

STATE OF MICHIGAN
COURT OF APPEALS

DAVID C. DOMINE,

Plaintiff-Appellee,

v

TOWNSHIP OF GROSSE ILE,

Defendant-Appellant.

UNPUBLISHED

May 18, 2001

No. 217572

Wayne Circuit Court

LC No. 98-827966-AA

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by leave granted an order reversing the decision of the Grosse Ile Township Zoning Board of Appeals (ZBA) and granting plaintiff's request for a variance. We reverse the decision of the circuit court and reinstate the decision of ZBA.

Plaintiff owns two parcels of property in the Elbamar County Subdivision. Plaintiff acquired lot seventy-eight on July 13, 1972, and he resides in a home on this lot. On April 4, 1973, plaintiff purchased lot seventy-nine, an adjacent lot. In 1998, plaintiff decided to sell lot seventy-nine to a buyer interested in building a single-family residence on the lot. Accordingly, plaintiff applied for a zoning variance, because the lot does not meet current width or area requirements.

The ZBA eventually ruled that plaintiff could not sell lot seventy-nine for purposes of building a single-family residence because under defendant's zoning ordinances, two contiguous lots of nonconforming size owned by a single owner had to be treated as only one lot. The ZBA denied plaintiff's request for a variance, concluding that plaintiff's hardship was self-created because he was attempting to sell lot seventy-nine separately from lot seventy-eight.

Plaintiff appealed the ZBA's decision to the circuit court. The circuit court agreed that the current applicable ordinance prevented the building of a single-family home on lot seventy-nine without a variance. However, the court ruled that a variance was warranted because the restrictions plaintiff faced regarding lot seventy-nine were not self-created. Accordingly, the court reversed the ZBA's decision. Defendant contends that the court erred in doing so.

We must first interpret the applicable township ordinance and determine if the ordinance indeed prevented the building of a single-family residence on lot seventy-nine, as the circuit court

found. This Court reviews de novo a circuit court's interpretation of an ordinance. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000). Moreover,

[t]he primary goal of statutory interpretation and, by implication, the interpretation of ordinances, is to give effect to the intent of the legislative body. The first criterion in determining intent is the specific language used by the legislative body in the statute or ordinance. If the plain and ordinary language is clear, then judicial construction is normally neither necessary nor permitted. [*Ballman v Borges*, 226 Mich App 166, 167-168; 572 NW2d 47 (1997) (citations omitted).]

The applicable ordinance in effect in 1998 stated, in part:

A. Use of Non-conforming Lots: Any non-conforming lot shall be used only for a use permitted in the district in which it is located. In any district in which single-family dwellings are permitted, notwithstanding limitations imposed by other provisions of this ordinance, a single-family dwelling and customary accessory buildings may be erected on any single lot of record at the effective date of this ordinance. This provision shall apply even though such lot fails to meet the requirements for area or width, or both, that are generally applicable in the district, provided that the lot is in conformance with all other applicable yard setback, minimum floor area and maximum height requirements for the district in which it is located (see item C below).

* * *

C. To develop a non-conforming lot(s) . . . the applicant is required to submit evidence that ownership of the lot was not under contiguous single ownership with other lots which could have been combined into a conforming or more conforming lot.

D. Non-conforming Contiguous Lots under the Same Ownership: The following regulations apply to non-conforming contiguous lots under the same ownership.

1. If two or more lots or combination of lots with continuous frontage are or have been under single ownership are of record [sic] at the time of adoption or amendment of this Ordinance, and if all or part of the individual lots do not meet the requirements established for lot width and area, the lands involved shall be considered to be an individual parcel for the purposes of this Ordinance. Any altering of lot lines or combination of lots shall result in lots which conform to the requirements of this Ordinance.

* * *

4. Once any combination which creates a conforming lot occurs, the resulting lot shall not retain non-conforming lot of record status and will hereafter

be required to comply with the lot requirements of this ordinance. [Grosse Ile Ordinance, § 18.5.]

At the time this ordinance took effect, 1995, plaintiff owned lots seventy-eight and seventy-nine. It undisputed that these lots are contiguous. Accordingly, interpreting the statute as plainly written, we find that the circuit court did not err in concluding that plaintiff's lots must be treated as one undivided parcel and that the building of a single-family home on lot seventy-nine could not occur without a variance.

Next, we must determine whether the circuit court properly analyzed the ZBA's denial of a variance. As stated in *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996), a court must affirm a decision of a zoning board of appeals unless the decision is "(1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion." See also *Johnson v Robinson Twp*, 420 Mich 115, 124; 359 NW2d 526 (1984).

Here, the court concluded that a variance was warranted because at the time plaintiff purchased the lots in 1973, they were treated as separate parcels. Accordingly, the court found that plaintiff's current hardship was not self-created but was instead created by the enactment of the 1995 ordinance and that a variance was necessary. The court looked to the following, prior ordinance, adopted in 1958, in determining that the lots were treated as separate parcels upon plaintiff's purchase of lot seventy-nine in 1973:

In any district in which single-family dwellings are permitted, a single-family dwelling and customary accessory buildings may be erected on any single lot of record at the effective date of adoption or amendment of this ordinance, notwithstanding limitations imposed by other provisions of this ordinance. Such lot must have been in separate ownership prior to November 20, 1958 [the date of passage of the ordinance], and not of continuous frontage with other lots in the same ownership. This provision shall apply even though such lot fails to meet the requirements for area or width, or both, that are generally applicable in the district, provided that yard dimensions and requirements other than these applying to area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variance of yard requirements shall be obtained only through action of the Board of Appeals.

If two or more lots or combinations of lots and portions of lots with continuous frontage in single ownership are of record at the time of passage or amendment of this ordinance, and if all or part of the lots do not meet the requirements established for lot width and area, the lands involved shall be considered to be an undivided parcel for the purpose of this ordinance, and no portion of said parcel shall be used or sold in a manner which diminishes compliance with lot width and area requirements established by this ordinance, nor shall any division of any parcel be made which creates a lot with width or area below the requirements stated in this ordinance. [Grosse Ile Township Ordinance, § 11.20; emphasis added.]

The court concluded that because the same individual did not own both lots on November 20, 1958, the lots did not have to be treated as one upon plaintiff's purchase of lot seventy-nine. Accordingly, the court ruled that a variance in the instant situation was necessary because "[plaintiff's] property did not become one parcel when he purchased lot 79, [so] he did not divide his property [by attempting to sell lot seventy-nine in 1998] and thereby impose a hardship on himself."

Defendant contends that the 1958 ordinance did indeed make lots seventy-eight and seventy-nine one parcel upon plaintiff's purchase of lot seventy-nine in 1973. Defendant contends that if an owner acquired two contiguous, nonconforming lots after the adoption of the 1958 ordinance, the lots had to be treated as one under the ordinance, regardless of whether the lots were owned by one entity at the time of the ordinance's adoption. Defendant's contention finds support in *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995), in which this Court examined a materially identical ordinance and ruled that the ordinance "requires an owner of two or more lots with continuous frontage to combine the lots to conform to the township's minimum lot size and frontage requirements." Although the *Kalinoff* Court did not specifically address the question of whether the combination requirement applied only if the two lots were owned by a single owner at the time of the passage of the ordinance, the implication of the Court's ruling was that it did not matter whether this common ownership existed at the time of passage. Indeed, the Court appeared to interpret the ordinance as meaning that any two contiguous lots owned by a single owner had to be combined, regardless of the lots' prior ownership status. We question this interpretation, since the language at issue clearly refers to ". . . two or more lots or combinations of lots with continuous frontage *in single ownership* . . . of record at the time of passage or amendment of this ordinance. . . ." Here, the lots in question were not under single ownership on November 20, 1958.

Nonetheless, we need not even address whether the 1958 ordinance essentially combined lots seventy-eight and seventy-nine upon plaintiff's purchase of lot seventy-nine in 1973. Indeed, even assuming, arguendo, that the 1958 ordinance did not apply and that the parcels remained separate until the enactment of the 1994 ordinance, the circuit court still erred in reversing the ZBA's decision to deny a variance.

MCL 125.293; MSA 5.2963(23) gives authority to a township's zoning board of appeals to grant a variance and provides, in part:

Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing on appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done.

The hardships justifying a variance cannot be self-created, and the plight of the landowner must be due to the unique circumstances of the property. *Johnson, supra* at 126.

In this case, plaintiff's property does not conform to the zoning ordinance because it fails to meet the lot size requirements. Admittedly, this is a practical difficulty inherent in the property itself. However, this practical difficulty could have been avoided if plaintiff had not

decided to sell lot seventy-nine separately. Thus, plaintiff, and not the zoning ordinance, can reasonably be deemed to have caused the practical difficulty. Additionally, the zoning officer opined that “[g]ranting approval of this request would be affording special consideration to the applicant not afforded to other property owners in the area.” This was a permissible consideration in denying the variance, given *Johnson, supra* at 126, in which the Court stated that “[t]he Zoning Board of Appeals was surely correct in foreseeing that, if these plaintiffs could obtain the requested variance, there would be little basis to ever deny a subsequent similar request.” Indeed, consideration of the effect of the variance on others and on the character of the subdivision is appropriate.

Accordingly, even if plaintiff did have the right to build a single-family residence on lot seventy-nine at the time he purchased the lot, the ZBA’s decision to deny a variance was nonetheless supported by competent, material, and substantial evidence. *Id.* at 124; *Parker, supra* at 378. As stated in *Mich Education Ass’n Political Action Committee v Secretary of State*, 241 Mich App 432, 444-445; 616 NW2d 234 (2000):

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. *See Korzowski v. Pollack Industries*, 213 Mich App 223, 228, 539 NW2d 741 (1995).

* * *

Black’s Law Dictionary (6th ed.), p. 1345, defines “scintilla” as “the least particle.” Random House Webster’s College Dictionary (1997), p. 1159, defines “scintilla” as “a minute particle; spark; [or] trace.”

Here, there was more than a “minute particle” of evidence supporting the ZBA’s decision. Even if the circuit court’s reasoning was plausible, or if the circuit court would have arrived at a contrary conclusion if it had been in the ZBA’s place, the court was nonetheless bound to affirm the decision as long as the decision was sufficiently supported. *See, e.g., Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689-690, 525 NW2d 921 (1994). Accordingly, the court clearly erred in reversing the ZBA’s decision.

Finally, we note that plaintiff argues that if he is not granted a variance, defendant has effectuated a taking of plaintiff’s property. We disagree. Indeed, plaintiff has not shown that the zoning precludes his use of the property for *any* purpose for which it is adapted. *Bell River Assoc v China Charter Twp*, 223 Mich App 124, 134; 565 NW2d 695 (1997). Moreover, according to the record, plaintiff did not attempt to use lot seventy-nine for purposes of a single-family residence until after the relevant zoning ordinances were adopted; accordingly, no taking occurred. *Bevan v Brandon Twp*, 438 Mich 385, 401; 475 NW2d 37 (1991).

Reversed; the decision of the ZBA is reinstated.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter