

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP3201

Cir. Ct. No. 2008CV2486

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CITY OF OCONOMOWOC ZONING BOARD OF APPEALS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Kessler, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from a circuit court order affirming a decision of the City of Oconomowoc Zoning Board of Appeals granting area variances to Tony Pipito, Inc. to establish the Club Porticello

Restaurant on property on the shore of Silver Lake. We agree with the circuit court that the board acted properly in granting the area variances. We affirm.

¶2 This case involves variances from area zoning. “Area zoning ... regulates density, setbacks, frontage, height, and other dimensional attributes, in order to promote uniformity of development, lot size, and building configuration and size.” *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶22, 269 Wis. 2d 549, 676 N.W.2d 401. “[A]rea variances provide an increment of relief (normally small) from a physical dimensional restriction such as building height, setback, and so forth....” *Id.*, ¶23.

¶3 In a May 21, 2008 decision, the board granted the area variances to Pipito.¹ The variances permitted Pipito to enclose two stoops and one stairwell, replace retaining walls, and add 300 square feet to the nonlakeside entrance to the restaurant. By the time the board granted the area variances, Pipito had already remodeled and completed the improvements to the formerly dilapidated structure on the property.

¶4 We review the board’s decision as follows:

- (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.

¹ Because we review the May 21, 2008 decision granting area variances, we do not address any of the State’s arguments premised upon the standards for use variances. “The law treats use and area variances differently” *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶22, 269 Wis. 2d 549, 676 N.W.2d 401. In addition, we spend no time on earlier proceedings relating to variances requested and/or denied for the Silver Lake property.

Id., ¶14. “[W]e will not disturb the board’s findings if they are supported by any reasonable view of the evidence.” ***Block v. Waupaca Cnty. Bd. of Zoning Adjustment***, 2007 WI App 199, ¶7, 305 Wis. 2d 325, 738 N.W.2d 132.

¶5 In area variance cases, the unnecessary hardship standard applies to variance requests. ***Ziervogel***, 269 Wis. 2d 549, ¶33. The standard is described as follows:

“‘[W]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.’” ***Snyder [v. Waukesha Cnty. Zoning Bd. of Adjustment]***, 74 Wis. 2d 468, 473, 247 N.W.2d 98 (1976)] also emphasized that variance requests are always evaluated in light of the purpose of the zoning ordinance and the public interests at stake. Accordingly, whether the ***Snyder*** standard is met in individual cases depends upon a consideration of the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and larger public interest. The established requirements that the hardship be unique to the property and not self-created are maintained, and the burden of proving unnecessary hardship remains on the property owner...

Ziervogel, 269 Wis. 2d 549, ¶33 (citations omitted).

¶6 On appeal, the State argues that Pipito failed to prove unnecessary hardship. Essentially, the State asks us to reweigh the evidence considered by the board. This we cannot do. The board determines the weight of the evidence. ***Roberts v. Manitowoc Cnty. Bd. of Adjustment***, 2006 WI App 169, ¶32, 295 Wis. 2d 522, 721 N.W.2d 499.

¶7 After considering the standard set out in ***Ziervogel***, excerpted above, the board concluded that Pipito proved unnecessary hardship. The board

concluded that with regard to each requested variance, Pipito established that the absence of the variance would unreasonably prevent use of the property for a permitted purpose or would render conformity with the restriction unnecessarily burdensome. The board determined that the variances for the stoops, stairwell, and addition were *de minimis* and required only a minimal footprint expansion, the variances minimized the detrimental effects to the lakeshore area because the variances were largely located within the remodeled structure and would not further encroach on the shoreline, the variances were necessary for safety and code requirements, and the variances enhanced visitor safety. The variances also improved the building's aesthetics and the appearance of the entire community and neighborhood.

¶8 With regard to replacing the retaining walls, the board determined that Pipito met the applicable burden and the work was mandated by approvals given by the Department of Natural Resources and the City of Oconomowoc. The board found that the existing retaining walls were in poor shape and needed replacing to serve their purpose and better protect the lake. The board determined that adhering to these plans and permits would protect Silver Lake from an environmental perspective. City planner Jason Gallo recommended granting the variances with some requirements to offset any potential environmental impact.

¶9 The State next argues that any unnecessary hardship was self-inflicted. The board concluded that the hardship was not self-created and was unique to the property. The board found that the property had unique physical limitations due to its irregular shape and steep boundaries.

¶10 The State next argues that Pipito could have constructed a new restaurant building or moved the existing structure to the northern portion of the

parcel, across the highway from the southern, lakeside portion on which the restaurant sits. We disagree. First, Pipito did not seek to relocate the restaurant; it sought area variances relating to the existing structure. Second, the board rejected the State's idea. The board specifically found that moving "the structure to another location [on the Pipito property] would require substantial excavation, grading and filling of the parcel, and would likely result in substantial harm to Silver Lake and its environs." The board considered the *de minimis* changes required for the existing structure on the southern portion and what would be required to place a structure and restaurant business on the northern portion. The board balanced the need for area variances against the detrimental effect of building on the northern portion of the property. The board's decisions are reasonably supported in the evidence.

¶11 The State contends that the board did not consider the public's interest in protecting navigable waters. We disagree. The board noted that the variances were *de minimis* in effect and that the State's proposed solution, locating the restaurant on the northern portion of the property, would be detrimental to the lake. In addition, the board required Pipito to take a number of steps to ameliorate any adverse impact of the variances, including a shoreland buffer zone and effective retaining walls. The board properly considered the public interest.

¶12 Finally, the State contends that the board prejudged the variance request in favor of Pipito. The board made the variance decision on the merits, without regard to the fact that Pipito made the changes to the property before he obtained the variances. The hardships the board considered related to the physical characteristics of the property and its environment, not to the fact that Pipito proceeded without the necessary variances and could suffer harm if the variances were denied. The board acted appropriately under our standard of review.

¶13 We conclude that the board applied the proper legal standard and acted reasonably given the evidence. Its decision was based on the evidence and there was no bias in favor of Pipito.² We affirm the circuit court's order affirming the board's decision.

By the Court.—Order affirmed.

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

² Any issue we did not expressly consider is deemed rejected. “An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.” *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

