STATE OF MICHIGAN

COURT OF APPEALS

PETER SWIECICKI, SUSAN WARD, MYRON LEMECHA, BRENDA J. NATION, JOSEPH UMLAUF, M. NATACHA UMLAUF,

Plaintiffs-Appellants,

v

CITY OF DEARBORN and DA'FISH ENTERPRISES, INC.,

Defendants-Appellees.

UNPUBLISHED
September 12, 2006

No. 262892
Wayne Circuit Court
LC No. 04-435052-AA

PETER SWIECICKI, SUSAN WARD, MYRON LEMECHA, BRENDA J. NATION, JOSEPH UMLAUF and NATACHA M. UMLAUF,

Plaintiffs-Appellees,

v

CITY OF DEARBORN and DA'FISH ENTERPRISES,

Defendants-Appellants.

No. 263066
Wayne Circuit Court
LC No. 04-438113-AA

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

In Docket No., 262892, plaintiffs appeal the trial court's order that affirmed the Dearborn Zoning Board of Appeals' grant of a nonuse variance to defendant, Da'Fish Enterprises. In Docket No. 263066, plaintiffs appeal the trial court's order that granted summary disposition to Da'Fish on plaintiffs' claim that the Dearborn city council erroneously granted a lot split for property owned by Da'Fish.

These consolidated cases involve property to which the parties refer as Lot D or Parcel D in a residential neighborhood in Dearborn. Da'Fish Enterprises bought Lot D in 2001 and planned to develop it into four lots for single-family homes. Plaintiffs own residential lots near

the disputed property and object to both the lot split and the building of homes that do not abut a public road as required by a local ordinance. The Zoning Board of Appeals (ZBA) granted Da'Fish a variance to permit access to the lots by a private road. Thereafter, the city council granted Da'Fish's request to split Lot D into four separate lots. Plaintiffs appealed the city council's lot split and the ZBA's grant of a variance in two actions in the circuit court and the court affirmed both decisions.

II. Variance

Plaintiffs contend that the ZBA erroneously granted Da'Fish a variance from an ordinance that requires residential lots to abut a public road, Dearborn Zoning Ordinance (DZO) 2.10.B. Specifically, plaintiffs maintain that the trial court erred by granting a nonuse rather than a use variance and that no variance should have been granted because (1) the condition resulting in the need for the variance was self-created, and (2) the grant amounts to a de facto amendment of the Dearborn zoning ordinance. This Court reviews questions of law in zoning cases de novo. *Bell River Assoc v China Twp*, 223 Mich App 124, 129; 565 NW2d 695 (1997). An appellate court's review of a decision by a ZBA is controlled by MCL 125.585(11), which provides:

> The decision of the board of appeals shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal the circuit court shall review the record and decision of the board of appeals to insure that the decision:
>
> (a) Complies with the constitution and laws of this state.
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> (b) Is based upon proper procedure.
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> (c) Is supported by competent, material, and substantial evidence on the record.
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> (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

This Court must review the circuit court's decision de novo, but must also give "great deference" to the findings of the circuit court and ZBA. *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004), citing *Cryderman v Birmingham*, 171 Mich.App 15, 20; 429 NW2d 625 (1988). However, this Court only defers to the ZBA's findings of fact if they are supported by competent, material, and substantial evidence on the record. *The Jesus Ctr v Farmington Hills Zoning Bd of Appeals*, 215 Mich App 54, 60; 544 NW2d 698 (1996).

A. Nonuse v Use Variance

We hold that the ZBA and circuit court properly treated Da'Fish's request as one for a nonuse variance from DZO 2.10.B which requires that "[t]he front lot line of all lots shall abut onto a publicly dedicated road right-of-way." As this Court explained in *Nat'l Boatland v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985):

> Variances fall within one of two categories: use variances or non-use variances. Use variances permit a use of the land which the zoning ordinance otherwise proscribes. Non-use variances are not concerned with the use of the land but, rather, with changes in a structure's area, height, setback, and the like. *Heritage Hill Ass'n, Inc v Grand Rapids*, 48 Mich App 765, 768; 211 NW2d 77 (1973). Non-use variances also include "the right to enlarge nonconforming uses or alter nonconforming structures." 3 Rathkopf, The Law of Zoning and Planning, (4th ed, 1979) p 38-1.

The DZO also expressly defines a "use variance" as "a variance to permit a use not otherwise permitted within a zoning district. . . ." DZO 32.05.C.2. "Although the grant of a land use variance cannot change the zoning district classification or amend the zoning ordinance, the effect of a land use variance is similar to rezoning because variances typically run with the land." *Paragon Props Co v Novi*, 452 Mich 568, 575; 550 NW2d 772 (1996).[1]

Lot D is zoned residential and Da'Fish's proposed construction of four single-family dwellings is consistent with that use. Because Da'Fish's proposed use is permitted within the zoning district, Da'Fish was not required to seek a "use" variance, the effect of which would be similar to rezoning. *Paragon Props, supra* at 575. Rather, Da'Fish's request to build a private, rather than a public road was more akin to a variance of "area, height, setback, and the like." See *Nat'l Boatland*, *supra* at 387. Accordingly, the ZBA and circuit court properly treated this as a request for a nonuse variance.

B. Grant of Variance and Circuit Court Affirmance

We further hold that the ZBA correctly granted Da'Fish's variance request and that the circuit court correctly affirmed that decision. Pursuant to DZO 32.05.C.2, the ZBA has the following power to authorize a nonuse variance:

> Where there are practical difficulties preventing a property owner from conforming with the strict letter of the [DZO], the [DZBA] shall have the power to authorize variances from the standards in these regulations, with such conditions and safeguards as it may determine to be necessary so that the spirit of these regulations is observed, public safety secured, and substantial justice done.[2]

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[1] We note that a nonuse variance is also referred to as an "area" or "dimensional" variance. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 577; 609 NW2d 593 (2000); *Frericks v Highland Twp*, 228 Mich App 575, 582-583 and n 2; 579 NW2d 441 (1998); *Nat'l Boatland*, *supra* at 383 n 1.

[2] DZO 32.05.F provides a list of factors to be considered when determining whether to grant a variance or appeal, only one of which must be found by the DZBA: practical difficulties, substantial justice, public safety and welfare, extraordinary circumstances, preservation of property rights, no safety hazard, no impact on land values, neighborhood character, light and

(continued…)

The DZO was enacted in compliance with MCL 125.585(9), which provides:

> 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.

Practical difficulty and unnecessary hardship exist when the denial of the variance would deprive the landowner of the use of his or her property or compliance with the ordinance would be unnecessarily burdensome. This Court opined in *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002):

> To conclude that a property owner has established unnecessary hardship, a zoning board of appeals must find on the basis of substantial evidence that (1) the property cannot reasonably be used in a manner consistent with existing zoning, (2) the landowner's plight is due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) a use authorized by the variance will not alter the essential character of a locality, and (4) the hardship is not the result of the applicant's own actions. *Johnson v Robinson Twp*, 420 Mich 115, 125-126; 359 N.W.2d 526 (1984); *Puritan-Greenfield Improvement Ass'n v Leo*, 7 Mich App 659, 672-673, 677; 153 NW2d 162 (1967).

As reflected by the fourth factor, a practical difficulty or unnecessary hardship cannot be self-created. *Norman Corp*, *supra* at 202, citing *Cryderman*, *supra* at 21. The DZO also specifically defines "practical difficulties" that support a variance request:

> Compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk, density, or other dimensional provisions would create practical difficulties, unreasonably prevent the use of the property for a permitted purpose, or render conformity with such restrictions unnecessarily burdensome. The showing of mere inconvenience is insufficient to justify a variance. [DZO 32.05.F.1.a.]

We agree with Da'Fish, the ZBA, and the circuit court that compliance with DZO 2.10.B would impose practical difficulty and would amount to an unnecessary hardship to Da'Fish. The front lot line of Lot D does not abut a public road. If a variance were not granted to allow the construction of a private road, Lot D could never be developed for any purpose. And despite the single-family residential zoning designation, Da'Fish could not construct one house on the property without a variance for a private road.[3] Further, the grant of the variance would result in

(…continued)

air, promotes orderly development, traffic flow, no nuisance impacts, impact on adjacent properties, relationship to adjacent land uses, and relationship to master plan policies.

[3] Compare *Norman Corp*, *supra* at 203 (finding that compliance with a zoning ordinance limiting (continued…)

substantial justice to Da'Fish. Da'Fish bought the property with the deeded easement to allow its construction of residential homes in a residential neighborhood. If unable to use that easement, Da'Fish will have no economically viable use of the land because no development could occur on the property.

We also conclude that the difficulty is unique to this property. As this Court explained in *Janssen*, *supra* at 204:

> The requirement that the landowner's plight be due to unique circumstances does not mean that the circumstances must exclusively affect only the single landowner. . . . Rather, "the courts have repeatedly emphasized that the hardship to be unique is 'not shared by *all* others,'" *Beatrice Block Club Ass'n v Facen*, 40 Mich App 372, 381; 198 NW2d 828 (1972); quoting *Tireman-Joy-Chicago Improvement Ass'n v Chernick*, 361 Mich 211, 216; 105 NW2d 57 (1960) (emphasis supplied by *Facen* Court). [*Janssen*, *supra* at 204.]

Though plaintiffs contend that an owner of any piece of landlocked property would be in a similar situation, no other property owner has sought a variance from DZO 2.10.B since its enactment in 1993 which suggests that the circumstances here are unique.

We further agree with the ZBA and the circuit court that Da'Fish's need for the variance was not self-created and that the cases cited by plaintiffs are not applicable. In *Johnson*, *supra* at 115, our Supreme Court reinstated a ZBA's denial of a variance request to build a home on a substandard size lot. The plaintiff's grandfather had originally owned one large lot and he split the lot into three parcels, one of which the plaintiff inherited. *Id.* at 117. However, when the lot split occurred and when the plaintiff inherited the land, a zoning ordinance stated that homes could only be constructed on larger lots. *Id.* at 118. Our Supreme Court ruled that the plaintiff's grandfather created the "practical difficulties" when he divided the property into substandard parcels. *Id.* at 126. Similarly, in *Cryderman*, *supra* at 15, this Court also agreed with the local ZBA that the plaintiff's hardship was self-created and, therefore, a variance was inappropriate. This Court concluded that the plaintiffs created their alleged hardship when they divided their property in a nonconforming manner and contrary to the zoning ordinance, which was in force before the plaintiffs ever purchased the land. *Id.* at 21-22.

Here, the original Lot D was divided into lots A, B, C and D before the enactment of the zoning ordinance that requires the front lot line of all lots to abut a public road. Accordingly, unlike *Johnson* and *Cryderman*, the retention of an access easement was legal when the division was made.[4] Further, the unique topography that separates Lot D from Outlot A–a ravine and a creek–was not created by Da'Fish or its predecessors-in-interest.[5]

(…continued)

the size of company signs did not amount to a practical difficulty because the plaintiff could continue to use its building for the same purpose as it had before the variance denial).

[4] Plaintiffs also rely on *Bevan v Brandon Twp*, 438 Mich 385; 475 NW2d 37 (1991), a takings case. By its own language, however, *Bevan* is not applicable to this case. Here, unlike in *Bevan*, no party has alleged that initial division of the property into four distinct segments – Lot 6,

(continued…)

Plaintiffs maintain that the grant of the variance effectively amounts to an amendment of the zoning ordinance by eliminating the requirement that lots abut a public street. See *Paragon Props*, *supra* at 575. However, nothing in the DZO indicates that the ZBA may not grant a variance to allow the construction of a private road. Compare *Janssen*, *supra* at 199 (in which the party was allowed to request a use variance, rather than seek rezoning of a large parcel of land because the township variance ordinance made no limitation based on size). In fact, in the same section that sets forth the public road limitation, the DZO contemplates that private roads may exist within the city. DZO 2.10.G ("To assure the completion of a private road or service road in conformance with [safety] standards. . . ."). Moreover, the city maintained safety standards for the construction of private roads and the city's engineering division shared this information with Da'Fish in 2001, eight years after DZO 2.10.B was enacted.

For the reasons stated, the ZBA's decision to grant Da'Fish's requested variance from DZO 2.10.B was supported by competent, material, and substantial evidence on the record and was a reasonable exercise of discretion. The evidence revealed that Lot D had access to a public road only through a dedicated easement since the enactment of zoning ordinance 93-383 and could not practically access West Lane across Outlot A. Moreover the development would add four new luxury homes to this neighborhood and, thus, there is no evidence that the development would negatively impact the community.

II. Lot Split

A. Administrative Appeal

Plaintiffs assert that the trial court erroneously considered their complaint that challenged the city council's lot split as an administrative appeal.

(…continued)

Outlot A, Outlot B, and Lot D – was contrary to law and neither party argues that a taking has occurred. Accordingly, plaintiffs' reliance on *Bevan* is misplaced.

[5] We also agree with the circuit court that Da'Fish presented Dearborn with appropriate site plans with its variance request. When applying for a variance in the city of Dearborn, an applicant must include a "plot plan," which includes the (1) applicant's name and contact information, (2) the property identification number, scale, north point, and dates of submissions and revisions, (3) the zoning classification of the parcel and all neighboring parcels, (4) existing lot lines, building lines, structures, driveways, and other improvements within 50 feet of the site, (5) when requesting a dimensional variance, verified measurements of the existing conditions and the calculations for which the variance is sought, and (6) any additional information the planning commission or DZBA may need in reviewing the plans. DZO 35.05.E.2.

Da'Fish submitted three "site improvement plan" maps to the city with its request for a variance. A review of these maps reveals that Da'Fish included all the necessary information for a "plot map," including the proposed lot divisions and the outline of the proposed homes. More detailed construction was unnecessary for the city's initial determination to allow the private road variance.

We disagree with plaintiffs' argument that this case could only be an administrative appeal if the ZBA reviewed the city council's decision because the ZBA did not have jurisdiction to hear an appeal from the city council's decision. "A township board of appeals possesses only those powers invested in it by statute or ordinance." *Frericks v Highland Twp*, 228 Mich App 575, 582 n 1; 579 NW2d 441 (1998). The same is true for a city ZBA. DZO 33.04.F provides the following jurisdiction to the Dearborn ZBA:

> The ZBA shall act on all questions as they may arise in the administration of *the Zoning Ordinance,* including the interpretation of the zoning district map. The ZBA shall also hear and decide appeals from and review any order, requirements, decision, or determination made by an administrative official or body charged with enforcement of *this Ordinance*. The ZBA shall also hear and decide matters referred to them or upon which they are required to pass under *this Ordinance*. In doing so, the ZBA may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal is taken and may issue or direct the issuance of a permit. The ZBA shall not have the power to alter or change the zoning district classification of any property. [Emphasis added.]

The ZBA has no authority to review the city council's decisions rendered pursuant to the Dearborn Subdivision Ordinance at issue. The subdivision ordinance is not the zoning ordinance named in the DZO, but is a separate, independently enacted ordinance over which the ZBA has no control or review. Further, the subdivision ordinance was enacted to "carry out the provision[s]" of the Land Division Act, referenced by its former title "the Subdivision Control Act of 1967." DSO § 1. Moreover, the subdivision ordinance does not provide for review by the ZBA of the city council's determinations under the ordinance, but requires the city's planning commission to review a landowner's request and make a recommendation for the city council's final approval. DSO § 11.4.

That the ZBA lacks jurisdiction to hear an appeal of a decision about the subdivision ordinance does not, however, mean that plaintiffs' challenge to the division of Lot D, under either the Land Division Act or the subdivision ordinance, cannot sound as an administrative appeal. Rather, the determination depends upon whether the city council's decision was an administrative or legislative function.

In *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 197; 550 NW2d 867 (1996), the plaintiff submitted a special use permit application to the township board to construct a gun club on its property. The township board denied that application and the township's zoning ordinance did not provide for an appeal of that decision to the local ZBA. *Id.* Accordingly, the plaintiff filed a civil action against the township to challenge the board's denial of its application for a special use permit and it also alleged that the zoning ordinance was unconstitutional. *Id.* The township filed an interlocutory appeal to this Court for a determination of the appropriate method of appeal and standard of review when a local zoning ordinance does not provide for an appeal to a local ZBA. *Id.* at 198.

In considering the issue, the Court in *Carleton* focused on the appellate procedures set forth in MCL 125.293a, which is identical to MCL 125.585(11)-(13) but applies to the review of

a township's final zoning decision rather than that of a city. In *Carleton*, as in this case, an aggrieved party was entitled to appeal a final decision of the township (or city) ZBA to the circuit court. *Id.* at 200. Because the ordinance providing for the township board's approval of special use permits did not provide for review by the ZBA, the board's decision was final and subject to circuit court review pursuant to Const 1963, art 6, § 28. *Carleton*, *supra* at 200. The *Carleton* Court reasoned:

> Art 6, § 28 provides as follows:
>
> > "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record."
>
> The decision of the township board comes within the purview of this constitutional provision, and the trial court should have reviewed the township board's decision under it. . . . The circuit court is the proper court to review the township board's denial because the circuit courts have appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law. Const 1963, art 6, § 13.
>
> A hearing was required regarding plaintiff's request for a special land-use permit, and, thus, the circuit court's review should have been to determine if the township board's decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. [*Carleton*, *supra* at 200-201.][6]

In such cases, the circuit court sits "as a court of appellate jurisdiction," rather than "as a court of original jurisdiction." *Id.* at 201. Relying on *Macenas v Village of Michiana*, 433 Mich 380; 446 NW2d 102 (1989), which was based on MCL 125.585(11), this Court found that the "cause of action" to the circuit court was only one for appellate review, and not for an independent cause of action. *Carleton*, *supra* at 201-202.

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[6] MCL 600.631 similarly provides: "An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court."

We note that none of our courts have decided whether a city council or other local municipal body is acting in a legislative, executive, or administrative capacity when deciding whether a petitioner may divide his or her land under the Land Division Act or local ordinance enacted under the Land Division Act. This Court and our Supreme Court have ruled that a city council's consideration of the zoning or rezoning of land is a legislative function. *Schwartz v Flint*, 426 Mich 295, 307-308; 395 NW2d 678 (1986); *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000). A party aggrieved by a city council's zoning or rezoning determination may challenge the constitutionality of that action as an original action in the circuit court. *Sun Communities*, *supra* at 669-670. This Court has ruled, on the other hand, that the review of site plans and the approval of special use permits are administrative in nature. *Id.* at 669. However, this Court has also held that, where the city council is given the discretion to review the issue de novo and accept or reject the recommendations of the planning commission in the ordinance, the council's power is, instead, legislative. *Hesse Realty, Inc v Ann Arbor*, 61 Mich App 319, 323-324; 232 NW2d 695 (1975).

Here, DSO § 11.4 provides that the city council "may" approve the division of a previously platted lot "after report and recommendation from the City Plan Commission." Although neither party presented any evidence regarding the planning commission's review, plaintiffs do not challenge Da'Fish's contention on appeal that the planning commission unanimously recommended approval of its proposed land division. Da'Fish further contends that plaintiffs initially presented their objections to the planning commission, which then scheduled the matter for rehearing. Following that rehearing, the commission again recommended approval and forwarded the issue to the city council. Plaintiffs also appeared before the city council to voice their objections. Though the city council has discretion in approving a lot division, we hold that the decision is administrative in nature because the treatment of such requests involves a review of site plans and proposed developments, much like a planning commission, with the decision to grant a lot division, which is akin to a variance or special use permit.[7]

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[7] The circuit court also correctly dismissed the independent claims in plaintiffs' amended complaint. Contrary to plaintiffs' assertion, in *Soupal v Shady View, Inc*, 469 Mich 458; 672 NW2d 171 (2003), our Supreme Court never expressly considered the propriety of the plaintiffs filing a nuisance claim against the association in a general civil action. Further, in *Soupal*, there is no indication in that case that the association ever sought a variance from the township. Moreover, while the use of land in violation of a zoning ordinance is a nuisance per se, MCL 125.587, the ordinance at issue is not a zoning ordinance.

Furthermore the circuit court correctly dismissed plaintiffs' claims for superintending control or a writ of mandamus. If the proper remedy of a city action is through administrative appeal, the aggrieved party may not bring an action for superintending control. MCR 3.302(B); *Krohn v Saginaw*, 175 Mich App 193, 197; 437 NW2d 260 (1988). If a claim for superintending control is brought in such an appeal, it must be dismissed. MCR 3.302(D)(2). Moreover, if the city's action with regard to a request is discretionary, such as the grant or denial of a variance, a writ of mandamus is not an appropriate remedy. *Dowerk v Oxford Twp*, 233 Mich App 62, 74; 592 NW2d 724 (1998). Because the city council has discretion in granting a lot division request under DSO § 11.4, a writ of mandamus would be inappropriate.

Plaintiffs assert that the lot split violates the Land Division Act because, under the act, a "parent tract" or "parent parcel" of less than ten acres may not be divided into more than four parcels without platting. MCL 560.108(2)(a). Pursuant to MCL 560.108, the following kind of division is not subject to the platting requirements of the Land Division Act:

> (2) Subject to subsection (3), the division, together with any previous divisions of the same parent parcel or parent tract, shall result in a number of parcels not more than the sum of the following, as applicable:
>
> (a) For the first 10 acres or fraction thereof in the parent parcel or parent tract, 4 parcels.

Accordingly, if a parent parcel is divided four times or less, a landowner need not comply with the platting provisions of the Land Division Act. Several of the terms in section 108 are defined in MCL 560.102 as follows:

> (d) "Division" means the partitioning or splitting of a *parcel or tract* of land by the proprietor thereof or by his or her heirs, executors, administrators, legal representatives, successors, or assigns for the purpose of sale, or lease of more than 1 year, or of building development that results in 1 or more parcels of less than 40 acres or the equivalent, and that satisfies the requirements of sections 108 and 109. Division does not include a property transfer between 2 or more adjacent parcels, if the property taken from 1 parcel is added to an adjacent parcel; and any resulting parcel shall not be considered a building site unless the parcel conforms to the requirements of this act or the requirements of an applicable local ordinance. [Emphasis added.]
>
> * * *
>
> (g) "Parcel" means a continuous area or acreage of land which can be described as provided for in this act.
>
> (h) "Tract" means 2 or more parcels that share a common property line and are under the same ownership.
>
> (i) "Parent parcel" or "parent tract" means a parcel or tract, respectively, lawfully in existence on the effective date of the amendatory act that added this subdivision [March 31, 1997].

"Lot" and "outlot" are defined separately from "tract" and "parcel" in the Land Division Act and are not separately included in the definition of "division."

> (m) "Lot" means a measured *portion of a parcel or tract* of land, which is described and fixed in a recorded plat.
>
> (n) "Outlot", when included within the boundary of a recorded plat, means a lot set aside for purposes other than a development site, park, or other land

> dedicated to public use or reserved to private use. [MCL 560.102 (emphasis added).]

As noted, Da'Fish bought Lot D in 2001 and it was previously owned, along with Outlot A, Outlot B, and Lot 6 by the Frances ImOberstag Trust. Plaintiffs contend that the city council and circuit court were required to consider all the property owned by the trust on March 31, 1997, as one parent parcel or tract. Because that parent parcel had already been divided into four parcels—Lot D and the various divisions of Outlot A—plaintiffs contend that Da'Fish was limited to the division limitations in MCL 560.108(5):

> (5) A parcel or tract created by an exempt split or a division is not a new parent parcel or parent tract and may be further partitioned or split without being subject to the platting requirements of this act if *all* of the following requirements are met:
>
> (a) Not less than 10 years have elapsed since the parcel or tract was recorded.
>
> (b) The partitioning or splitting results in not more than the following number of parcels, whichever is less:
>
> (i) *Two parcels for the first 10 acres* or fraction thereof in the parcel or tract plus 1 additional parcel for each whole 10 acres in excess of the first 10 acres in the parcel or tract.
>
> (ii) Seven parcels or 10 parcels if one of the resulting parcels under this subsection comprises not less than 60% of the area of the parcel or tract being partitioned or split.
>
> (c) The partitioning or splitting satisfies the requirements of section 109. [Emphasis added.]

We agree that, pursuant to the above definitions, Lot D and Outlot A were separate "parcels" on March 31, 1997, because each was an individually described piece of land. Lot D was also clearly a "lot." Though part of the larger Lot 12 in the McReynold's and O'Flynn's Subdivision, it had been treated as an individual piece of property for decades. Lot D is and was a measured parcel of land within a platted subdivision. We also agree that a "lot" is a "parcel" because the term "parcel" is included in its definition. As such, a "lot" can be subjected to the division limitations of the Land Division Act. An "outlot" is also a "lot" and, therefore, a "parcel."

Plaintiffs are also correct that Outlot A and Lot D were part of a "parent tract" that also included Outlot B and Lot 6, on March 31, 1997, because the trust did not separate the parcels and transfer them to other owners until 1998. Accordingly, Outlot A and Lot D were under the same ownership and shared a common property line. There is no exception to this definition for a parent tract that stretches across two separately platted subdivisions or where the properties are divided by topographical features such as a ravine. As this Court observed in *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003):

> [T]his Court should generally not speculate about the Legislature's intent beyond the words actually used in the statute. *In re MCI*, 460 Mich 396[, 414-415; 596 NW2d 164 (1999)]; *Michigan State Bldg & Construction Trades Council v Dep't of Labor Director*, 241 Mich App 406, 411; 616 NW2d 697 (2000). Specifically, this Court should assume that an omission was intentional. *Cherry Growers, Inc v Agricultural Marketing [&] Bargaining [Bd]*, 240 Mich App 153, 170, 610 NW2d 613 (2000).

As a "parent tract," plaintiffs correctly argued that the division of Lot D must comply with the platting requirements of the Land Division Act.[8] In 1999, the trust's successor-in-interest of Outlot B transferred its interest to Michael and Beverly Ann Krug. Outlot A was divided into four separate parcels and transferred to new owners in 1999 and 2001. The developer who purchased the land from the trust also separated and sold Lot 6 in 2000. Were we to disregard the transfers of Outlot B and Lot 6, Outlot A was already divided four times without the submission of a plat for the city's approval. Accordingly, any further division of the parent tract is subject to the platting requirements of the Land Division Act. Therefore, without complying with the platting requirements, Da'Fish could only divide Lot D into two parcels pursuant to MCL 560.108(5)(b)(i).[9]

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[8] Our treatment of the trust's contiguous property on March 31, 1997, as a "parent tract" is also consistent with our Supreme Court's decision in *Sotelo v Grant Twp*, 470 Mich 95; 680 NW2d 381 (2004), in which our Supreme Court held that a parent parcel or tract in existence on March 31, 1997, keeps its identity for purposes of the Land Division Act.

[9] We disagree with Da'Fish that, under MCL 560.263, Dearborn could disregard the provisions of MCL 560.108 and MCL 560.109 and divide the property consistent only with the Dearborn Subdivision Ordinance (DSO). MCL 560.263 provides:

> No lot, outlot or other parcel of land in a recorded plat shall be further partitioned or divided unless in conformity with the ordinances of the municipality. The municipality *may* permit the partitioning or dividing of lots, outlots or other parcels of land into not more than 4 parts; however, any lot, outlot or other parcel of land not served by public sewer and public water systems shall not be further partitioned or divided if the resulting lots, outlots or other parcels are less than the minimum width and area provided for in this act. [Emphasis added.]

The Land Division Act allows a municipality some control over land division decisions. However, MCL 560.263 does not indicate that a municipality may ignore the other provisions of the Land Division Act in making these determinations.

Furthermore, while MCL 560.263 permissively grants a municipality the discretion to make these decisions, MCL 560.108 and MCL 560.109 require adherence to their strictures, i.e., a division "shall not" result in more than the maximum allowed parcels, MCL 560.108(2), and an application for a land division "shall be approved" if the requesting party meets the requirements of the Land Division Act, MCL 560.109(1). Accordingly, the DSO does not trump the Land Division Act.

(continued…)

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens

(…continued)

Moreover, there is no indication in the DSO that the city council may approve a division in contravention of the Land Division Act. As noted previously, any person wishing to "further divide" previously platted lots may only divide the lot into not more than four parcels pursuant to DSO § 11.1. When the divided lots do not meet the minimum lot requirements for the zoning classification, the city council must meet the following standard of review:

> Where there are unusual or unique circumstances, the Common Council, after report and recommendation from the City Plan Commission, may approve division of lots into two, three or four parts when resulting parcels are less than original size of lots and when resulting parcels do not satisfy minimum lot requirements of this ordinance. The report of the City Plan Commission must indicate that the proposed division of a platted lot would allow the development of the land in such a manner as to be compatible with surrounding land use and development and not contrary to the spirit and purpose of this ordinance and the Zoning Ordinance, or that the property is presently developed and the proposed division creates parcels conforming to existing individual building units. [DSO § 11.4.]

In fact, the DSO specifically states that it was enacted "to carry out the provision of" the Land Division Act. DSO §§ 1, 2.1. Accordingly, the classification of Lot D pursuant to the DSO or DZO is irrelevant to this appeal.