STATE OF MICHIGAN

COURT OF APPEALS

MARY LEE DUDA, as Trustee for MLND INTERESTS,

Appellant,

v

TOWNSHIP OF LITTLE TRAVERSE,

Appellee.

UNPUBLISHED
May 20, 2021

No. 352293
Emmet Circuit Court
LC No. 19-106589-AA

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

In this zoning dispute, appellant Mary Lee Duda (Duda), as Trustee for MLND Interests, appeals the circuit court's December 3, 2019 order affirming appellee Little Traverse Township Zoning Board of Appeals's (ZBA) denial of Duda's requested zoning variance. We affirm.

I. BACKGROUND

Duda, as trustee for MLND Interests, owns four adjoining lots in Ramona Park, which is a subdivision in Little Traverse Township (the Township). The lots are referred to as lots 148, 149, 150, and 151. Each lot is a nonconforming lot of record, meaning that each lot contains less than 40,000 square feet. The original plat, which was recorded in the 1920s, created 144 lots, "all of which are small by today's standards." Some of the land that was included in the plat was on the northern shoreline of Little Traverse Bay. That land was designated as a private park for the use of all lot owners in the plat. Of the original 144 lots, 35 of them, including Duda's four lots, have park land at the south end "such that they appear to be waterfront lots." The relevant park land is referred to as Waterfront Park.

In 2008, a quiet title action was initiated in the circuit court that involved multiple lots, including the four lots now owned by Duda. At the time the quiet title action was initiated, the lots were owned by Duda's predecessor-in-title. In 2010, a consent judgment was entered. The

consent judgment granted certain rights in Waterfront Park to the property owners whose lots abutted Waterfront Park. These rights include

> the right to use that portion of Waterfront Park that is encompassed by the area between their lot lines extending Southward to the water's edge . . . for any park purpose, except the Abutting Lot Owners cannot erect buildings, gazebos or similar structures or unreasonably impede or obstruct or otherwise interfere with the use of the Park . . . .

The consent judgment also permits abutting land owners to "install and maintain landscaping and [to] install, maintain, repair and/or replace docks." However, the judgment provides non-abutting lot owners the right to use Waterfront Park "for walking, access to the waterfront, swimming and sitting . . . ."

In 2011, the Township amended its zoning ordinance to include § 1300(3)(a) (hereinafter "the 2011 Amendment"). The 2011 Amendment provides, in relevant part, as follows:

> Subject to the provisions of this Subsection 3, one otherwise permitted single-family dwelling and customary accessory building(s) may be established on a Nonconforming Lot. If two or more contiguous Nonconforming Lots are held in common ownership as of or after the effective date of the amendment to this Ordinance that added this subsection, such Nonconforming Lots shall be combined, developed and used to the extent necessary to conform or more nearly conform with the district requirements for area, width, or both. The combined Nonconforming Lots shall be considered as a single Zoning Lot and must otherwise comply with the district requirements of this Ordinance.

Consistent with the 2011 Amendment, the four lots owned by Duda's predecessor-in-title became "a single Zoning Lot[.]"

Duda, as trustee for MLND Interests, purchased the four lots in October 2015. At the time of the purchase, there was a house located in the middle of the four lots. Duda razed the house and built a new house on Lots 150 and 151, which are located on the eastern side of the unified lot. After construction of the new house was complete, Duda sought permission from the Township "to split off the two western lots so that another home [could] be built there." Duda acknowledged that, under the Township's zoning ordinance, a lot in a Recreational Residential (RR) zoning district requires a minimum of 40,000 square feet. Duda further acknowledged that dividing the unified lot into two separate parcels would result in neither of the resulting parcels satisfying the minimum square foot requirement. Duda attempted to circumvent this problem by arguing that she should be able to add the adjoining area of Waterfront Park to the area in the lots, so that each of the proposed lots would meet the 40,000 square foot requirement. The Township's zoning administrator denied Duda's request on the basis that the Waterfront Park land was not owned by Duda and therefore could not be included to satisfy the minimum area requirement. Duda appealed to the ZBA, which affirmed the zoning administrator's decision.

Duda appealed the ZBA's decision to the circuit court. The circuit court affirmed the ZBA's decision, noting that the abutting Waterfront Park was a separate parcel of land and,

therefore, could not be considered together with Duda's lot as "a parcel of land." The circuit court held that it was reasonable for the ZBA to conclude that the special use rights that Duda had in Waterfront Park did not support considering that area as part of her lot. The circuit court also held that because Duda's lot, if divided, would not have sufficient area to meet the minimum square footage requirement, "the ZBA reasonably denied her lot split request." Duda filed an application for leave to appeal the circuit court's decision with this Court, which was denied. *Duda v Little Traverse Twp*, unpublished order of the Court of Appeals, entered May 8, 2019 (Docket No. 346429).

While the first appeal in the circuit court was pending, Duda submitted a request to the ZBA for a nonuse variance that would permit the lot to be split into two nonconforming lots with approximately 27,500 square feet each. The ZBA initially denied Duda's variance request because the ZBA concluded that it did not have jurisdiction to consider the request. Duda appealed this decision to the circuit court, which held that the ZBA did have jurisdiction over the request and remanded the matter to the ZBA for consideration on the merits.

In May 2019, the ZBA held a public hearing and received public comment on Duda's variance request. Among other things, the township supervisor argued that if Duda's property was permitted to be split, there would be no basis for the ZBA to disallow any other splits of similar lots, thereby rendering the 2011 Amendment ineffective. The ZBA essentially adopted this reasoning when it found that "[g]ranting the variances will adversely affect the purposes or objectives of the zoning plan of Little Traverse Township."

Duda again appealed the ZBA's denial to the circuit court, this time arguing that the ZBA had committed legal error and had failed to consider the specific, unique circumstances related to the property. Duda also argued that the ZBA's decision was not supported by competent, material, or substantial evidence. The circuit court issued a written opinion affirming the ZBA's decision, concluding that "the condition giving rise to the variance request is self-created[.]" The circuit court noted that Duda had "physically altered her land, after the enactment of the 40,000 square foot minimum area restriction, to create a second potential building lot unfit for the uses for which it is zoned because it does not contain the requisite area." Duda moved for reconsideration of the decision, and the circuit court denied the motion. This appeal followed.

II. JURISDICTIONAL ISSUE

At the outset, we must address a jurisdictional issue. The Township argues that this Court lacks jurisdiction to hear this appeal because the circuit court's December 2019 decision is not a final judgment that is appealable as of right under MCR 7.203(A)(1)(a). We disagree.

"Under MCR 7.203(A)(1)(a), a party does not have an appeal of right in this Court arising out of an order of a tribunal that was appealed in the circuit court." *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013) (emphasis omitted). In this case, the Township argues that the ZBA was acting as a tribunal when it denied Duda's request for a nonuse variance and that the circuit court's order affirming the ZBA's decision was an order on appeal from a tribunal.

An administrative agency that acts in a quasi-judicial capacity may be considered a tribunal for purposes of MCR 7.203(A)(1)(a). See *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App at 86-87. To determine whether an agency was acting in a quasi-judicial capacity, we must consider whether the agency's procedures are akin to court procedures. *Id*. at 86. "Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents." *Id*. In this case, the ZBA made its decision after a public hearing that was not comparable to a court proceeding. Therefore, the ZBA did not act as a tribunal in the present case, and MCR 7.203(A)(1)(a) does not apply to preclude this appeal as of right from the circuit court order affirming the ZBA's decision. See *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 453 n1; ___ NW2d ___ (2020).

III. DENIAL OF REQUEST FOR NONUSE VARIANCE

A. STANDARDS OF REVIEW

"This Court reviews de novo the circuit court's decision in an appeal from a zoning board, while giving great deference to the trial court and zoning board's findings." *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 458; 773 NW2d 730 (2009) (quotation marks and citation omitted). On appeal, a circuit court "may affirm, reverse, or modify the decision" of a ZBA, MCL 125.3606(2), or a circuit court "may make other orders as justice requires," MCL 125.3606(4). However, the circuit court must keep in mind that "[t]he courts do not sit to function as a super zoning board." *Cook v Bandeen*, 356 Mich 328, 333; 96 NW2d 743 (1959).

MCL 125.3606, which is contained in the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., "provides . . . the standard used to review the decision of a zoning board of appeals[.]" *City of Detroit v Detroit Board of Zoning Appeals*, 326 Mich App 248, 254; 926 NW2d 311 (2018). MCL 125.3606 provides, in relevant part:

> (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the 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 zoning board of appeals.

"In other words, the decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material, and

substantial evidence on the record, or an abuse of discretion." *City of Detroit*, 326 Mich App at 255 (alteration, quotation marks, and citation omitted).

We review de novo the underlying interpretation and application of statutes and ordinances. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407; 761 NW2d 371 (2008). The purpose of interpreting a statute or an ordinance is "to discern and give effect to the intent of the legislative body." *Id*. at 407-408. "When the plain and ordinary meaning of the . . . language is clear, judicial construction is neither necessary nor permitted." *Pace v Edel-Harrelson*, 499 Mich 1, 7; 878 NW2d 784 (2016).

B. ANALYSIS

Duda argues that the circuit court erred by affirming the ZBA's decision to deny her request for a nonuse variance. We disagree.

A 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). A variance may be a use variance or a nonuse variance. *Nat'l Boatland, Inc v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985). Nonuse variances are those variances concerned with the area, height, and setback requirements of structures. *Id*. A zoning board of appeals has "authority to grant nonuse variances," MCL 125.3604(8), and "MCL 125.3604 defines a board's authority to grant a use variance," *City of Detroit*, 326 Mich App at 255. MCL 125.3604 provides, in relevant part, as follows:

> (7) If there are practical difficulties for nonuse variances as provided in [MCL 125.3604(8)] or unnecessary hardship for use variances as provided in [MCL 125.3604(9)] in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances.

Additionally, the Township's zoning ordinance contains procedures for processing and granting variances in § 1604, which provides, in relevant part, as follows:

> The Board of Appeals shall have the following powers and it shall be its duty:
>
> * * *
>
> 2. In hearing and deciding appeals, the Board of Appeals shall have the authority to grant such variances therefrom as may be in harmony with their general purpose and intent so that the function of this Ordinance be observed, public safety and welfare secured, and substantial justice done, including the following:
>
> * * *
>
> d. Permit such modification of the height and area regulations as may be necessary to secure an appropriate improvement [to] a lot which is of such shape,

or so located with relation to surrounding development or physical characteristics that it cannot otherwise be appropriately improved without such modification.

* * *

3. Where, owing to special conditions, a literal enforcement of the use provisions of this Ordinance would involve practical difficulties or cause unnecessary hardships within the meaning of this Ordinance, the Board shall have power upon appeal in specific cases to authorize such variation or modification as may be in harmony with the spirit of the Ordinance, and so that public safety and welfare be secured and substantial justice done. No such variance or modification of the use provisions of this Ordinance shall be granted unless it appears beyond a reasonable doubt that all the following facts and conditions exist:

a. That there are exceptional or extraordinary circumstances or conditions applicable to the property or to its use that do not apply generally to other properties or uses in the same District.

b. That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the vicinity.

c. That the granting of such variance or modification will not be materially detrimental to the public welfare or materially injurious to the property or improvements in District in which the property is located.

d. That the granting of such variance will not adversely affect the purposes or adjectives [sic] of the Zoning Plan of the Township.

Thus, in relevant part, a ZBA has the authority to grant a nonuse variance under MCL 125.3604(7) "[i]f there are practical difficulties[.]"[1] See *New Covert Generating Co, LLC v Twp of Covert*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 348720; 348721); slip op at 13 (noting that "may" designates discretion).

With respect to what constitutes practical difficulties, in *Norman Corp v City of East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004), this Court held that "a practical difficulty . . . cannot be self-created." Duda argues on appeal that *Norman Corp* does not apply in

[1] Although § 1604(3) permits a variance to be granted if "a literal enforcement of the use provisions of th[e] Ordinance would involve practical difficulties *or* cause unnecessary hardships" (emphasis added), practical difficulties under MCL 125.3604(7) relate to nonuse variances and unnecessary hardship pertains to use variances. MCL 125.3604(7). Accordingly, "practical difficulty" is the relevant standard for evaluating whether Duda was entitled to the nonuse variance. See *Whitman v Galien Twp*, 288 Mich App 672, 679; 808 NW2d 9 (2010) (acknowledging that, because municipalities have no inherent zoning power, they can only exercise zoning authority that the State has delegated to them through enabling legislation). This is undisputed on appeal.

this case because the Court in *Norman Corp* analyzed MCL 125.585(9), which was contained in the City and Village Zoning Act (CVZA), MCL 125.581 *et seq*. MCL 125.585(9) provides as follows:

> If there are practical difficulties or unnecessary hardship in carrying out the strict letter of the ordinance, the board of appeals may in passing upon appeals grant a variance in any of its rules or provisions relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures, so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done.

Duda notes that 2006 PA 110 repealed the CVZA and replaced it with the MZEA. See MCL 125.3702(1). However, there is no indication that the Legislature intended for the meaning of "practical difficulties" within the CVZA to vary from the meaning of "practical difficulties" within the MZEA. Indeed, except for the distinction made between use and nonuse variances, MCL 125.3604(7) is substantially similar to the language that was contained in MCL 125.585(9). Therefore, in order for Duda to be entitled to the nonuse variance, the practical difficulty could not have been self-created.

In *Johnson v Robinson Twp*, 420 Mich 115, 126; 359 NW2d 526 (1984),[2] our Supreme Court concluded that the plaintiffs, who were the owners of certain real property, were properly denied an area variance because "the only practical difficulty or hardship [was] one that was produced by the plaintiffs' family." In that case, an ordinance prohibited the construction of buildings on lots that were less than 99 feet wide. *Id*. at 117. The grandfather of one of the plaintiffs owned a lot that was subject to the ordinance. *Id*. Notwithstanding the ordinance, "the family decided to split the grandfather's lot into three smaller parcels." *Id*. This resulted in a parcel that was only 60 feet wide. *Id*. That parcel was later transferred to one of the plaintiffs; both of the plaintiffs then sought a variance to construct a residence on the undersized lot. *Id*. The ZBA denied the request, but the circuit court and this Court concluded that the ZBA erred when it denied the variance request because the plaintiffs had demonstrated a hardship and that "the self-created nature of the lot was irrelevant[.]" *Id*. at 121 (quotation marks omitted). However, our Supreme Court reversed and reinstated the ZBA's denial of the variance, holding:

> The zoning ordinance preceded the division of this property. Thus the plaintiffs' problems were not caused by the township, but were caused by the division. Since, prior to the split, this land was being properly used in conformance with the zoning ordinance, we can see no sense in which the township can be said to have unconstitutionally deprived the plaintiffs of their property rights. On the facts of this case, neither can it be said that the [ZBA] abused its discretion. The facts are undisputed and serve as a competent, material, and substantial evidentiary basis for the decision of the board. [*Id*. at 126.]

[2] This Court is not bound by its opinions issued before November 1, 1990. MCR 7.215(J)(1). However, earlier Court of Appeals cases may nonetheless be persuasive authority. *DC Mex Holdings LLC v Affordable Land LLC*, 320 Mich App 528, 543 n 5; 907 NW2d 611 (2017).

More recently, in *City of Detroit*, 326 Mich App at 251-252, this Court considered whether the Detroit ZBA properly determined that an unnecessary hardship existed where the property owner "purchased the property with knowledge that [an] ordinance banned off-site advertising signs." After considering multiple cases, including *Johnson*, this Court held as follows:

> We conclude that a zoning board must deny a variance on the basis of the self-created hardship rule when a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land *after* the enactment of the applicable zoning ordinance, so as to render it unfit for the uses for which it is zoned . . . . [W]e decline to extend the self-created hardship rule to all instances in which a landowner simply purchases the property with knowledge of an ordinance's applicable restriction. [*Id*. at 261-262.]

Because there was no evidence that the applicant in *City of Detroit* "did anything but purchase the property" with knowledge of the ordinance, this Court upheld the ZBA's decision to grant the variance. *Id*. at 267-268. Additionally, this Court noted that "what little we know about the history of this parcel suggests its unique shape was not rendered unadaptable to any reasonable use until the ordinance was enacted in 1999." *Id*. at 267 (quotation marks omitted).

In this case, the ZBA found that "[o]ne single family residence was previously located towards the center of the zoning lot. The applicant acquired the property in 2015 and removed the structure in approximately 2016." The ZBA concluded that "[t]he need for the variance is self-created by the owner[.]" Additionally, in relevant part, the ZBA found that Duda did not meet the requirements outlined in § 1604(2)(d) and (3). Based on these findings, the ZBA found "that granting the variance would not be in harmony with the spirit of the Ordinance, allow public safety and welfare to be secured, and allow substantial justice to be done." The circuit court affirmed, concluding that Duda created the need for the variance by removing the house that was present on the property when she purchased it and by building a new house at a different location on the property.

We conclude that, contrary to Duda's arguments on appeal, the record supports that the practical difficulty was created by Duda. In the variance application, Duda alleged that:

> The requested variance is necessary for the preservation and enjoyment of a substantial property rights [sic] that all of Applicant's neighbors in the Ramona Park Plat currently enjoy. Strict compliance with portions of the zoning ordinance . . . prevent Applicant from using the Property for the intended purpose of single-family residential, which purpose is otherwise permitted in the RR District.
>
> * * *
>
> Applicant built a single-family residence on the 2 eastern-most lots from the original plat. Applicant situated its single-family dwelling so as to conform to the court ordered setbacks if those 2 lots are allowed to be split. The requested variances are the minimum necessary in order to allow a single family dwelling to be built on the western-most 2 lots in the original plat. All of the other area and use

> requirements of the lot can be satisfied with the construction of a single-family dwelling on the western lot of the proposed lot split other than the area requirement[.]

At the May 2019 public hearing, Dr. Randy Frykberg, who is a zoning consultant, presented a memorandum to the ZBA members. The memorandum provides, in relevant part, as follows:

> 4. There is not adequate area, per [the 2011] Zoning Ordinance requirements, in the established zoning lot to divide it into two zoning lots and have a residence on each.
>
> 5. One single family residence was previously located towards the center of the zoning lot. The applicant acquired the property in 2015 and removed the structure in approximately 2016.
>
> 6. The applicant then constructed a residence on the easterly half of the property.

Although Duda alleges that the 2011 Amendment prevents her from "using the [western portion of the] Property for the intended purpose of single-family residential" home, the fact that a single-family home cannot be built on the portion of the empty lot is the result of Duda's decision to tear down the home that existed in the center of the unified lot and to build a new home on the "2 eastern-most lots." This is unlike the applicant in the *City of Detroit* case, who merely purchased the property with the knowledge that an ordinance banned billboards and then sought a variance. Rather, as noted by the circuit court, the facts in this case are similar to that of *Johnson* given that Duda physically altered the property after the 2011 Amendment went into effect and then sought a variance.[3]

Although Duda argues that other owners of lots around her parcel were permitted to build houses on smaller lots, she does not explain or rationalize how this entitles her to the relief that she seeks. Indeed, Duda has not shown that any of the houses on the smaller lots were built after the 2011 Amendment or that anyone has been allowed to create a nonconforming lot and then build on it. Additionally, the record reflects that Duda knew when she purchased the property that, although the property consisted of four lots, the property was considered one parcel and limited to one single-family residence. Nonetheless, Duda attempts to avoid the 2011 Amendment by arguing that, even though she knew that she was limited to one home on the property, she should be permitted to split the parcel to build another home because all the homes around her home are on small parcels. What Duda's argument ignores is that the 2011 Amendment was adopted to prevent exactly this scenario. At the May 2019 hearing, the township supervisor noted that giving

[3] Duda argues that, if she "had rebuilt her home in the exact same location as the house she demolished, she could have requested a variance to build a house on either one of the other two lots." However, this argument disregards the fact that this is not the course of action taken by Duda. Regardless of what Duda could have done, the fact of the matter is that Duda removed the existing house and building a new house on the eastern lots.

Duda a variance to split her property and to build a second single-family residence in violation of the 2011 Amendment would be contrary to the purpose of the amendment, i.e., to preserve the Township's desire for lower density and more open space, and would potentially nullify the 2011 Amendment.

In sum, the ZBA had authority to grant Duda the nonuse variance had she not created the practical difficulty. Because the record evidence establishes that Duda created the practical difficulty, the ZBA lacked authority to grant the variance. Consequently, the circuit court did not err by affirming the ZBA's decision to deny Duda's variance request. Duda's arguments that the ZBA improperly applied § 1604(3) and that the ZBA failed to make sufficient findings of fact based on the record evidence concerning the factors listed in § 1604(2)(d) when denying her request are therefore moot.

Affirmed.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford