FILED
02-29-2024
Circuit Court
St. Croix County, WI
2023CV000339

BY THE COURT:

DATE SIGNED: February 29, 2024

Electronically signed by Michael Waterman
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT ST. CROIX COUNTY

WILD RIVERS CONSERVANCY
OF THE ST. CROIX & NAMEKAGON,
et.al,

Plaintiffs,

v.

BOARD OF APPEALS FOR THE
CITY OF HUDSON, WISCONSIN,

Defendant.

DECISION AND ORDER

Case No. 2023 CV 339

The plaintiffs seek certiorari review of a decision by the Board of Appeals for the City of Hudson. The Board granted eight zoning variances for a development near the St. Croix River. The plaintiffs challenge five of those variances.

The subject property consists of five contiguous lots. Together, they constitute an entire city block. The property is located within the city's St. Croix Wild and Scenic Riverway and Shoreland Protection Overlay District,[1] which incorporates by reference the zoning standards of Administrative Code Chapter NR 118.

Wis. Stat. § 30.27, the enabling legislation for NR 118, curtails the power of local government to grant variances from NR 118 standards. The statute expressly

[1] City of Hudson Ordinance § 255-18(A).

prohibits zoning authorities from granting variances from NR 118 standards without the consent of the Department of Natural Resources.[2]

Three of the five contested variances involve NR 118 standards. They are:

- Appeal 266 – a variance from NR 118.06(a)(d)1 to exceed the maximum principal building height of 45 feet.
- Appeal 272 – a variance from NR 118.06(5) to alter a slope greater than 12% in the slope preservation zone.
- Appeal 273 – a variance from NR 118.06(1)(f)1 to build a structure within the 40-foot bluff line setback.

The DNR did not consent to these variances. In fact, the DNR recommended the Board deny them.[3] Without DNR consent, the Board lacked the authority to grant the variances. By doing so, the Board exceeded its lawful authority, and its decision must be reversed.

On certiorari review, the Board acknowledges how Wis. Stat. § 30.27(3) limits its authority to grant variances, but the Board insists its decision should stand. The Board argues that the plaintiffs and DNR forfeited[4] the need for DNR approval by failing to mention the requirement to the Board. The Court disagrees.

A party can forfeit an issue by failing to assert it before an administrative body.[5] Judicial review contemplates a review of the record developed by the agency. If an issue was not raised before the agency, there is nothing for a court to review.

Forfeiture does not apply here. The Board's authority was established by statute, and the Board was obligated to exercise its authority consistent with the statutory mandate. Section 30.27(3) expressly prohibits the Board from granting NR 118 variances without DNR approval. The Board is constrained by the statute,

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[2] Wis. Stat. § 30.27(3) (2021-22).

[3] *See* Doc. #11:1-4; Doc. #41:9-11; Doc. #75:1-2.

[4] The Board framed the issue as waiver. Forfeiture is a more apt description. Forfeiture is the failure to make the timely assertion of a right whereas waiver is the intentional relinquishment or abandonment of a known right. *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612. Forfeiture is more appropriate because the Board argues that the plaintiffs and DNR failed to assert Wis. Stat. § 30.27 as a basis to deny the variances.

[5] *See State v. Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶ 55, 244 Wis. 2d 613, 628 N.W.2d 376.

and that constraint applies regardless of whether or not someone brings it to the Board's attention. The Board simply cannot exercise powers it does not have, leaving no possibility for someone to forfeit the issue.

The Court also recognizes that the doctrine of forfeiture is a rule of judicial administration.[6] Courts may disregard the doctrine to reach the merits of an unpreserved issue in appropriate cases, especially legal issues of great importance like the one here.

The legislature has deemed protection of the St. Croix River to be a matter of public interest that will benefit the health and welfare of the citizens of Wisconsin. The legislature emphasized the importance of uniform zoning along the St. Croix River and continued inclusion in the national scenic rivers system.[7] Because management of land use along the St. Croix River is a matter of statewide concern, the Court will not invoke forfeiture to allow a clear and obvious error by the Board to stand. For these reasons, the Court reverses the variances in Appeals 266, 272 and 273.

The plaintiffs asserted alternative reasons to contest the variance in Appeal 266. The plaintiffs believe the Board lacked authority to approve the variance on a motion to reconsider, and the plaintiffs believe the vote fell short of the supermajority required by Hudson City Code § 225-91D. The Board, on the other hand, argues that it has the power to reconsider its own decisions and that the city's ordinance is subordinate to Wis. Stat. § 62.37(7)(e)3m, which only requires a majority vote. Because the Court reversed the variance on other grounds, the dispute over the vote on reconsideration is no longer ripe for adjudication.

Two of the five contested variances do not involve NR 118 standards or require DNR approval. They are:

- Appeal 269 – a variance from City Ordinance § 253-4.3(B)(1) and NR 116.13(2)(b)(2) to reduce the need for flood elevation fill to extend 15 feet past the structure.
- Appeal 270 – a variance from City Ordinance § 255 to reduce the 25-foot rear yard setback.

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[6] *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶ 53, 374 Wis. 2d 26, 892 N.W.2d 267; *see also Outagamie Cty. Bd. Of Adjustment*, 244 Wis. 2d at ¶ 56.

[7] *See* Wis. Stat. § 30.27(1), (2).

The Board has discretion when determining whether a variance request should be granted.[8] But, the Board may do so only when " '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.' "[9] The unnecessary hardship must be unique to the land, and not self-created by the property owner.[10]

The Board's written findings for both Appeal 269 and 270 do not support the conclusion that an unreasonable hardship existed. On appeal 269, the Board found that a hardship existed "based on the conditions and characteristics of the property including the slope and the development of one entire lot that will be merged from five lots." On appeal 270, the Board found that a hardship existed because "[t]here are conflicting municipal code requirements for the rear design of the property."[11]

For an unreasonable hardship to exist, the Board needed to find either that the property owner cannot use the property in compliance with the zoning regulations or that compliance would be unreasonably burdensome. The Board made no such findings, and this Court cannot see how the slope and size of the lot prevent the property owner from using it in compliance with the zoning code. To the contrary, the Board's attorney acknowledged at oral argument that the existing structures on the lot comply with zoning. If that is the case, an unreasonable hardship, by definition, does not exist. The developer's preference for a structure that requires variances is not an unreasonable hardship; if anything, it is a self-created one.

The Board obviously gave the variance application a great amount of attention, and the Court recognizes that the Board's decision is presumed correct.[12] However, the presumption of correctness is overcome by the absence of any factual

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[8] *State v. Waushara Cnty. Bd. of Adjustment*, 2004 WI 56, ¶ 13, 271 Wis. 2d 547, 679 N.W.2d 514.

[9] *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 33, 269 Wis. 2d 549, 676 N.W.2d 401 (quoting *Snyder v. Waukesha County Zoning Bd. of Adjustment,* 74 Wis.2d 468, 475, 247 N.W.2d 98 (1976).

[10] *Id.* at ¶ 20.

[11] Doc. #62:9-10.

[12] *Ziervogel*, 269 Wis. 2d 549,¶ 13. 676 N.W.2d 401.

findings in the written decision that support the existence of an unreasonable hardship. Therefore, the variances on Appeals 269 and 270 are reversed.

BY THE COURT:

R. Michael Waterman
Circuit Court Judge
St. Croix County, Wisconsin

– THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL –