

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN PERLMAN,

Plaintiff/Counter-Defendant-
Appellee,

v

CHARTER TOWNSHIP OF BLOOMFIELD, and
BLOOMFIELD TOWNSHIP ZONING BOARD
OF APPEALS,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

January 8, 2008

No. 267493

Oakland Circuit Court

LC No. 2004-062677-AA

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiff built a sports court in his backyard without obtaining a building permit or the required township approvals. Once the township became aware of the non-conforming and illegally constructed structure, the township instructed plaintiff to obtain after-the-fact approval for the structure from the Zoning Board of Appeals (ZBA). The ZBA denied the request to approve the sports court as a permitted accessory structure. Plaintiff appealed the decision to the circuit court, and the circuit court reversed the decision of the ZBA that denied approval of the sports court as an accessory structure. However, the circuit court affirmed the ZBA's denial of approval for the fence associated with the court.¹ Defendants appeal the circuit court's decision to this Court by leave granted. We remand for further proceedings.

Defendants argue that it was improper for the circuit court to view the property and to consider both the aerial photograph showing other sports courts and the approval of another sports court in June 2005, because by considering an expanded record, the circuit court substituted its judgment for that of the ZBA. Defendants are correct that generally the circuit court's review is limited to the record before the ZBA. See, e.g., *Northwestern Nat'l Casualty*

¹ Despite defendants' arguments to the contrary, the fence is not at issue on appeal because the circuit court affirmed the ZBA's denial of approval for the fence. Plaintiff did not appeal that ruling and has represented that the fence has been removed.

Co v Comm'r of Ins, 231 Mich App 483, 496; 586 NW2d 563 (1998). Defendants, however, have waived the instant issue. The circuit court specifically asked both parties if they would take issue with the court's looking at the property, and defendants' attorney stated that they did not object. Further, defendants did not object at the hearing below to the additional evidence plaintiff presented in its reply brief, and it submitted additional evidence of its own for the circuit court's consideration. A party may not waive objection below and then argue on appeal that the action taken was error. *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006).

Defendants next argue that the circuit court erred when it ruled that the ZBA did not have the discretion to reject plaintiff's request for approval of the sports court. The circuit court's decision in an appeal from a zoning board of appeals is reviewed de novo, although this Court gives great deference to the circuit court's and zoning board's findings of fact. *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). A decision of a township zoning board should be affirmed unless it was contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion. *Century Cellunet of So MI Cellular Ltd v Summit Twp*, 250 Mich App 543, 546; 655 NW2d 245 (2002); MCL 125.293a. Substantial evidence is "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994).

A zoning ordinance is subject to the rules governing the construction of statutes. *Thomas v New Baltimore*, 254 Mich App 196, 206; 657 NW2d 530 (2002). If ordinance language is clear and unambiguous, it must be enforced as written; judicial interpretation of plain language is improper. *Id.* "Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006) (internal citations and quotation marks omitted). The fair and natural import of the pertinent terms, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998).

The parties do not dispute that the sports court is an accessory use and a "principal use permitted" in the residential district where it is located. Such a use must be located as required in "Article XV, General Provisions" of the township ordinance. Bloomfield Township Zoning Ordinance, Article IV, § 400. The general provision governing accessory structures is § 1503 of the ordinance. The parties do not dispute that the sports court meets the requirements of § 1503, which require that an accessory use must be in a rear yard, at least 16 feet from the lot lines, and not higher than one story. In dispute is whether the sports court is a structure that has sides above the existing grade of the rear yard and that is, therefore, governed by § 1503(6) of the ordinance, which specifically incorporates the additional standards of § 1804 of the ordinance. "The omission of a provision in one part of a statute that is included in another part should be construed as intentional" *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). Thus, if the sports court is not above the existing grade, then no other

standards are included in the ordinance for the ZBA to consider, specifically, the standards of § 1804.

There is insufficient evidence on this record to determine if the sports court is above the existing grade.² If not, then the circuit court properly reversed the ZBA's decision because the sports courts complied with the applicable ordinance provisions. However, if the sports court *is* above the existing grade, then the circuit court erred in reversing the ZBA's decision, in light of the considerable deference entitled to be given to the ZBA's decision and in light of the information from a real estate agent that a neighboring condominium was having trouble being sold and that agents of prospective buyers had expressed concern regarding the location and size of the sports court. This evidence implicated § 1804(7), involving the impairment of value of neighboring properties, and provided sufficient justification for the ZBA's ruling.

We remand this case for a determination involving whether the sports court has sides above the existing grade.³

Remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens

² The fence is not implicated in determining whether the structure was above the existing grade because it has been dealt with separately, as indicated in footnote 1.

³ Contrary to the circuit court's and plaintiff's suggestions, there was no constitutional violation here by way of the ZBA's decision. Each sports court reviewed by the ZBA was a unique entity, involving different neighbors and neighborhoods, and no equal protection violation is apparent. See, e.g., *Walker's Amusements, Inc v City of Lathrup Village*, 100 Mich App 36, 43; 298 NW2d 878 (1980).