STATE OF MICHIGAN

COURT OF APPEALS

FORT SUMMIT HOLDINGS, LLC, and BRIDGEWATER INTERIORS, INC.,

Plaintiffs-Appellants,

v

PILOT CORPORATION and CITY OF DETROIT BOARD OF ZONING APPEALS,

Defendants-Appellees.

UNPUBLISHED
May 3, 2002

No. 233597
Wayne Circuit Court
LC No. 00-021242-AA

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the circuit court's order affirming the City of Detroit Board of Zoning Appeals' decision to grant defendant's application for a permit to construct a motor vehicle gasoline filling station on the subject property. We affirm.

I. Facts and Procedural History

Defendant applied to the Department of Buildings and Safety Engineering (DBSE) for a permit to build a truck stop and gasoline station on 4401 West Fort Street, between Clark Street and McKinstry Street, in Detroit. The proposed project includes a retail convenience store, a fast-food restaurant with a drive-through window, nine truck refueling pumps, truck-scale parking, and driver restrooms with showers. The site on which the filling station would be built is zoned M4, intensive industrial. The store, restaurant, parking, and restrooms are all permitted as a matter of right in this zone. Motor vehicle filling stations are also permitted as of right in M4 zones but are subject to certain "locational suitability" requirements.

The DBSE denied defendant's application for a permit because its proposed filling station did not meet the "locational suitability" requirements of the zoning ordinance under §§ 42.0631-42.0632 and 42.0633. Specifically, the proposed filling station is not located at the intersection of two major thoroughfares or a major thoroughfare and freeway, and three other filling stations operate within one-thousand radial feet from the site. However, according to § 42.0634 of the zoning ordinance, when the filling station does not meet both of these locational suitability requirements, "[t]he request for waiver shall be heard by the Board of Zoning Appeals as a use variance, pursuant to Sections 42.0600 through 42.0664, 62.0403 and any other applicable provision of this ordinance."

Defendant appealed the DBSE's decision to the City of Detroit Board of Zoning Appeals (BZA) which, in turn, granted defendant's application for a permit. However, the circuit court subsequently reversed the decision of the BZA and remanded the case for a rehearing to comply with its procedural responsibility of notifying all of the surrounding and contiguous property owners of the hearing. After the hearing on remand, the BZA upheld its previous decision and granted defendant's application for a permit. The BZA found, among other things, that the travel center complied with the spirit and intent of the zoning ordinance and that defendant had satisfied all of the requirements for a variance under § 62.0403 of the zoning ordinance.

Plaintiffs appealed the BZA decision in the circuit court and argued that the BZA's decision to grant the permit was not supported by substantial evidence and the BZA did not follow the procedural requirements of the zoning ordinance. The circuit court affirmed the BZA decision and ruled that defendant presented sufficient evidence for the BZA to find that defendant demonstrated a practical difficulty in complying with the zoning ordinance, which was enough to grant defendant a locational waiver.

II. Analysis

A. Standing

In granting plaintiffs' application for leave to appeal, this Court instructed plaintiffs to address the issue of their standing to challenge the BZA's decision. Whether a party has standing is a question of law that we review de novo on appeal. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

Under the City and Village Zoning Act ("CVZA"), "a person having an interest affected by the zoning ordinance may appeal to the circuit court." MCL 125.585(11). The essential question in determining whether a party has standing is whether the party has alleged "special damages." *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 699-701; 311 NW2d 828 (1981). Possible adverse effects of the change on a person's property are enough to confer standing under this statute. *Id.* at 700. In *Brown*, this Court ruled that the plaintiffs had standing to challenge the zoning board decision because they alleged that the proposed project "in their immediate vicinity has at least a potential for interfering with the beneficial use and enjoyment of their own land." *Id.* at 699. This Court held that "[t]he fact that plaintiffs have an interest affected by defendant's decision to grant the variance is manifest in their active opposition to the variance and their participation in the different hearings." *Id.*

Here, Bridgewater owns a facility on a neighboring property owned by Fort Summit. Bridgewater alleged that it moved to this property because of the proposed industrial park and revitalization project. Plaintiffs now express concern that the proposed travel center will cause increased traffic, which they say would be detrimental to Bridgewater's success and might cause air pollution and might encourage prostitution. In *Brown*, this Court found that the plaintiffs had standing to challenge the zoning board decision because they demonstrated that the proposed project "might serve to intensify the change in the character of the neighborhood as well as increase the number of its residents." *Brown, supra* at 700. Plaintiffs have alleged that the travel center might change the character of the neighborhood and might adversely affect potential revitalization. Further, plaintiffs allege that this might cause them economic harm. We hold that

these allegations meet the standard set forth in MCL 125.585(11) and under *Brown* and that plaintiffs have standing to challenge that BZA's decision.

B. BZA's Permit Decision

Plaintiffs challenge the BZA's decision to grant defendant a permit to build the proposed travel center and filling station. The standard of review for an appeal of a decision of a zoning board of appeals is set forth in MCL 125.585(11):

> Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of this state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

In *Michigan Ed Ass'n Political Action Committee (MEAPAC) v Secretary of State*, 241 Mich App 432, 443-444; 616 NW2d 234 (2000), this Court explained the standard of review for an administrative agency decision:

> An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 354; 564 NW2d 519 (1997). Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. See *Korzowski v Pollack Industries*, 213 Mich App 223, 228; 539 NW2d 741 (1995). This Court's review of the circuit court's decision is limited to determining whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). In other words, this Court reviews the circuit court's decision for clear error. *Id*. A decision is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 235[.]

This Court must give due deference to an agency's regulatory expertise and may not invade the agency's fact-finding duties. *Gordon v City of Bloomfield Hills*, 207 Mich App 231, 232; 523 NW2d 806 (1994).

Plaintiffs argue that the BZA did not make the findings required by the zoning ordinance for a use variance and that the BZA decision was not supported by substantial evidence. On the other hand, defendant argues that the BZA was not required by the zoning ordinance to make the findings required for a use variance because the BZA did not grant defendant a *use* variance, but instead, granted defendant a *locational* waiver. Consequently, defendant argues, it was not required to present evidence sufficient to obtain a use variance. Therefore, the critical issue is whether the BZA granted defendant a use variance or a locational suitability waiver, and, if it granted defendant a locational suitability waiver, whether defendant was required to meet the requirements for a use variance.

The rules of statutory construction apply to ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). "The starting point for determining the Legislature's intent is the language of the statute itself." *Stozicki v Allied Paper Co, Inc*, 464 Mich 257, 263; 627 NW2d 293 (2001). "Statutes should be interpreted consistently with their plain and unambiguous meanings." *Id.* Questions of statutory interpretation are reviewed de novo on appeal. *Id.*

Under § 42.0630, filling stations are permitted as a matter of right in M4 zoning districts. However, the zoning ordinance indicates that a permit to construct a filling station requires "locational suitability." As defined by § 42.0631, "'[l]ocational suitability' is the establishment of a proposed motor vehicle filling station at the intersection of two (2) or more major thoroughfares, or of a major thoroughfare and a freeway . . . ." If the proposed filling station is not located at such an intersection, under § 42.0633, the proposed site must be "a minimum distance of one thousand (1,000) radial feet from any existing or approved motor vehicle filling station," and a "waiver of 'Locational Suitability' [must be] obtained in accordance with [§] 42.0634."

Under § 42.0634, entitled "Procedure for waiver of 'Locational Suitability,'" if a filling station, like the one proposed in this case, is not at the intersection of two major thoroughfares and is less than one-thousand radial feet from another filling station, "[t]he request for waiver shall be heard by the Board of Zoning Appeals as a use variance, pursuant to [§§] 42.0600 through 42.0664, 62.0403 and any other applicable provision of this ordinance." Thus, the ordinance directs that, here, defendant must apply for a *waiver of locational suitability* which is heard by the BZA as a *use variance*.

The requirements for obtaining a locational suitability waiver under §§ 42.0600 through 42.0664 differ from the requirements for obtaining a use variance under § 62.0403. The zoning ordinance sets forth specific findings required if there are *no* other filling stations within one-thousand feet of the proposed filling station. However, the ordinance does not set forth required findings for locational suitability waivers heard by the BZA if the proposed location does not meet the "major thoroughfare" and "distance from other filling stations" requirements. Rather, generally, a party requesting a non-use variance such as a location waiver, as opposed to a use variance, does not have to show unnecessary hardship in following the ordinance, but rather, only needs to show practical difficulties in following the ordinance. *National Boatland, Inc v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985).

Here, however, the ordinance states that applications such as the one at issue here should be heard "as a use variance, pursuant to Section 42.0600 through 42.0664, 62.0403 and any other

applicable provision of this ordinance." § 42.0634. Plaintiffs interpret this section to mean that the applicant must *meet the requirements* for obtaining a use variance under § 62.0403, which states that an applicant must demonstrate:

> (a) That the property in question cannot be reasonably used only for a purpose permitted in that zone, and
>
> (b) That the plight of the owner is due to unique circumstances and not to general conditions in the neighborhood, and
>
> (c) That the use to be authorized by the variance will not alter the essential character of the locality.

In contrast, defendant argues that § 42.0634, which directs that locational suitability waivers "shall be heard by the Board of Zoning Appeals as a use variance" merely means "that, unlike the other requested waivers of locational suitability, which are heard by the Buildings and Safety Engineering Department, these specified requests for waivers must be heard in the first instance by the BZA, as are requests for use variances." In other words, defendant maintains that the application is *heard* as a use variance, not *decided* as a use variance.

We agree with defendant for several reasons. First, filling stations are permitted as a matter of right in intensive industrial M4 zoning districts such as the one at issue here. It makes little sense to require a use variance for a use that the zoning ordinance clearly permits as of right. Defendant's proposed filling station is consistent with the existing zoning and, therefore, the critical issue is not whether the land is zoned to permit the use, but the location of the proposed project with respect to cross streets and other filling stations. As this Court explained in *National Boatland*, *supra* at 386:

> Variances fall within one of two categories: use variances or non-use variances. Use variances permit a use of the land which the zoning ordinance otherwise proscribes. Non-use variances are not concerned with the use of the land but, rather, with changes in a structure's area, height, setback, and the like.

"A land use variance is, in essence, a license *to use property* in a way that would not be permitted under a zoning ordinance." *Frericks v Highland Twp*, 228 Mich App 575, 582; 579 NW2d 441 (1998) (emphasis added). Here, a waiver of locational suitability is what is at issue.

Plaintiffs observe that § 42.0634 states that applications should be heard "as a use variance, pursuant to . . . [§] 62.0403 . . . ." and argue that this reference to the "use variance" section implies that defendant must demonstrate the requirements of a use variance. However, § 42.0634 also refers to §§ 42.0600 through 42.0664, the locational suitability waiver sections. Thus, the zoning ordinance contemplates the application of both the locational suitability waiver sections *and* the use variance sections. The reference to both does not change the true nature of defendant's claim: the use of the property to operate a filling station is permitted as of right and the only issue is its locational suitability, not the nature of the use.

As defendant correctly observes, to rule otherwise would impose on defendant an impossible and illogical task. § 62.0403 specifically states that a "use variance shall be granted

only in cases of property having unique characteristics which prevent reasonable use of the property as zoned" and that "[a] use variance shall not be granted unless the board finds, on the basis of substantial evidence, that the property cannot reasonably be used in a manner consistent with existing zoning . . . ." Again, defendant's use of the property as a filling station is permitted by existing zoning laws. There is no logic in requiring defendant to prove that the property cannot reasonably be used for that or another permitted purpose.

"Courts attempt not to interpret statutes, and by implication ordinances, in a manner that leads to absurd results." *Brandon Charter Twp v Tippett*, 241 Mich App 417, 424; 616 NW2d 243 (2000). Defendant's right to use the property as proposed is settled by its existing zoning designation and it is merely the location that remains in dispute. The only logical reading of the zoning ordinance is that, for the locational suitability waiver required in this case, the BZA shall *hear* defendant's claim, but its *decision* is whether to permit a waiver of locational suitability, not whether defendant has demonstrated a need for a use variance.

At the BZA hearing and in its written decision and order, the Board clearly applied and found sufficient evidence to meet the requirements for a use variance under § 62.0403. For the reasons stated, the BZA imposed an incorrect and unduly burdensome standard on defendant; under the facts of this case, defendant was not required to meet the criteria under § 62.0403.[1] As noted, on appeal, the circuit court affirmed the BZA's decision because it found that, while the zoning ordinance only required defendant to present evidence to justify a locational suitability waiver, the evidence in the record was sufficient to grant such a waiver.

Given our limited review powers and the broad discretion of the BZA, we hold that the circuit court correctly affirmed the BZA's decision. While statements in the record indicate that the Board applied a more onerous standard than required, its ultimate decision did not violate state laws, was procedurally correct, was supported by ample evidence and constituted a reasonable exercise of discretion granted by law. Furthermore, for the reasons stated, the circuit court applied the correct legal principle by finding that defendant merely had to show practical difficulties in following the ordinance to obtain a non-use waiver. *National Boatland, supra* at 387; MCL 125.585(9). On review of the record, we are left with the firm conviction that the circuit court reached the correct result and that the BZA correctly granted defendant a permit to build the filling station on the property.

Defendant presented competent, substantial and material evidence showing the practical difficulty of complying with the major thoroughfare and minimum distance restrictions for the property, particularly in light of the need in the area for additional filling stations based on already-existing truck traffic. Furthermore, given that defendant's intended use is a matter of right in this zone, defendant clearly showed that the location restrictions "would unreasonably prevent the owner from using the property for a permitted purpose." *National Boatland, supra* at 388. Moreover, there was ample evidence in the record to support the BZA's ultimate

[1] And, as plaintiffs correctly observe, defendant failed to present "competent, material, and substantial" evidence to support a use waiver under § 62.0403. Defendant failed to show that the property has unique characteristics which prevent reasonable use of the property as zoned or that it cannot be reasonably used for another purpose permitted in the zone. Indeed, defendant acknowledged at the hearing that the land could be used for other intensive industrial purposes.

conclusion that the use "as proposed would be in keeping with the spirit and intent of the Zoning Ordinance." It would simply be a waste of judicial and agency resources to remand this case for the BZA to apply a less stringent standard, particularly because there is abundant evidence in the record to support its decision to permit defendant to build and operate the filling station. Accordingly, we affirm the trial court's order upholding the BZA's decision.[2]

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad

[2] We also reject plaintiffs' argument that the BZA's decision must be reversed because it decided the matter before the Planning and Development Department (PDD) submitted a written report. Neither § 42.0620 nor § 42.0640 prevents the BZA from making a decision without a PDD report. Both sections merely state that the PDD has a duty to submit a report to the DBSE and the BZA before a hearing. The language of the ordinance does not suggest that the BZA cannot act without a written report from the PDD or that a decision of the BZA is invalid without the submission of such a report.