

STATE OF MICHIGAN
COURT OF APPEALS

MARSHALL TOBIN,

Plaintiff/Counter-Defendant-
Appellee,

v

CITY OF FRANKFORT,

Defendant/Cross-Defendant-
Appellee,

and

FRIENDS OF BETSIE BAY, INC.,

Intervening Defendant/Cross-
Plaintiff-Appellant.

UNPUBLISHED
June 12, 2012

No. 296504
Benzie Circuit Court
LC Nos. 06-007712-CH,
02-006417-AA

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

This appeal involves a condominium development planned by plaintiff, Marshall Tobin, on property that he owns in defendant city of Frankfort. Intervening party, Friends of Betsie Bay, Inc. (FOBB or intervenor), consists of owners of residential property near plaintiff's proposed development who oppose the project. Intervenor appeals by right two orders that the circuit court entered in November 2009: (1) an order revoking FOBB's standing and right to intervene in two lawsuits that plaintiff filed against the city, and (2) an order entering a consent judgment between plaintiff and the city. We affirm.

We initially consider the dispositive question whether FOBB possessed standing to participate in the underlying litigations that plaintiff commenced against the city. We review de novo the legal question of whether a party has standing. *The Cadle Co v Kentwood*, 285 Mich App 240, 253; 776 NW2d 145 (2009).

Pursuant to longstanding Michigan jurisprudence,

a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. *A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large* or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (emphasis added).]

A landowner's interest in the zoning of neighboring property derives solely from statutory authority. *City of Livonia v Dep't of Social Servs*, 119 Mich App 806, 810; 328 NW2d 1 (1982). When the city considered plaintiff's conditional zoning request in 2005, the City and Village Zoning Act (CVZA), MCL 125.581 *et seq.*, governed the proceedings.¹ MCL 125.590 provides:

Any party aggrieved by any order, determination or decision of any officer, agency, board, commission, board of appeals, or the legislative body of any city or village, made pursuant to the provisions of section 3a of this act may obtain a review thereof both on the facts and the law, in the circuit court for the county wherein the property involved or some part thereof, is situated [Emphasis added.]

Several decisions of this Court have interpreted the extent to which a landowner must be aggrieved by a zoning decision to invest the landowner with standing to challenge a zoning board of appeals decision. This Court has consistently held that to have standing to challenge a zoning decision a party must be "aggrieved" and have "suffered some special damages not common to other property owners similarly situated." *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975), citing *Joseph v Grand Blanc Twp*, 5 Mich App 566; 147 NW2d 458 (1967) and *Marcus v Busch*, 1 Mich App 134; 134 NW2d 498 (1965).²

¹ The Legislature enacted the Zoning Enabling Act (ZEA), MCL 125.3101 *et seq.*, effective July 1, 2006. 2006 PA 110. The ZEA repealed the then existing Michigan zoning statutes, including the CVZA. MCL 125.3702(1)(a). Because the city's decision on plaintiff's conditional rezoning request occurred in 2005, the terms of the CVZA continue to apply to this litigation. MCL 125.3702(2). Currently, the ZEA allows an aggrieved party to appeal a decision of the zoning board of appeals to the circuit court. MCL 125.3605; MCL 125.3606(1).

² See also *Village of Franklin v City of Southfield*, 101 Mich App 554, 556; 300 NW2d 634 (1980) ("for a party to have standing in court to attack the actions of a zoning board of appeals, the party must be an aggrieved party, and standing cannot be based solely on the fact that such party is a resident of the city"), and *Western Mich Univ Bd of Trustees v Brink*, 81 Mich App 99, 102-103 n 1; 265 NW2d 56 (1978) (reaffirming a neighboring landowner must prove special damages to qualify as an aggrieved party).

In *Joseph*, 5 Mich App at 571, this Court stated:

Other jurisdictions have held that a mere increase in traffic with its incidental inconvenience did not constitute a substantial damage and, therefore, the plaintiff was not considered to be an aggrieved party. . . .

This Court concurs in this reasoning in deciding that plaintiff did not allege that he had suffered any special damages, which were different in kind from those suffered by the community so as to qualify as an aggrieved party.

Thus, a neighboring landowner merely alleging a likely increase in traffic volume, or a loss of aesthetic value, or a general claim of economic loss, has not alleged special damages sufficiently to become an aggrieved party. *Village of Franklin v City of Southfield*, 101 Mich App 554, 557; 300 NW2d 634 (1980); *Unger*, 65 Mich App at 617.

Intervenor argues that it has established through its members' affidavits that it has standing to intervene and pursue its member's claims. The relevant declarations by FOBB members in their September 2000 affidavits primarily detail concerns about (1) increases in population, traffic, noise levels, lights, air pollution, and property taxes; (2) decreases in home values, aesthetics of the neighborhood, and environmental value caused by tree and vegetation removal attributable to the development; and (3) the potential presence of commercial establishments. The generalized concerns relating to environmental impacts, population increases, aesthetics, and pecuniary harm do not suffice to demonstrate "special damages . . . different in kind from those suffered by the community, so as to qualify [intervenor] as an aggrieved party." *Joseph*, 5 Mich App at 571. Alternately phrased, development-related aesthetic changes, population increases, environmental impacts, and pecuniary harm will be experienced by other community members to the same extent as affiants.

The affidavit of the Clingmans does allege a specific injury unique to their parcel of property, namely the significant filling of wetlands on both sides of their property. This may have been the case when they attested to their affidavit in September 2000, the same time that all the FOBB member affidavits were executed. But plaintiff's 2000-vintage development proposal had changed before the 2006 litigation commenced, and again shortly thereafter when plaintiff and the city reached their consent agreement. A copy of the proposed consent judgment that appears in the circuit court file, dated January 11, 2007, contains documentation and terms identical to the consent judgment entered by the circuit court in November 2009. The terms and documentation, including a site-plan drawing, reflect that the final development would take place on only a portion of plaintiff's lots west of M-22 (not on both sides of the Clingmans' property), and that plaintiff would avoid disturbing or encroaching on nearby wetlands.

Although the Clingmans and other FOBB members had knowledge of the proposed consent judgment since the city held meetings in late 2006 to vote on whether to endorse the agreement, and the litigation in both circuit court cases remained ongoing until November 2009, FOBB never submitted any updated allegations of harm by its members, or an explanation of

how the project embodied in the consent judgment would cause the members to suffer special damages.³ We conclude that in light of the generalized averments of damages by FOBB members that are common to other local property owners and the Clingmans' more specific stale allegations of flooding, the circuit court correctly concluded that FOBB lacked standing to intervene and object to the consent judgment.⁴ FOBB failed to establish that its members would suffer special damages adequate to support its status as an aggrieved party under either MCL 125.585 or MCL 125.590, or that it had a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large," as contemplated in *Lansing Sch Ed Ass'n*, 487 Mich at 372.

In light of our conclusion that FOBB lacked standing to intervene in this action, it is unnecessary to consider FOBB's remaining issues on appeal.

We affirm. As the prevailing parties, appellees may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly

³ In the context of intervenor's intervention argument on appeal, it refers to FOBB members' active participation in hearings before various city entities since 1998 or 1999. But, intervenor cites no authority that such participation at public hearings contributes to its showing of special damages necessary to establish standing.

⁴ FOBB heavily relies on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 698; 311 NW2d 828 (1981), construing then MCL 125.585(6), which stated that "a person having an interest affected by the zoning ordinance may appeal to the circuit court." The *Brown* Court discussed a standing test less demanding than the aggrieved-party standard; however, the Court's discussion was dicta because the Court concluded that the plaintiffs in that case had established "special damages" sufficient for standing as aggrieved parties. *Brown*, 109 Mich App at 699-701. Thus, we find the facts of *Brown* distinguishable from those involved in this case, primarily because the *Brown* plaintiffs proved specific damages to their properties. *Id.*