) whether the evidence was such that the board might reasonably have made the determination under review. ***State v. Kenosha County Board of Adj.***, 218 Wis. 2d 396, 410-11, 577 N.W.2d 813 (1998).[3]

¶10 Because the circuit court considered additional evidence as permitted under WIS. STAT. § 59.694(10),[4] we review the record as augmented by the second board hearing. *See* ***Lakeshore Dev. Corp. v. Plan Comm'n***, 12 Wis. 2d 560, 565, 107 N.W.2d 590 (1961). The board's findings of fact will be upheld if substantial evidence supports its decision, even if substantial evidence also supports the opposite conclusion. *See* ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 568 n.4, 579 N.W.2d 668 (1998). Substantial evidence means relevant, credible and probative evidence upon which reasonable persons could rely to reach a

[3] The court remanded the case to the board for additional fact finding, *see* WIS. STAT. § 59.694(10) (1997-98), and then applied those facts to its own conclusions of law. Both parties present their arguments as if we are reviewing both the board and the circuit court. In an appeal of a trial court order affirming an agency decision, however, we review the agency's decision, not the trial court's. *See* ***Sterlingworth Condo. Ass'n v. DNR***, 205 Wis. 2d 710, 720, 556 N.W.2d 791 (Ct. App. 1996). Neither party has demonstrated why the trial court's remand to the board for additional fact finding would change this axiom.

[4] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

conclusion. *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). The board, and not the reviewing courts, determine the weight and credibility of the evidence. ***Delta Biological Resources v. Board of Zoning Appeals***, 160 Wis. 2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991). Reviewing courts are hesitant to interfere with administrative decisions and accord to the board's decision a presumption of correctness and validity. *See* ***Snyder v. Waukesha County Zoning Board of Adj.***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976).

DISCUSSION

¶11 The Molitors raise five arguments relating to errors the board and circuit court made. It is necessary to resolve the questions of law regarding the proper standards before we address the arguments related to the sufficiency of the evidence.

I. STANDARD FOR REVIEWING VARIANCES

¶12 The heart of the Molitors' appeal is whether the standard as enunciated in ***Kenosha County***, 218 Wis. 2d at 411, applies to this case.[5] In ***Kenosha County***, a property owner was denied a variance to build a deck on a lake house. ***Id.*** at 401. The proposed deck violated the seventy-five-foot setback

[5] Members of our supreme court disagree on whether its recent decision in ***State v. Outagamie County Board of Adj.***, 2001 WI 78, ___Wis. 2d ___, 628 N.W.2d 376, modified the standard in ***Kenosha County***. Justices Sykes, Prosser, Crooks and Wilcox agreed that an owner must only show unnecessary hardship in *light of the purpose of the applicable zoning regulations.* Justices Sykes and Prosser perceived that ***Kenosha County*** should be overruled to arrive at this standard. Justices Crooks and Wilcox, however, viewed ***Kenosha County*** as already applying this same "purpose" standard. *See* ***Outagamie Cty.***, 2001 WI 78 at ¶¶68, 69, 73, 81 and 83. It is unnecessary to resolve this conflict for the purpose of this decision.

requirement. ***Id.*** Upon review, the supreme court reasoned that an applicant has the burden to prove that a variance is required to avoid an unnecessary hardship.[6] ***Id.*** at 410. It determined that unnecessary hardship could only be proved where the property owner has no reasonable use of the property without the variance. ***Id.*** at 411.

¶13 The Molitors contend that the board should have applied the standard found in ***Snyder***, 74 Wis. 2d at 474. The Molitors read ***Snyder*** to require proof of a "practical difficulty" rather than an "unnecessary hardship." The Molitors appear to interpret "practical difficulty" as a less onerous burden than "unnecessary hardship." We disagree. ***Snyder*** explained: "[A]lthough the terms 'unnecessary hardship' and 'practical difficulty' are insusceptible to precise definition and are often stated disjunctively in zoning enactments, the authorities generally recognize that there is no practical difference between them." ***Id.*** at 472.

¶14 The Molitors further contend that ***Kenosha County*** does not apply to their case because ***Kenosha County*** resolved the standard for shoreline setbacks, not side lot setbacks. ***Kenosha County*** answers the Molitors' argument when it

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[6] The court interpreted WIS. STAT. § 59.694(7)(c), which provides:

> POWERS OF BOARD. The board of adjustment shall have all of the following powers:
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> ….
>
> (c) To 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.

quoted a previous case to demonstrate that "unnecessary hardship" should apply to all aspects of an area variance, not just a setback from the waterfront.

> In a previous application of the zoning statute, we described an unnecessary hardship as where "compliance with the strict letter of the restrictions governing area, set backs, frontage … would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome."

Id. at 412 (quoting ***Snyder***, 74 Wis. 2d at 475, citing 2 RATHKOPF, *The Law of Zoning & Planning*, 45-28 (3d ed. 1972)). The court did not differentiate between side setbacks and waterfront setbacks.

¶15 Once an appellate court interprets legislation, its interpretation becomes a part of the enactment as much as if it appeared expressly therein, unless the legislative body subsequently amends the legislation. *See* ***Salerno v. John Oster Mfg. Co.***, 37 Wis. 2d 433, 441, 155 N.W.2d 66 (1967). There has been no amendment to WIS. STAT. § 59.694 (7)(c) since ***Kenosha County***. Thus, we conclude that the proper standard to be applied to this case is whether the Molitors have no reasonable use of the property without the variance.

II. SUFFICIENCY OF THE EVIDENCE

¶16 The Molitors first contend that the board failed to make findings of fact to support its decision and that the board failed to make a sufficient record of the proceedings.

¶17 Under WIS. STAT. § 59.694(3), the board is required only to keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating that fact. The statute further mandates that the minutes be filed immediately in the office of the board of adjustment and

shall be a public record. The board followed this procedure and filed a signed decision articulating the reasons for the variance denial.

¶18 The circuit court had further questions and remanded the case to the board to make findings relevant to those questions. The board held a hearing and recorded the proceedings in a transcript. The Molitors concede that nothing in the case law commands that the board prepare written findings of fact, conclusions of law and judgment. We conclude that the board satisfied the statutory requirements for recording the proceedings.[7]

¶19 Next, the Molitors argue that substantial evidence does not support the decision. They contend that they suffered an unnecessary hardship and that their property was unique, qualifying them for a variance.

¶20 The Molitors carry a dual burden on this appeal in order to be granted a variance. *See* ***Arndorfer v. Sauk Cty. Board of Adj.***, 162 Wis. 2d 246, 253, 469 N.W.2d 831 (1991). First, they must overcome the presumption of correctness accorded to the board's decision. ***Id.*** Second, they must show that they will suffer unnecessary hardship if a variance is not granted. ***Id.***

> [T]he question of whether unnecessary hardship … exists is best explained as "[w]hether compliance with the strict letter of the [zoning] restrictions … would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome."

[7] The Molitors also argue that because the record is so inadequate, it is "impossible to determine if the Court of Appeals kept within its jurisdiction." Because we conclude that the record has been sufficiently memorialized, we dismiss this argument without resolving whether the Molitors mean the circuit court, the board or, although quite unlikely, the court of appeals.

Id. at 255 (quoting 2 RATHKOPF, *supra,* at 45-28, as cited in ***Snyder***, 74 Wis. 2d at 474-75). To be an unnecessary hardship, it must be related to a unique condition affecting the subject property. ***Id.*** If the hardship applies to the neighboring lands as well as the subject property, it is not unique, and the owner should seek legislative relief, rather than administrative relief. ***Id.*** at 256. To grant variances in these cases would "be unfair to owners who remain subject to the general restrictions of the zoning ordinance, and it would endanger the community plan by piecemeal exemption." ***Id.*** (quoting 3 ANDERSON, *American Law of Zoning*, 474-76 (3d ed. 1986)). In addition, to be an unnecessary hardship, the variance must not be contrary to the public interest. ***Id.***

¶21 A zoning authority has the power to enact ordinances that limit the change or extension of nonconforming uses. ***Schroeder v. Dane County Board of Adj.***, 228 Wis. 2d 324, 339, 596 N.W.2d 472 (Ct. App. 1999). Thus, Rusk County had the authority to adopt an ordinance that established side yard setbacks and, given pre-existing nonconforming lots, prohibit further building beyond setbacks without a variance. The County also had the authority to establish a rule that a building permit will only be issued for additions on nonconforming structure up to 50% of the assessed building value. Variances are granted sparingly. ***Kenosha County***, 218 Wis. 2d at 421 (citing 3 ZIEGLER, *Rathkopf's The Law of Zoning & Planning*, § 37.06 at 37-81 (4th ed. 1993). As described above, the ordinance requires the board to examine three criteria to determine whether a variance is appropriate. Here, the first two, unnecessary hardship and uniqueness, are dispositive. We therefore do not address the public interest standard. *See* ***Norwest Bank Wisconsin Eau Claire, N.A., v. Plourde***, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994).

¶22 A property's "uniqueness" in the case law is interpreted as a means for proving unnecessary hardship. *See* ***Kenosha County***, 218 Wis. 2d at 409 (citing ***Arndorfer***, 162 Wis. 2d at 254). ***Arndorfer*** noted:

> Hardship is not peculiar to the applicant's land if it is shared by a neighborhood or an entire area; a shared hardship will not support the granting of a use variance to relieve it. … Where the hardship imposed upon an applicant's property is no greater than that suffered by nearby lands, the board of adjustment may not grant a variance to relieve it.

Id. at 255-56 (quoting 3 ANDERSON, *supra*, at 474-76).

¶23 To the extent the shoreland regulations have been amended to impose limitations on lot sizes and side yard setbacks, they apply to all lots on Lake Holcombe and all other navigable bodies of water in Rusk County. The Molitors concede that other lots in their subdivision are nonconforming. A condition that applies to multiple properties does not make a single property unique. Their remedy is with the legislature, not the board of adjustment. As we stated above, the Molitors have the burden on this issue and they have not shown that their property is unique.

¶24 Nowhere in the record is there any testimony or other evidence that the Molitors' home is unlivable, unsafe, that it has been damaged or destroyed or that they can make no reasonable use of the property. The Molitors are charged with full knowledge of zoning ordinances. ***Willow Creek Ranch v. Town of Shelby***, 2000 WI 56, ¶162, 235 Wis. 2d 409, 482, 611 N.W.2d 693. They chose not to have a survey completed before beginning construction on the addition to their house. They built an addition twice as large as that approved. The record supports the conclusion that they created a self-imposed hardship. Their hardship is therefore not unnecessarily burdensome.

¶25 The board has discretion to deny a variance for an addition that does not satisfy the ordinance's purpose. The evidence shows that the Molitors' proposed addition would violate the setback limit in 1998 and also in 1995. The applicant bears the burden to demonstrate that the variance should have been granted. The Molitors did not meet that burden. The board was within its discretion to conclude that the 1998 proposed construction exceeded both the setback requirements and the rule allowing only 50% of the value to be invested in remodeling the nonconforming house.[8]

¶26 The board had substantial evidence before it to determine that the Molitors' request did not meet two of the three standards required by ordinance for approval of a variance. The board applied the proper standards of law and properly denied the variance. We affirm the trial court's decision to affirm the board.

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[8] The Molitors contend that the zoning administrator was without authority to revoke the building permit. Although this case is before us on a review of the variance denial, we note that even where a permit was issued, if based upon an erroneous reading of an ordinance by the official charged with its enforcement, this would not prevent the municipality from later enforcing the ordinance as written. *See* ***Village of Wind Point v. Halverson***, 38 Wis. 2d 1, 5, 155 N.W.2d 654 (1967); ***Snyder***, 74 Wis. 2d at 477 (a building permit cannot confer the right to violate the ordinance). We dismiss their laches, estoppel and unclean hands arguments on the same grounds.

The Molitors also make reference to "political infighting, pettiness, and outright fraud" being the cause of the variance denial. The only evidence they cite is that the new zoning administrator disagreed with the previous zoning administrator whether a building permit should have been granted. The new administrator explained that after a site visit and discovery that the previous administrator had based the permit on boundaries supplied by the Molitors, the permit was not properly issued. The Molitors provide no other support for this claim of political infighting. We do not address the issue further.

To the extent we have not addressed other arguments the Molitors have raised, the arguments are deemed rejected. *See* ***State v. Waste Mgmt.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.