STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY HILLS RACQUET & HEALTH CLUB, LTD, doing business as BEVERLY HILLS CLUB, Appellant,	UNPUBLISHED June 27, 2024
v	No. 361202 Oakland Circuit Court
VILLAGE OF BEVERLY HILLS ZONING BOARD OF APPEALS, Appellee.	LC No. 2021-190294-AA

Before: MALDONADO, P.J., and PATEL and HOOD, JJ.

PER CURIAM.

Appellant, the Beverly Hills Racquet & Health Club, Ltd, doing business as the Beverly Hills Club (BHC), appealed in the circuit court a decision by appellee, the Beverly Hills Zoning Board of Appeals (hereinafter: "the board"), granting two zoning variances to Kellie McDonald and The Goddard School of Beverly Hills (GSBH) (collectively: "the applicants"). The circuit court dismissed BHC's appeal on standing grounds, and BHC now appeals by leave granted.[1] We reverse.

I. BACKGROUND

At issue in this case is a plot of land located in Beverly Hills, Michigan and owned by Phil Vestevich. McDonald is interested in purchasing the land for a mixed-use development, which would include retail space and a childcare facility. The childcare facility is the source of this dispute because McDonald sought, and received, multiple zone variances in order to proceed; the plans did not provide the amount of outdoor play area required by Beverly Hills Municipal Code, § 22.08.370(b), or adequate separation from another licensed childcare facility as required by Beverly Hills Municipal Code, § 22.08.370(c). BHC opposed the development because the

[1] *Beverly Hills Racquet & Health Club v Beverly Hills Zoning Bd*, unpublished order of the Court of Appeals, entered January 19, 2023 (Docket No. 361202).

childcare center would be located 280 feet from its entrance, far short of the 1,200 feet required by the ordinance. According to BHC, the proximity of this childcare facility would harm its economic interests. The board granted the variances over BHC's objections. BHC appealed the board's decision in the circuit court, but the board contended that BHC lacked standing to appeal. In addition to arguments pertaining to the merits, BHC asserted that the applicants lacked standing to seek zoning variances. The circuit court determined that BHC lacked standing to appeal the board's decision to grant the variance and summarily dismissed its appeal without reaching the merits of the underlying decision.

This appeal followed.

II. STANDING

BHC argues that the circuit court erred by concluding that it did not have standing to contest the variances. We agree.

A. STANDARDS OF REVIEW

Whether a party has standing is a question of law reviewed de novo. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). We likewise review de novo any underlying issues regarding the interpretation and application of any relevant statutes and ordinances. *Zaher v Miotke*, 300 Mich App 132, 140; 832 NW2d 266 (2013). The principles of statutory construction apply when construing an ordinance. *Norman Corp v City of East Tawas*, 263 Mich App 194, 206; 687 NW2d 861 (2004). The goal of interpreting statutes and ordinances "is to discern and give effect to the intent of the legislative body." *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407-408; 761 NW2d 371 (2008). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 410; 987 NW2d 501 (2022).

B. GOVERNING LAW

MCL 125.3604(1) provides that "[a]n appeal to the zoning board of appeals may be taken by *a person aggrieved* . . . ." MCL 125.3605 provides that, after the zoning board makes a decision, "[a] party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under [MCL 125.3606]." MCL 125.3606(1), in turn, provides:

> 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:
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> (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.[2]

"Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Barak v Drain Comm'r for County of Oakland*, 246 Mich App 591, 597; 633 NW2d 489 (2001).

Our Supreme Court recently outlined factors for determining who is a "party aggrieved" by a zoning decision, in *Saugatuck Dunes Coastal Alliance v Saugatuck Twp*, 509 Mich 561, 595; 983 NW2d 798 (2022).[3]

First, the appellant must have participated in the challenged proceedings by taking a position on the contested decision, such as through a letter or oral public comment.

Second, the appellant must claim some legally protected interest or protected personal, pecuniary, or property right that is likely to be affected by the challenged decision.

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[2] Beverly Hills Municipal Code, § 22.38.030 borrows language from this statute, providing a right to appeal to the BHZBA to "any person, firm or corporation aggrieved . . . by any decision of the Building Official."

[3] Although not raised by the parties, we must first determine if *Saugatuck Dunes* has retroactive effect. The Michigan Supreme Court did not issue its opinion until July 2022, but the circuit court resolved the BHC's appeal in April 2022. "[T]he general rule is that judicial decisions are to be given complete retroactive effect. We have often limited the application of decisions which have overruled prior law or reconstrued statutes. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *McNeel v Farm Bureau Gen Ins Co*, 289 Mich App 76, 94; 795 NW2d 205 (2010) (quotation marks and citation omitted). In *Saugatuck Dunes*, the Supreme Court did not overrule clear and uncontradicted precedent. Rather, it "set Michigan zoning law back on its proper trajectory" because "the term 'aggrieved' in the MZEA ha[d] become inappropriately intertwined with real-property ownership" over time. *Saugatuck Dunes*, 509 Mich at 585-586. The Court also stated: "In light of the modest clarification to the law that this opinion makes and the breadth of existing precedent that has been retained, we disagree with the dissent's suggestion that this decision will cause confusion or 'upend decades of stability in Michigan zoning law.' " *Id*. at 597 (alteration omitted). The Supreme Court's statements in *Saugatuck Dunes* make clear that the opinion must be given full retroactive effect.

> Third, the appellant must provide some evidence of special damages arising from the challenged decision in the form of an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the effects on others in the local community. [*Id*. at 595.]

The third prong of the *Saugatuck* test—special damages—is the focal point of this dispute. The Court explained the third criteria in further detail:

> We use "others in the local community" to refer to persons or entities in the community who suffer no injury or whose injury is merely an incidental inconvenience and *exclude* those who stand to suffer damage or injury to their protected interest or real property that derogates from their reasonable use and enjoyment of it. Factors that can be relevant to this final element of special damages include but are not limited to: (1) the type and scope of the change or activity proposed, approved, or denied; (2) the nature and importance of the protected right or interest asserted; (3) the immediacy and degree of the alleged injury or burden and its connection to the challenged decision as compared to others in the local community; and (4) if the complaining party is a real-property owner or lessee, the proximity of the property to the site of the proposed development or approval and the nature and degree of the alleged effect on that real property. [*Id*. at 595-596.]

The Court cautioned against finding concerns to be merely general in nature to avoid addressing the merits:

> It also remains true that *generalized* concerns about traffic congestion, economic harms, aesthetic harms, environmental harms, and the like are not sufficient to establish that one has been aggrieved by a zoning decision. But we caution courts and zoning bodies against an overbroad construction of allegations as mere generalizations to avoid addressing the merits of an appeal. While *generalized* concerns are not sufficient, a specific change or exception to local zoning restrictions might burden certain properties or individuals' rights more heavily than others. A party who can present some evidence of such disproportionate burdens likely will have standing to appeal under MCL 125.3605 and MCL 125.3606. [*Id*. at 597 (citations omitted).]

The Supreme Court provided some clarity on the *Saugatuck* test's requirement of special damages when it decided *Tuscola Area Airport Auth v Mich Aeronautics Comm*, 511 Mich 1024; 991 NW2d 581 (2023). In *Tuscola*, the Supreme Court applied the *Saugatuck* aggrieved person test in the context of the Tall Structure Act, MCL 259.481 *et seq*., and it concluded that an airport had standing to challenge permits issued for the construction of wind turbines. *Id*. The Supreme Court handled the matter in a summary order, so examination of this Court's opinion is also necessary.

The airport put forth three explanations for why it was an aggrieved party entitled to challenge the permits: "loss of revenue to the airport caused by fewer pilots using the airport, injury to its safety interests resulting from alteration of flight paths 'to a steeper and riskier approach angle' resulting from the building of the turbines, and revocation of federal grants by the FAA."

Tuscola Area Airport Zoning Bd of Appeals v Mich Aeronautics Comm, 340 Mich App 760, 779; 987 NW2d 898 (2022), rev'd in part *Tuscola Area Airport Authority*, 511 Mich at 1024. The Supreme Court concluded, contrary to the Court of Appeals holding, that the airport alleged "a concrete and particularized injury" with respect to the first explanation—the possibility that "the turbines will result in a pecuniary loss to the airport." *Tuscola Area Airport Authority*, 511 Mich at 1024. The opinion of the Court of Appeals described that pecuniary interest as follows:

> Looking first at the loss of revenue to the airport, Airport Authority relies on MDOT reports to establish that "the average visitor to the airport spends $262" and contends that the loss of even one visit would establish a pecuniary interest. There are multiple problems with this argument. First, given that the number of visitors to an airport varies from year to year, even without turbines, the loss of multiple visitors, let alone a single one, is not enough to establish that the loss—if any—was created by the installation of turbines. Rather, weather conditions, the economy, the personal finances of individual pilots, and any number of other factors necessarily affect the number of visitors to an airport in any given year. Absent some way to correlate the loss of revenue to the installation of turbines, this assertion of harm is nothing more than speculation.
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> Second, MDOT's method of calculating the spending of the "average" visitor to the airport is nothing more than dividing revenue by the number of visits to the airport. Airport Authority has provided no evidence to establish that this number can or should be used to represent what the average pilot, who might not make a particular visit because of the turbines, spends. There is no evidence to indicate what types of revenue, such as fuel sales and hangar rental, make up the $262 figure, nor is there any evidence to establish whether a typical pilot who might be affected by the changes in descent altitude makes any of these types of expenditures when they use the airport. . . .
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> . . . Further, although pilots expressed concerns that the wind turbines could create navigational hazards or pose a threat to the safety of the airspace, not a single pilot stated that the addition of the turbines would definitely cause them to stop using the airport or that they had intended to fly under VFR during periods of low visibility but would now be prevented from doing so as a result of the turbines.
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> Airport Authority contends that the circuit court erred by faulting Airport Authority for failing to provide evidence of how the turbines would affect current flight paths, how many airplanes might cease using the airport, or any financial data related to those flights. Airport Authority notes the "higher than standard minimum climb gradient," which could "potentially exclude aircraft from departing Tuscola Area Airport." This evidence only supports the circuit court's determination that Airport Authority failed to prove anything concrete, given that the statement specifically provides that it only *potentially* excludes aircraft. The vague potential of this outcome is enough to render this harm a mere possibility arising from some unknown and future contingency. [*Tuscola Area Airport Zoning Bd of Appeals*, 340 Mich App at 779-781 (quotation marks, citation, and alterations omitted).]

While the Court of Appeals deemed this too vague, the Supreme Court concluded that sufficient evidence was presented to establish that the airport was aggrieved.

C. BHC'S STANDING

The applicants sought and obtained two zoning variances, one allowing for a smaller-than-required outdoor play area and one allowing closer proximity to another licensed childcare facility. While BHC lacks standing to challenge the play area variance, it has standing to challenge the proximity variance.

1. OUTSIDE PLAY AREA VARIANCE

On appeal, BHC seems to abandon any challenge to the play area variance, focusing only on the proximity variance. Regardless, we note that BHC clearly cannot establish standing with respect to this variance. BHC's only claim of special damages is financial; BHC claims that granting the variances will cause them to lose business. We can discern no basis upon which to conclude that allowing the applicants to have a smaller outdoor play space would harm BHC's business prospects. If anything, it helps BHC that its competition would have a smaller yard. Therefore, BHC does not have standing to challenge this variance.

2. PROXIMITY VARIANCE

BHC asserts that it has standing as an aggrieved party because the opening of a childcare facility more-or-less across the street from its childcare facility will cause it to lose money. We view *Tuscola* as controlling, and the takeaway from *Tuscola* is that the *Saugatuck Dunes* test is a low bar. In *Tuscola*, the only concrete evidence of special damages was that the wind turbines would alter the flight path of those landing and departing from the airport. The airport inferred that the higher climb gradient *could potentially* cause some pilots to go elsewhere, and the airport asserted that losing even one customer would cause a pecuniary harm. We believe the potential for harm to the health club requires smaller leaps of logic; it is reasonable to infer that the presence of a facility across the street offering the same services as BHS's facility would cause people who would otherwise patronize BHS to instead patronize the business across the street. The *Tuscola* decision suggests that even one parent dropping their kids across the street who would otherwise have used BHS is enough to establish special damages. BHC's concerns might not ultimately warrant relief, but they were sufficient to support its status as an aggrieved party with a statutory right to appeal to the circuit court.

D. APPLICANT'S STANDING

We conclude that the applicants are persons aggrieved who could seek a variance from the BHZBA under MCL 125.3604(1) and Beverly Hills Zoning Ordinance, § 22.38.030.

The applicants contend that their purchase agreement for the subject property gave them "some legally protected interest or protected personal, pecuniary, or property right that is likely affected by the challenged decision" as contemplated under *Saugatuck Dunes*. In *Saugatuck Dunes*, 509 Mich at 585, the Michigan Supreme Court said, "Over time, the term 'aggrieved' in the MZEA has become inappropriately intertwined with real-property ownership to a point where

judicial decisions have begun to suggest that only real-property owners have the ability to appeal a zoning decision." The lack of a current ownership interest is not dispositive under *Saugatuck Dunes*. The applicants characterize the purchase agreement for the subject property as contingent on approval of the zoning variances for their proposed development. While the applicants did not present the purchase agreement to the board or the circuit court, they did provide detailed site plans demonstrating the time and money they invested in the project. Further, the applicants listed the property owner on the application for site plan review and the board's appeal form. Vestevich signed the application for site plan review as the owner. While the BHC insists Vestevich had to be present at the board's meeting if he was an interested person, such is not required by the board. Beverly Hills Zoning Ordinance, § 22.38.030 states: "Upon a hearing before the Zoning Board of Appeals any person or party may appear in person, or by agent, or by attorney." MCL 125.3604(6) similarly provides that "a party may appear personally or by agent or attorney." It was sufficient for McDonald to represent the parties' interests.

The third *Saugatuck Dunes* factor required the applicants to "provide some evidence of special damages arising from the challenged decision." Here, the zoning ordinance's limitation on the uses of the subject property, "in the form of an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the effects on others in the local community." *Saugatuck Dunes*, 509 Mich at 595. The site plans submitted by the applicants demonstrated that the dimensions of the subject property could not accommodate their suggested development with the required 1,500-foot separation and 30,000-square-foot outdoor play area. Being unable to develop the parcel as planned was "an actual or likely injury" different from others in the community.

Accordingly, the record establishes the applicants were persons aggrieved with the right to seek relief from the board. The circuit court correctly rejected the BHC's arguments to the contrary.

III. CONCLUSION

The circuit court erred by dismissing BHC's appeal on the basis of standing. This case is remanded for the circuit court to consider the merits of BHC's appeal and determine whether the board's decision was "supported by competent, material, and substantial evidence on the record." MCL 125.3606(1)(c). We do not retain jurisdiction. BHC, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Allie Greenleaf Maldonado
/s/ Sima G. Patel
/s/ Noah P. Hood