STATE OF MICHIGAN

COURT OF APPEALS

AMERICORP FINANCIAL GROUP, INC.,

Plaintiff-Appellee,

v

CITY OF BIRMINGHAM and BIRMINGHAM BOARD OF ZONING APPEALS,

Defendants-Appellants.

UNPUBLISHED
September 13, 2007

No. 270228
Oakland Circuit Court
LC No. 2005-067332-AA

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendants city of Birmingham and Birmingham board of zoning appeals (BZA) appeal by leave granted the circuit court's order interpreting the language of the Birmingham zoning ordinance and reversing the BZA's denial of a zoning variance for plaintiff. We vacate and remand for reinstatement of the decision of the BZA.

I

This action involves plaintiff's request to use its property at 1140 Webster Street in the city of Birmingham as a parking lot for an office building that it owns across the street. The property on 1140 Webster Street is zoned O-2, office and commercial use. The city maintained below that under its zoning ordinance, a freestanding parking lot is not a permissible use in an O-2 district, and that parking is permitted in an O-2 district only as an accessory use. Plaintiff appealed the city's interpretation of the zoning ordinance to the BZA, and in the alternative, applied for a use variance. The BZA denied plaintiff's appeal and additionally denied the variance request. Plaintiff then appealed the BZA's decision to the circuit court pursuant to MCL 125.585.[1] The circuit court determined that the BZA had erred in its interpretation of the

[1] This statute was repealed by 2006 PA 110, effective July 1, 2006. See MCL 125.3702(1)(a). It has been recodified in substantially similar form at MCL 125.3606(1). The repeal of the statute does not affect this case, which was pending on the effective date of repeal. See MCL 125.3702(2) (stating that "[t]his section shall not be construed to alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on the effective date of this act or any ordinance, order, permit, or decision that was based on the acts repealed by this
(continued…)

zoning ordinance and also in denying the requested variance. Accordingly, the circuit court reversed the BZA's decision and granted plaintiff injunctive relief.

II

A circuit court's review of a final administrative decision is limited to determining whether the decision was authorized by law, and whether the findings were supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 602; 633 NW2d 489 (2001). Appellate review of a zoning case presents mixed questions of law and fact. *Macenas v Village of Michiana*, 433 Mich 380, 394-395; 446 Mich 102 (1989). An appellate court must defer to determinations of fact made by a zoning board of appeals if they are reasonable and supported by competent, material, and substantial evidence on the record. Former MCL 125.585(11); *Macenas*, *supra* at 395-396. The decision of a zoning board should be affirmed by the courts unless it 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. *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996). Matters involving the interpretation of a zoning ordinance or the application of an ordinance to facts found by a zoning board of appeals are for the court to decide as questions of law. *Macenas*, *supra* at 395-396. Questions of law are reviewed de novo. *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 662-663; 593 NW2d 534 (1999).

This appeal raises questions concerning the proper interpretation of the city's zoning ordinance. The rules of statutory interpretation apply with equal force to municipal zoning ordinances. *Macenas*, *supra* at 397 n 25; *Williams v City of Troy*, 269 Mich App 670, 676; 713 NW2d 805 (2005). Therefore, when faced with such questions of interpretation, the courts must discern and give effect to the drafters' intent as expressed in the words of the ordinance. See *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). If the language is unambiguous, it must be presumed that the drafters intended the meaning clearly expressed. See *id.* The courts must not read into an ordinance anything that is not within the manifest intention of the drafters as gathered from the ordinance itself. See *Michigan State Bldg & Constr Trades Council, AFL-CIO v Dep't of Labor*, 241 Mich App 406, 411; 616 NW2d 697 (2000). When the language used in an ordinance is clear and unambiguous, a court may not engage in judicial interpretation, and the ordinance must be enforced as written. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995).

The city's zoning ordinance unambiguously states that parking is an accessory use in an O-2 district. Birmingham Zoning Ordinance, § 126-572. Plaintiff contends, however, that the definition of accessory use does not require that the accessory use take place on the same lot as the associated principal use. Section 126-26 of the ordinance defines "use, accessory" as "a subordinate use which is customarily incidental to the principal use *on the same lot*." (Emphasis added.) Therefore, the circuit court erred in finding that the definition of "use, accessory" does not require the presence of the principal use on the same lot.

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section").

Plaintiff argues that the phrase "customarily incidental" in this definition means that accessory uses usually, but do not always, take place on the same lot as the principal use. Therefore, plaintiff asserts that the ordinance allows for the possibility that an accessory use might take place on a different lot. Defendants disagree with this interpretation and maintain that, by definition, an accessory use takes place on the same lot as the principal use.

Defendants' interpretation is correct. Read together, the words "customarily incidental" form a compound modifier that describes the relationship of the accessory use to the principal use. The compound modifier differentiates the significance of the principal use from the significance of the accessory use, and delineates primary and chief purposes from subordinate purposes. Plaintiff contends that the term "customarily" was intended to modify the phrase "on the same lot," meaning that an accessory use might sometimes take place on a different lot. This reading misconstrues the plain meaning and form of the sentence. If the drafters of the ordinance had intended this meaning, they would have defined "use, accessory" as "a subordinate use which is incidental to the principal use and customarily takes place on the same lot." However, the ordinance was not drafted in this way, and its plain language clearly belies plaintiff's argument in this regard.

Plaintiff also contends that § 126-568(2) authorizes its use of 1140 Webster as a parking lot. But plaintiff's reliance on this section is misplaced. Although § 126-568(2) allows an owner to satisfy the ordinance's minimum parking space requirement in some cases by offering sufficient parking on a different lot than the lot of the building served, it in no way permits off-lot parking as a principal use in zoning districts where such a use is otherwise prohibited. Nor does it provide that any lot within 100 feet of the building served can be used principally for parking, regardless of whether it lies in a district where parking is permissible only as an accessory use. Rather, the provision means that if sufficient parking is *otherwise permissible* on a different lot within 100 feet of the building served, the requirements of § 126-567 are satisfied.

Here, the circuit court reasoned that parking on the Webster property would be an accessory use to plaintiff's office building because the two lots would become contiguous if the city vacated the street and the dedicated land underlying the roadway reverted to the property owners. Even assuming arguendo that this reasoning is correct, the two lots would still be just that—contiguous but separate lots. We fail to see how vacating the street would transform two contiguous lots into "the same lot" within the meaning of § 126-26. After all, there would still be a dividing line separating the two lots, which would presumably exist along the line now occupied by the street's centerline. Quite simply, parking on one of the lots still would not qualify as an accessory use because it would not exist on "the same lot." Birmingham Zoning Ordinance, § 126-26. The circuit court's hypothetical situation does not provide a basis for reversing the BZA's decision.

III

Defendants also argue that the circuit court mistakenly determined that the Cole Street parking lot, which abuts 1140 Webster, serves as precedent for allowing a freestanding parking lot in an O-2 district. Although the circuit court referred to the Cole Street parking lot, it apparently did not rely on the existence of the Cole Street parking lot as a basis for its decision.

Plaintiff nonetheless argues that the Cole Street parking lot serves as an alternative basis for affirming the circuit court's decision. It maintains that the zoning ordinance is ambiguous, and must be construed in plaintiff's favor because the city previously permitted a freestanding parking lot in an O-2 district when it approved the Cole Street parking lot. Plaintiff relies on *Macenas*, *supra* at 398, in which our Supreme Court stated that a local zoning board's longstanding interpretation of an ambiguous ordinance is entitled to judicial deference "where a construction has been applied over an extended period by the officer or agency charged with its administration . . . ." Here, however, the ordinance is not ambiguous. Therefore, the interpretation of the ordinance is a question of law, and the ordinance must be enforced as written. *Kalinoff*, *supra* at 11.[2]

IV

Finally, defendants argue that the circuit court erred in reversing the BZA's denial of plaintiff's variance request. The former MCL 125.585(9) provided in pertinent part:

> 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.

Section 126-675(3)(a) of Birmingham's zoning ordinance provides the following procedure for obtaining a use variance from the BZA:

> The board shall hear and grant or deny requests for variances from the strict application of the provisions of this chapter where there are practical difficulties or unnecessary hardships in carrying out the strict letter of such chapter. . . . The board shall not grant any variance unless it shall first determine that:
>
> 1. Because of special conditions applicable to the property in question, the provisions of this chapter, if strictly applied, unreasonably prevent the property owner from using his property for a permitted purpose;
>
> 2. Literal enforcement of the chapter will result in unnecessary hardship;

[2] Moreover, there is some indication in the record that the Cole Street parking was approved before the present O-2 zoning classification was ever developed. In such a case, the lot would constitute a prior nonconforming use. See, e.g., *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993).

3. The granting of the variance will not be contrary to the spirit and purpose of this chapter nor contrary to the public health, safety and welfare; and

4. The granting of the variance will result in substantial justice to the property owner, the owners of property in the area and the general public.

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. *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002). As noted above, the decision of a zoning board should be affirmed by the courts unless it 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. *Reenders*, *supra* at 378. The reviewing court may not substitute its own judgment for that of the BZA. *C & W Homes, Inc v Livonia Zoning Bd of Appeals*, 25 Mich App 272, 274; 181 NW2d 286 (1970).

Defendants argue that the circuit court disregarded the proper bases for reversing a zoning board's decision, and instead substituted its own judgment. We agree. The circuit court did not adequately identify a proper basis for reversing the BZA's decision, and no such basis is apparent.

The BZA's decision was not contrary to applicable law or proper procedure. Its decision is adequately supported by competent, substantial, and material evidence. In this regard, we note that plaintiff clearly failed to establish that its problem is unique. An owner seeking a variance must show that its "plight is due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning." *Janssen*, *supra* at 201. This unique circumstances requirement does not mean that the circumstances must exclusively affect only the single landowner, but the plaintiff must show that the hardship is not shared by all others in the neighborhood. *Id.* at 204. The evidence in this case showed that plaintiff could not renovate or redevelop the property for residential or office use because the sale and lease rates in the area would not generate a sufficient return on its investment. Such evidence reflects general conditions in the local real estate market, not anything unique to plaintiff or to 1140 Webster.

Furthermore, the BZA found that the requested variance would be contrary to the residential character of the neighborhood. There was evidence that a freestanding parking lot would adversely affect the residential character of Webster Street. Several property owners expressed concerns that a parking lot would give the appearance of a neighborhood in decline. The BZA's finding that a parking lot was contrary to the neighborhood's residential character is supported by substantial, competent, and material evidence.

The circuit court's comments also suggest that it believed that the BZA abused its discretion in denying the variance. We disagree. A decision constitutes an abuse of discretion only when it falls outside the range of principled and reasonable outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The BZA's decision cannot be considered unreasonable

or unprincipled when it merely enforced the zoning regulations that were in effect when plaintiff purchased 1140 Webster and its office building property.

There was no basis for finding that the BZA's decision was contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion. *Reenders*, *supra* at 378. Therefore, the circuit court erred in reversing the BZA's decision. We vacate the circuit court's order and reinstate the decision of the BZA.

Vacated and remanded for reinstatement of the decision of the BZA. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray