STATE OF WISCONSIN **CIRCUIT COURT** **COUNTY OF DANE**
BRANCH 14

JAMES D. PETERSON and
SUSAN L. COLLINS,

Plaintiffs,

vs.

Case No. 11CV3376
Code: 30955

CITY OF MADISON ZONING
BOARD OF APPEALS;

Defendant.

DECISION and ORDER

Plaintiffs James D. Peterson and Susan L. Collins seek reversal of the decision of the City of Madison Zoning Board of Appeals ("Board"), which denied Plaintiffs' application for a 3 foot 9 inch variance from setback requirements. Plaintiffs filed a brief on April 13, 2012. The Board submitted a response brief on May 16, 2012, and Plaintiffs filed a reply on June 1, 2012.

For the reasons stated below, Plaintiffs' request to reverse the Board's decision is **GRANTED**. The Court remands the case to the Board with directions to approve the variance.

BACKGROUND

Plaintiffs own a home at 3017 Irvington Way, Madison, Wisconsin. The houses to the east and west on Irvington Way are single-family homes. Behind their home, to the south, is a small wooded outlot owned by the city. Beyond the outlot is a densely-wooded area of Knollwood Conservation Park.

Plaintiffs applied for a variance for the construction of a screen porch that would encroach 3 feet 9 inches into the 35-foot rear setback of their property. The Zoning

Administrator denied the application. The Plaintiffs appealed to the Board, which denied the appeal. Because the Board did not issue a written decision, the Court reviews the deliberations of the Board. *See Block v. Waupaca County Bd. of Zoning Adjustment*, 2007 WI App 199, ¶ 8, 305 Wis. 2d 325, 332, 738 N.W.2d 132, 135.

STANDARD OF REVIEW

The reviewing court must apply a presumption of correctness to the Board's decision. *Snyder v. Waukesha County Zoning Board*, 74 Wis.2d 468, 476, 247 N.W.2d 98 (1976). When courts do not take additional evidence, certiorari review 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 board might reasonably make the order or determination in question based on the evidence." *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 14, 269 Wis. 2d 549, 559, 676 N.W.2d 401, 405-06.

Under certiorari review, "[t]he court may reverse or affirm, wholly or partly, or may modify" the Board's decision. Wis. Stat. § 62.23(7)(e)(10). Whether the Board employed the correct legal standard is a question of law, which the Court reviews independently. *Ziervogel*, 2004 WI 23, ¶ 14. Courts uphold the Board's factual findings "if any reasonable view of the evidence sustains them." *Snyder*, 74 Wis.2d at 476.

The City of Madison's Zoning Code permits variances from zoning requirements when the Board finds that all the following conditions are present:

> 1. Compliance with the strict letter of the ordinance would result in unnecessary hardship for the owner.
>
> 2. The conditions upon which the application for a variance is based would not be applicable generally to other property within the same zoning classification.

> 3. The purpose of the variance is not based exclusively upon a desire for economic or other material gain by the applicant or owner.
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> 4. The alleged difficulty or hardship is caused by the ordinance and has not been created by any person presently having an interest in the property.
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> 5. The granting of the variance will not be detrimental to the public welfare, injurious to other property or improvements in the neighborhood in which the property is located , or inconsistent with the purpose of the ordinance.
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> 6. The proposed variance will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood.[1]

Zoning Code, § 28.12(9)(c); *see also* Wis. Stat. § 59.694(7)(c). The Board is not required to issue a written decision, but must "express, on the record, its reasoning why an application does or does not meet the statutory criteria." *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 2005 WI 117, ¶ 32, 284 Wis. 2d 1, 19, 700 N.W.2d 87, 96.

The hardship requirement is met when compliance "would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Ziervogel*, 2004 WI 23, ¶ 41. The Board must "evaluate the hardship in light of the purpose of the zoning restriction at issue." *Id.*, ¶ 20. "A variance cannot be contrary to the public interest." *Id.* The hardship cannot be self-created, and must "be based on conditions unique to the property rather than considerations personal to the property owner." *Id.*, ¶¶ 20, 33. The burden is on the property owners to establish the unnecessary hardship. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 253-54, 469 N.W.2d 831, 833 (1991).

[1] The Code lists three other conditions, which do not appear to be relevant to this case.

ANALYSIS

Plaintiffs argue that the Board's decision did not apply the correct legal standard, and ask the Court to reverse the decision. The Court agrees with Plaintiffs, and thus remands the case to the Board with instructions to grant the variance.[2] The Court orders the Board to grant the variance, rather than remanding the case to be decided under the correct legal standard, because the only reasonable view of the evidence is that Plaintiffs met their burden to prove unnecessary hardship caused by unique conditions of the property.

In the appeals hearing, the Board members did not spell out the hardship standard that they employed. However, from their statements at the hearing, the Court is able to discern that they did not apply the correct standard.

None of the statements of the Board during its deliberations can be construed as applying that standard. The closest thing any Board member said to considering the hardship in light of the purpose of the setback requirement[3] was this statement of Board member Diane Milligan:

> And even though it might be more neighborly to be farther away, I guess I have a concern with conservancy land. I know we've been protective, consistently protective of public spaces. And even if there's not a house there, it's everybody's property. So, you know, to borrow space from the conservancy to move it closer to there to try to not be noticeable to the neighbor.

(Transcript, p. 6.) This statement seems to describe a vague discomfort with the variance because of a general desire to protect conservancy land. However, it does not constitute a coherent discussion of the alleged hardship in relation to the purposes of the setback requirement. The last phrase is a sentence fragment and does not express a complete thought.

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[2] Plaintiffs also contend that the Board was arbitrary because it was based on improper factors. (Opening Brief, p. 14-15.) Because the Board's failure to apply the correct legal standard is dispositive, it is unnecessary to consider this argument. For this reason, the Court does not address it.

[3] Wisconsin appellate courts have not discussed the purposes of rear yard setbacks, but the Wisconsin Supreme Court explained that side yard setbacks "are intended to provide unoccupied space for several purposes, including to afford room from lawn and trees, to promote rest and recreation, to enhance the appearance of the neighborhood, and to provide access to light and air." *Snyder*, 74 Wis. 2d at 479. The Court presumes that rear yard setbacks have similar purposes.

The remainder of the Board's deliberations do not discuss the purposes of setback requirements at all. As Plaintiffs observe, Board member Dina Corigliano appears to form her opinion based in large part on the "enormous" size of the lot and a concern about "precedent." (Transcript, p. 6.)[4]

However, Board member Corigliano makes two statements about the hardship issue which may have also informed her decision. The first statement is the following:

> [S]o a lot of what you just talked about is, addresses more a preference for this location. Unfortunately, we don't get to decide on preferences. We have to decide on hardships and, you know, the other standards according to the variance standards. So for me, I'm looking for a reason why you cannot put this within the setbacks. And, of course, the area of the existing deck looks like a perfect location because everything would fit there neatly within the setbacks. So I guess if you could explain to me why you couldn't put it there, that would be very helpful to me....So you're saying challenge meaning it would be difficult but not impossible?

(*Id.*, p. 4-5.) Board member Corligliano clearly believes that the Board cannot find hardship unless it is impossible to build within the setbacks. The hardship standard contains no such requirement.[5]

Second, Board member Corigliano said "I'm struggling with a hardship issue here. I agree that the location of this porch is a better location, but just like with the last porch, we don't get to decide if it's better or not." (*Id.*, p. 6.) This statement does not demonstrate a correct understanding of the hardship standard, because it does not describe the content of the standard. The statement is also misleading, because when unnecessary hardship would result from strict compliance with setback requirements, the location made possible by the variance will necessarily be "better."

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[4] Board Member Michael Basford, the third of the five board members to vote against the variance, said very little in the deliberations, other than claiming that the porch could be built on the existing deck, and stating that "the precedent argument is a rather strong one for me too." (Transcript, p. 7.)

[5] Board Member Milligan expressed the same misunderstanding about the hardship standard, when she said "it didn't sound like they couldn't, they just wouldn't, they'd rather not." (Transcript, p. 6.)

Board member Milligan also states that "I guess I have concerns about the hardship. I feel like the standard hasn't been met that we have. We don't have a uniqueness issue and we have, we're setting up a situation that could invite additional types of requests." (*Id.*, p. 5.) This statement does not explain why the Plaintiffs had not met the hardship standard, or demonstrate an accurate understanding of that standard.

In its response brief, the Board contends that its decision was based on Plaintiffs' failure to demonstrate that the hardship related to a unique condition of their property. Plaintiffs argued that the platting of the properties was irregular, and noted that if the platting had been slightly different, making the plat larger, the variance would have been unnecessary (Transcript, p. 2-3.) Defendant maintains that the platting of the Plaintiffs' lot is not unusual because the plat is similar to the houses to the west, and because a different platting would have been even more peculiar. (Response Brief, p. 8-9.) In addition, the Board argues that the other factors Plaintiff discusses—"[i]ncreased roof construction costs, promixity to neighbors, architectural design, ...the internal flow of the house...[and] washout from roof drainage"—are "considerations personal to the property owner" and not unique features of the property. (*Id.*, p. 12.)

There are fundamental problems with Defendant's argument. First, the Board members' sparse and conclusory statements about the uniqueness requirement do not demonstrate an adequate understanding or application of the requirement.[6] The only statement about uniqueness from a Board member was Board member Milligan's statement that, "We don't have a uniqueness issue and...I've heard preference, convenience, aesthetics, and avoiding imposing on the neighbor."[7] (Transcript, p. 5.)

[6] The Court rejects the Board's argument that this case is similar to *Snyder*. (Response Brief, p. 11-13.) As Plaintiffs explain, the case is distinguishable in numerous ways. (Reply Brief, p. 7-9.)

This statement does not accurately describe Plaintiffs' evidence. Plaintiffs discussed several physical features giving rise to the hardship, including irregular platting, the need to rebuild the roof, and drainage problems. These are not merely matters of preference, convenience or aesthetics. Because Board member Milligan failed to address these physical features, or explain the reasoning behind her conclusion, her statement on uniqueness did not correctly apply the uniqueness requirement.[8]

Second, given the evidence Plaintiffs presented, the only reasonable conclusion is that Plaintiffs satisfied the uniqueness requirement. The Court finds that three of the physical features cited by Plaintiff qualify as unique conditions of the property (rather than conditions personal to the property owner) under any reasonable view of the evidence.

At the time of the original platting of the property, planners made an apparently arbitrary decision to make Plaintiffs' plot of land significantly shorter than their neighbor to the east. Due to the winding of the road, planners needed to decide how to handle the boundaries of the two properties' backyards. The most natural option would have been to make the Plaintiffs' rear border a continuation of their neighbor's border, but at an angle to reflect the curve in the road.[9] That would have given the Plaintiffs' about 26 more feet of land (which now forms part of the wooded outlot behind Plaintiffs' property), making the variance unnecessary.

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[7] An unidentified person speaking at the hearing also mentions the uniqueness requirement, but only briefly and without identifying the standard or articulating whether it applies. (Transcript, p. 3.) These brief comments questioned Plaintiffs' platting argument, but, as indicated below, the only reasonable view of the evidence is that the platting is unique.

[8] Because none of the Board members adequately explained their reasoning in denying the variance, the Court agrees with Plaintiffs that the Board's decision violates *Lamar*. 2005 WI 117, ¶ 32

[9] Another possibility, which would not have increased the land allotted to Plaintiffs' neighbors to the west, would have been to been to add a triangle of land to Plaintiffs' property, by drawing a line from the northwest corner of their eastern neighbor's property to the northwest corner of Plaintiff's property. That would have also made the variance unnecessary.

The Court is satisfied that, under any reasonable view of the evidence, the unusual platting is a unique condition giving rise to the hardship. The map of the neighborhood reveals that the border between the two properties' backyards is unlike any of the properties in the area (Variance Application, Exh. A.) There are no other examples of adjacent properties which have dramatically different front-to-back lengths, or rear borders that do not neatly match each other. If the platting had been slightly different, and more like the other properties in the area, Plaintiffs would have had a larger backyard, and thus no need for a variance. Given these circumstances, which Plaintiffs clearly demonstrated in their submissions, the only reasonable conclusion is that the hardship is based on a condition not generally applicable to other properties in the area.

Similarly, the only reasonable view of the evidence is that the drainage and roofline issues satisfy the uniqueness requirement. In their application, Plaintiffs explained that building the screen porch within the setback would "require a substantial reconstruction of the roof..." (Application, p. 1.) In their testimony at the hearing, Plaintiff Peterson and his architect provided further support for this claim. (Transcript, p. 2, 5.) The architect also testified that washout and drainage in the location of the existing deck would make it impractical to build the porch there. The practical difficulties caused by drainage, and the need to rebuild part of the roof, relate to physical conditions of the property, not matters personal to the property owners.

Citing a statement by one of the Board members, Defendant suggests that the drainage issue is not unique.[10] (Response Brief, p. 13.) However, Plaintiffs do not need to definitively prove that no other properties might have drainage issues that construction within setbacks would exacerbate, by documenting the conditions on all the properties in the area. There is no reason to believe that similar roofline or drainage issues would prevent other property owners in

[10] A more accurate interpretation of the quotation would be that the Board member believed that there would be drainage problems no matter where the Plaintiffs built the porch. (Transcript, p. 6.) That statement has no relevance to the uniqueness issue, and lacks evidentiary foundation.

the area from building within their setbacks. Plaintiffs have met their burden of showing that the hardship results from unique conditions of the property, rather than personal considerations.

The Court also finds that under any reasonable view of the evidence, Plaintiffs met their burden of proving unnecessary hardship. If the Board had correctly applied the hardship doctrine, it would have concluded that building within the setback would be unnecessarily burdensome, and that allowing the variance would better serve the purposes behind the setback requirements.

To review, hardship occurs when zoning requirements "would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Ziervogel*, 2004 WI 23, ¶ 41. In this case, conformity with zoning restrictions would be unnecessarily burdensome. Plaintiffs established that compliance would be burdensome through their submissions and testimony on the topics of roof reconstruction and drainage. Rebuilding part of the roof would require additional expense, and building at the area of drainage and washout would worsen these problems. Complying with zoning requirements would be unnecessarily burdensome because these physical conditions are significant problems, not slight inconveniences.

The hardship is also unnecessary because in this case, a variance would actually promote the purposes of the setback better than compliance with the setback. *See id.*, ¶ 20. Setbacks "are intended to provide unoccupied space for several purposes, including to afford room from lawn and trees, to promote rest and recreation, to enhance the appearance of the neighborhood, and to provide access to light and air." *Snyder*, 74 Wis. 2d at 479. Plaintiffs' eastern neighbor submitted a letter indicating that the proposed construction would be more conducive to privacy than a

porch built within the setback. [11] (Application, Exh. B.) Plaintiffs' western neighbor noted that the porch would be invisible from his home. (*Id.*) Both neighbors said that the improvements would not interfere with their light, air or enjoyment of the nature conservancy to the south of their homes. (*Id.*) Both averred that the improvements would be "attractive, unobstrusive and ... good for the neighborhood." (*Id.*)

The testimony by Plaintiff Peterson and his architect further supported these claims. In fact, Board members who voted against the variance acknowledged that the proposed construction would be "more neighborly" and in a "better location." (Transcript, p. 6.) One Board member suggested that the variance would "borrow space from the conservancy," but such a concern was unfounded. (*Id.*) There is no evidence that the variance would have any impact on visitors' enjoyment of the conservancy, or on the conservancy itself. Importantly, a wooded outlot serves as a buffer between Plaintiffs' property and the conservancy. Moreover, the aerial photos Plaintiffs submitted show that the closest trail in the conservancy is a significant distance away from Plaintiffs' property. (Record, p. 20.)

Given the evidence before the Board, it could not have reasonably concluded that the 3 foot 9 inch variance would damage any of the interests protected by the setback. The only reasonable conclusion was that the variance in fact promotes the purposes of the setbacks more than compliance with the setbacks. As explained earlier, the only reasonable view of the evidence was that Plaintiffs met their burden of demonstrating an unnecessary hardship caused by unique conditions of the property. The Court thus remands the case to the Board with instructions to grant the variance.

[11] Because constructing buildings too close to one another would reduce privacy, maintaining privacy is presumably among the purposes of setback requirements.

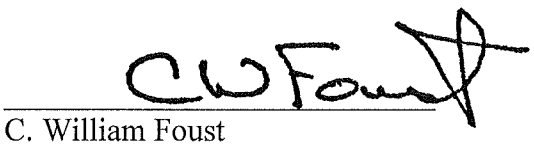
CONCLUSION

For the reasons stated above, Plaintiffs' request to reverse the Board's decision is **GRANTED**. The Court remands this case to the Board, with instructions to approve the Plaintiffs' variance application.

IT IS SO ORDERED.

Dated this 11th day of October, 2012.

BY THE COURT:



C. William Foust
Circuit Court Judge, Branch 14

cc: Atty. Bryan Cahill
Assistant City Atty. Katherine Noonan