

STATE OF MICHIGAN
COURT OF APPEALS

JERRY P. HARKEY,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF BLOOMFIELD,

Defendant-Appellee.

UNPUBLISHED

June 14, 2002

No. 228287

Oakland Circuit Court

LC No. 99-015449-AZ

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order vacating a decision of defendant's Zoning Board of Appeals (ZBA), which denied plaintiff's request to construct an addition to the east side of his house. The circuit court remanded the matter to the ZBA to "apply the ordinances as written or explain and support its basis for deviating from the strict language of the ordinances." We affirm as modified.

We have considered plaintiff's arguments challenging the circuit court's remand order in light of MCL 125.293a(1), which governs review of a decision of the ZBA, as well as MCL 125.293a(2), which authorizes a court to remand when it either finds "the record of the board of appeals inadequate to make the review required by this section" or "that there is additional evidence which is material and with good reason was not presented to the board of appeals." See *Reenders v Parker*, 217 Mich App 373; 551 NW2d 474 (1996).

Plaintiff's lot is irregularly shaped. Defendant's ordinance requires front, side and rear "setbacks" of forty, sixteen and thirty-five feet respectively. "Setback" is defined in the ordinance as "the distance required to obtain front, side or rear yard open space provisions of this Ordinance."¹ The decision of the ZBA that was before the circuit court rested on the identity of the type of yard that existed with respect to plaintiff's plan to build an addition to his house.²

¹ We take that definition from the circuit court's opinion and order for remand. Neither party has provided on appeal a copy of the ordinance that includes the definition of "setback." There also is not a copy of that particular ordinance in the lower court file.

² While the proper setback is necessarily dependant on determination of a property's yards, this case hinges on the determination of the property lot lines because the designation of the lot lines will ultimately determine the yards.

The ZBA adopted defendant's consultant planner's interpretation of the area in question, but provided no explanation why it considered that interpretation correct. Identification of the eastern lot line of plaintiff's property is critical to plaintiff's plans to build the addition because plaintiff's planned addition is located more than sixteen feet, but less than thirty-five feet, from the eastern lot line.

The relevant ordinances state:

Lot lines: The lines bounding a lot as defined herein:

- a. **FRONT LOT LINE:** In the case of an interior lot, is that line separating said lot from the street. In the case of a corner lot, or double frontage lot, is that line separating said lot from either street.
- b. **REAR LOT LINE:** That line opposite the front line. In the case of a lot pointed at the rear, the rear lot line shall be an imaginary line parallel to the front lot line, not less than ten (10) feet long lying farthest from the front lot lines and wholly within the lot.
- c. **SIDE LOT LINE:** Any lot line other than the front lot line or rear lot line. A side lot line separating a lot from another lot or lots is an interior side lot line.

* * *

Yards: Is the open space on the same lot with a main building, unoccupied and unobstructed from the ground upward except as otherwise provided in this Ordinance, and as defined herein:

- a. **FRONT YARD:** An open space extending the full width of the lot, depth of which is the minimum horizontal distance between the front lot line and the nearest point of the main building.
- b. **REAR YARD:** An open space extending the full width of the lot the depth of which is the minimum horizontal distance between the rear lot line and the nearest point of the main building. In the case of a corner lot, the rear yard may be opposite either street frontage.
- c. **SIDE YARD:** An open space between a main building and the side lot line, extending from the front yard to the rear yard, the width of which is the horizontal distance from the nearest point of the side lot line to the nearest point of the main building.

The principal issue presented to the circuit court was how to apply the "rear lot line" definition in defendant's zoning ordinance to plaintiff's irregular lot. Defendant's position was that the eastern property line should be identified as the rear lot line, whereas plaintiff argued that an imaginary line should be used to identify the rear lot line and the eastern line is, therefore, a side lot line.

On appeal, plaintiff argues that the circuit court did not have a proper basis to remand the case because the ordinances at issue unambiguously establish that plaintiff's planned addition complies with the township's setback requirements. Were we to conclude that the ordinances are unambiguous, we would agree that remand is unnecessary. However, we conclude that the lot line ordinance is subject to more than one reasonable interpretation when applied to plaintiff's irregularly shaped lot and, therefore, is ambiguous. See *Adrian School District v Michigan Public School Employees Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998).³

It is not clear that this lot presents a "case of a lot pointed at the rear." The word rear being undefined, may be construed in accordance with its dictionary definition. *Ryant v Cleveland Twp*, 239 Mich App 430, 434; 608 NW2d 101 (2000). Dictionary definitions include the "the back of something, as distinguished from the front" and "the space or position at the back of something." Random House Webster's College Dictionary (2d ed, 1997). Plaintiff's argument that the lot is "pointed at the rear" is premised on the assumption that the rear lot line must be located to the rear of his house. The eastern and southern-most lot lines intersect in back of plaintiff's house. However, no portion of the ordinances at issue indicates that the definition of "rear" is to be defined by the physical placement of any structure on the property. Viewing plaintiff's property without giving deference to the physical placement of plaintiff's house, it is wholly unclear regarding whether the lot is pointed at the rear. Insofar as the lot line ordinance allows for more than one reasonable interpretation of the rear lot line, the ordinance is ambiguous.

Given the ambiguity, the trial court's decision to remand the case to the ZBA was proper. As noted, in a case where the ZBA is charged with interpreting an ordinance that is ambiguous, deference to the ZBA's interpretation is appropriate, although the amount of deference is dependent on how long the interpretation has been applied. *Macenas v Michiana*, 433 Mich 380, 396; 446 NW2d 102 (1989). On remand, the ZBA may develop the record in regard to its

³ We reject plaintiff's assertion that because defendant has not brought a cross-appeal arguing the ordinances are ambiguous, the issue of ambiguity was not preserved for our review. Plaintiff's argument in this regard is premised on the view that the circuit court, in its opinion and order for remand, conclusively determined the ordinances are unambiguous. The circuit court's conclusion in regard to the ordinances is not that clear. The court's order states, in part: "On remand, the ZBA is to apply the ordinances as written" That statement suggests the court found the ordinances unambiguous. However, immediately thereafter, the court directed the ZBA, "or explain and support [the] basis for deviating from the strict language of the ordinances." That latter statement along with the court's recognition that the ZBA record "is barren or unclear" on several points indicates the court recognized the possible application of the principle noted in *Macenas v Michiana*, 433 Mich 380, 396; 446 NW2d 102 (1989) (in a case where the ZBA is charged with interpreting an ordinance that is ambiguous, deference to the ZBA's interpretation would be appropriate). The circuit court did not clearly determine that the ordinances are unambiguous and defendant was not required to bring a cross-appeal to specifically preserve the issue of ambiguity. We note that defendant argues in its brief on appeal that the lot line ordinance is ambiguous in cases involving irregular lots.

practice of determining the lot lines of irregularly shaped lots and the length of time such a practice has been applied.

We modify the circuit court's remand order to provide that the circuit court is to retain jurisdiction to review the ZBA's decision on remand after the ZBA provides a more full explanation of the facts and reasoning by which "lot lines" were determined under the requirements of the ordinance. Consistent with MCL 125.293a(2), the ZBA may modify or affirm its original decision on remand before filing a supplemental record and decision with the circuit court.

Finally, we have considered plaintiff's collateral estoppel argument, but conclude that it does not afford plaintiff a basis for relief. Although the argument was not addressed by the circuit court, we have considered it because it was raised in the proceedings before the circuit court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) (a party should not be punished for a trial court's failure to rule on an issue that was properly raised below). Nevertheless, because the circuit court was sitting as a reviewing court and plaintiff's collateral estoppel argument is dependent on evidence outside the scope of the ZBA appeal record, it would have been improper for the circuit court to determine whether the ZBA should be collaterally estopped from denying that the rear lot line is located behind plaintiff's house. As a general rule, enlargement of the record on appeal is not permitted. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Moreover, plaintiff has not shown any basis for applying the doctrine of collateral estoppel. See *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995), and *Ditmore v Michalik*, 244 Mich App 569, 577-578; 625 NW2d 462 (2000). Accordingly, plaintiff's collateral estoppel issue lacks merit.

Affirmed as modified and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad