STATE OF MICHIGAN

COURT OF APPEALS

MILLER APPLE LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

EMMET COUNTY, EMMET COUNTY BOARD OF COMMISSIONERS, and EMMET COUNTY PLANNING COMMISSION,

Defendants-Appellees,

and

RLG BEAR CREEK, LLC, GCG BEAR CREEK, LLC, and RG PROPERTIES, INC.,

Intervening Defendants-Appellees.

UNPUBLISHED
February 9, 2010

No. 286730
Emmet Circuit Court
LC No. 08-001165-AA

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's order dismissing, for lack of standing, plaintiff's appeal of the decision of defendant Emmet County Board of Commissioners approving an amendment of a mixed-use Planned Unit Development (PUD) Agreement to allow the operation of a new restaurant on a vacant lot near plaintiff's existing restaurant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue is the PUD Agreement governing a Petoskey development known as Bear Creek Plaza ("the Plaza"). Specifically, the dispute concerns the proposed development of a vacant parcel, which is currently designated for office and professional use, to house a restaurant. Plaintiff operates an Applebee's restaurant on a leased lot in the Plaza, which is across the street from the vacant parcel. Intervening defendant RG Properties, Inc., is the developer of the parcel and a party to the PUD Agreement with Bear Creek Township and defendant Emmet County. Intervening defendants RLG Bear Creek, LLC, and GCG Bear Creek, LLC, are the owners of plaintiff's leased lot and the vacant parcel.

Pursuant to the original PUD Agreement, up to two restaurants were permitted in the Plaza. In 2007, RG Properties initiated administrative proceedings to amend the PUD

Agreement to change the designation of the vacant lot to permit the construction of a third restaurant. Following several hearings at which plaintiff's representatives voiced their objections, the PUD amendment was approved, first by defendant Emmet County Planning Commission and subsequently by the Emmet County Board of Commissioners ("the Board").

Plaintiff filed a claim of appeal from the Board's decision to the circuit court. Intervening defendants moved to dismiss the appeal on the ground that plaintiff was not an "aggrieved party" and therefore lacked standing to appeal. The circuit court granted the motion, holding that plaintiff's expectation that the operation of a Bob Evans restaurant across the street would cause it economic injury was not a "legally protected interest" under the constitutional standing test of *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739-740; 629 NW2d 900 (2001).

Whether a party has standing is a question of law subject to de novo review. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004); *Lee*, 464 Mich at 734.

The Michigan Constitution vests the state's "judicial power" in the courts, Const 1963, art 6, § 1, and directs that the powers of the three branches of government be separate, Const 1963, art 3, § 2. *Lee*, 464 Mich at 737. The doctrine of standing ensures that a genuine case or controversy is before the court such that the judiciary does not usurp the tasks assigned to the executive and legislative branches. *Id*. at 735-737; see also *Huntington Woods v Detroit*, 279 Mich App 603, 617; 761 NW2d 127 (2008).

The requirement of standing demands a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large. *Huntington Woods*, 279 Mich App at 617. To establish standing:

> "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." [*Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 28; 755 NW2d 553 (2008), quoting *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007) (citations and quotation marks omitted by *Coldsprings Twp*).]

The three requirements "establish[] the 'irreducible constitutional minimum' of standing." *Lee*, 464 Mich at 740, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed 2d 351 (1992). The party invoking the court's jurisdiction bears the burden of establishing these elements. *Lee*, 464 Mich at 739-740, quoting *Lujan*, 504 US at 560-561.

Moreover, "to have appellate standing, the party filing an appeal must be 'aggrieved.'" *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008), citing *People v Hopson*, 480 Mich 1061; 743 NW2d 926 (2008), and *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). To establish aggrieved status,

> " . . . one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Federated*, 475 Mich at 291-292, quoting *In re Trankla Estate*, 321 Mich 478, 482; 32 NW2d 715 (1948) (citations omitted).]

In the zoning context, a party is "aggrieved" only if he alleges and proves that he has suffered special damages related to the beneficial use and enjoyment of his own land that are not common to other similarly situated property owners. *Village of Franklin v Southfield*, 101 Mich App 554, 557; 300 NW2d 634 (1980), citing *Western Mich Univ Bd of Trustees v Brink*, 81 Mich App 99, 103 n 1; 265 NW2d 56 (1978), and *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582 (1975).[1] Proof of increased traffic and of general economic or aesthetic losses is not sufficient to show special damages. *Unger*, 65 Mich App at 617, citing *Joseph v Grand Blanc Twp*, 5 Mich App 566; 147 NW2d 458 (1967). Moreover, a party's financial interest in stifling competition posed by the development of neighboring properties is not a "legally protected interest" sufficient to grant standing to seek appellate review. *Brink*, 81 Mich App at 105.[2] As this Court stated in *Brink*, a plaintiff's "financial interest in throttling the development of neighboring properties is not the kind of legally protectable property right or privilege, the threatened interference with which grants standing to seek review." *Id*.

We conclude that plaintiff's interest in thwarting competition from a nearby restaurant business, even assuming that such prospective competition constitutes an "actual" and not merely "conjectural" or "hypothetical" injury, is not a "legally protected interest" sufficient to

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[1] See also *Stewart v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2008 (Docket No. 276720), slip op p 3; *Guastello v Trans Inns Mgt, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 1997 (Docket No. 191296), slip op p 2. While unpublished decisions are not precedentially binding authority, MCR 7.215(C)(1), they may be persuasive. See *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004).

[2] See also *Stewart*, unpub op at 3-4; *Guastello*, unpub op at 2-3.

establish standing.[3] *Michigan Citizens for Water Conservation*, 479 Mich at 294-295; *Brink*, 81 Mich App at 105.[4]

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[3] Accordingly, although intervening defendants assert that plaintiff's proffered affidavit constituted an improper expansion of the administrative record, whether this affidavit was properly considered by the circuit court is of no consequence. Accepting, as the circuit court did, the assertion in the affidavit that plaintiff reasonably expects that a Bob Evans restaurant across the street will cause it economic injury, such an assertion is not sufficient to establish standing.

[4] Plaintiff's reliance on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688; 311 NW2d 828 (1981), and *Detroit Downtown Dev Auth v US Outdoor Advertising Inc*, 480 Mich 991; 742 NW2d 133 (2007), is misplaced. Unlike the plaintiffs in *Brown*, plaintiff in this case has neither claimed nor established any potential deleterious effect on the "beneficial use and enjoyment" of the property on which its restaurant is located. *Brown*, 109 Mich App at 699-700. Furthermore, the circumstances conferring standing in *Detroit DDA*—i.e., the plaintiff's status as a statutory body with supervisory authority over the area encompassing the variance, its ownership of nearby buildings, and its substantial ($65 million) investment in the area—are entirely inapposite to the circumstances of plaintiff in the case at bar. *Detroit DDA*, 480 Mich at 992.