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STATE OF MICHIGAN

COURT OF APPEALS

LISA A. SCHEIN,

Appellant,

v

CITY OF ROCHESTER HILLS,

Appellee.

UNPUBLISHED
June 20, 2024

No. 366597
Oakland Circuit Court
LC No. 2022-197175-AA

Before: O'BRIEN, P.J., and M. J. KELLY and FEENEY, JJ.

PER CURIAM.

In this zoning dispute, appellant appeals as of right the circuit court's order affirming the denial of her variance request by appellee's Zoning Board of Appeals (ZBA). On appeal, appellant contends that (1) the ZBA failed to follow the nonuse variance ordinance by not making required findings of fact and considering disallowed factors; (2) there was insufficient evidence to support the ZBA's denial of the variance; and (3) she was denied due process. We affirm.

I. BACKGROUND

This case arises from a nonuse zoning variance request made by appellant for renovations to her home. The subject property is zoned as district R-2, one-family residential. The default minimum front yard setback in the R-2 zoning district is 40 feet. Rochester Hills Code of Ordinances, § 138-5.100. An exception to this general rule is provided in Rochester Hills Code of Ordinances, § 138-5.101B, and under that exception, the setback requirement for appellant's property is 29 feet.

In 2020, a basement-waterproofing permit was applied for and issued for the property. The permitted work included areas under the front porch. The work began but was not completed before the permit expired. This led appellee to issue a civil infraction against appellant in December 2021. Appellee and appellant entered into a consent judgment indicating that appellant had to obtain a permit and complete work on the front porch.

In July 2022, appellant's builder submitted plans to appellee that were more expansive than the front-porch construction originally proposed—the new plans included additions of an enclosed

living space along the front of the house. Problematically, appellant's new building plans would move the front facade of the house forward, encroaching 3.3 feet into the required 29-foot setback.

Appellee denied the permit application because the proposed setback was in violation of the 29-foot requirement. The letter advised appellant that she could appeal the decision to the ZBA, and specified the requirements that a variance request must meet to be granted by the ZBA.

Appellant applied for a setback variance in September 2022, claiming that the variance was required "to execute the minimum necessary structural improvements (install shear walls) to existing residential structure." This variance request was heard at an October 19, 2022 hearing. Appellee's planning manager presented his report on the variance request. Appellant was not present at the meeting but was represented by her builder, her attorney, and her husband, Brad Wolfbauer. Wolfbauer, a licensed contractor, stated that the proposed renovations were the most-assured way to permanently fix a structural problem with shear movement in the home, though he admitted that there were other options. A member of the ZBA observed that there was no expert testimony to substantiate appellant's assertion that the renovations were necessary for structural soundness, nor was there any report in the record explaining the alleged wind-shear problem. When the ZBA opened the floor to public comment, several of appellant's neighbors spoke out in opposition to the variance request. Wolfbauer then had an opportunity to address the public comments, and he answered additional questions from members of the ZBA. Eventually, a motion was made to deny the variance, and the motion passed unanimously. The next day, the ZBA sent appellant a letter informing her of the denial and providing the findings of fact on which the denial was based.

Appellant appealed the ZBA's denial of her variance request to circuit court. The ZBA's decision should not stand, appellant claimed, because it failed to consider all of the criteria for granting a variance request as required by ordinance, and considered other criteria not listed in the ordinance. Appellant also challenged the ZBA's factual findings, contending that they were unsupported by the evidence. And regardless of whether the ZBA's factual findings were adequately supported, appellant argued, they were insufficient to support the ZBA's denial of appellant's variance request.

In a written opinion affirming the ZBA's denial of the variance,[1] the circuit court stated:

> The Court agrees with the ZBA as to Appellant's allegations of improper procedure and whether its decision comported with the law. Appellant's brief failed to properly raise these issues. . . . Appellant's only remaining argument is that the ZBA's decision was not supported by competent, material, and substantial evidence.

[1] The circuit court issued its opinion without a hearing after concluding that appellant waived oral argument because she failed to comply with two orders to notice the case for oral argument.

> The Court disagrees with Appellant. To grant a dimensional, non-use variance, an applicant must show she suffers a "practical difficulty" in complying with the zoning ordinance. . . .
>
> During the hearing, Appellant's representative agreed there were ordinance compliant alternatives to address the purported structural deficiencies: specifically, construction of an addition to the rear of the home rather than to the front of the home. The ZBA found Appellant's plight to be self-created, due to her decision to add on to the front of her home rather than the back of her home. The record suggests there is nothing preventing Appellant from continuing to use her Property as a residence, and her Property is not uniquely situated as compared with the rest of the neighboring properties.
>
> For these reasons, the Court finds that the ZBA's decision to deny Appellant's request for a dimensional variance was based upon competent, material, and substantial evidence.

This appeal followed.

II. STANDARD OF REVIEW

We review de novo the pertinent law and its application to the ZBA's factual findings. *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009). The ZBA's findings themselves, however, are entitled to deference, and our review of those findings reflect this. Our Supreme Court recently explained the standard for reviewing a ZBA's factual findings as follows:

> When reviewing a decision of a [ZBA], a circuit court's review is limited to whether the decision is authorized by law and supported by competent, material, and substantial evidence on the whole record. "Substantial evidence" is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance. The factual findings of a [ZBA] are entitled to deference. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.
>
> [Appellate courts] review a circuit court's determinations regarding a [ZBA's] findings to assess whether the circuit court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA's] factual findings. Whether a circuit court misapprehended or grossly misapplied the substantial evidence test is reviewed under a standard identical with the "clearly erroneous" standard. A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. [*Pegasus Wind, LLC v Tuscola Co*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket No. 164261); slip op at 6-7 (quotation marks and citation omitted).]

III. ORDINANCE COMPLIANCE

On appeal, appellant first argues that the ZBA failed to make sufficient findings of fact to support its denial of appellant's variance request because the ZBA both failed to address certain criteria it was required to consider and considered other criteria not listed in the ordinance. We conclude that the ZBA's finding that multiple required criteria were not met provided a sufficient basis for the ZBA to deny appellant's variance request.

Local units of government are granted authority to regulate land use and development through zoning under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*. *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 515; 838 NW2d 915 (2013). That act provides that zoning "regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district." MCL 125.3201(2). The MZEA also provides that an individual dissatisfied with a zoning regulation as applied to their property can appeal to the ZBA for a variance. MCL 125.3604(1). A variance is a grant of relief to a property owner from the strict application of a zoning ordinance. *Frericks v Highland Twp*, 228 Mich App 575, 582; 579 NW2d 441 (1998). Appellant here sought a nonuse variance, which can be granted if complying with a zoning ordinance imposes a practical difficulty. MCL 125.3604(7). While the MZEA does not define "practical difficulty," it does provide that a zoning ordinance must establish procedures and standards for how the ZBA is to review and grant a nonuse variance request. MCL 125.3604(7) and (8).

Here, the standards governing the ZBA's discretion to find a practical difficulty and grant appellant's nonuse variance was Rochester Hills Code of Ordinances, § 138-2.407, which states:

> A. Authority. The Zoning Board of Appeals may grant a dimensional (nonuse) variance to provide relief from a specific standard in this ordinance relating to an area, a dimension or a construction requirement or limitation, upon the concurring vote of a majority of the members of the Zoning Board of Appeals.
>
> B. Practical Difficulty. A nonuse variance shall not be granted unless the Zoning Board of Appeals finds that there is a practical difficulty in the way of carrying out the strict letter of this ordinance. In determining whether a practical difficulty exists, the Zoning Board of Appeals must find that:
>
> > 1. Compliance with the strict letter of the restrictions governing area, setback, frontage, height, bulk, lot coverage, density or other dimensional or construction standards will unreasonably prevent the owner from using the property for a permitted purpose or will render conformity with such restrictions unnecessarily burdensome.
> >
> > 2. A grant of the variance will do substantial justice to the applicant as well as to other property owners in the district, and a lesser variance will not give substantial relief to the applicant as well as be more consistent with justice to other property owners in the zoning district.

3. The plight of the applicant is due to the unique circumstances of the property.

4. The problem is not self-created.

5. The spirit of this ordinance will be observed, public safety and welfare secured, and substantial justice done.

6. There is compliance with the standards set forth in Section 138-2.400B.[2]

7. There is compliance with the standards for discretionary decisions as contained in Section 138-2.302 of this ordinance.[3]

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[2] Rochester Hills Code of Ordinances, § 138-2.400B states:

> B. Review Considerations. In consideration of all appeals and all proposed variances to this ordinance the Zoning Board of Appeals shall, before granting any variance to this ordinance in a specific case, first determine that the proposed variance will not impair an adequate supply of light and air to adjacent property or unreasonably increase the congestion in public streets or increase the danger of fire or endanger the public safety or unreasonably diminish or impair established property values within the surrounding area or in any other respect impair the public health, safety, comfort, morals, or welfare of the inhabitants of the City.

[3] Rochester Hills Code of Ordinances, § 138-2.302 requires that a discretionary decision subject to this provision comply with the following standards:

> A. Promote the intent and purpose of this ordinance.
>
> B. Be designed, constructed, operated, maintained and managed so as to be compatible, harmonious and appropriate in appearance with the existing or planned character of the general vicinity, adjacent uses of land, the natural environment, the capacity of public services and facilities affected by the land use, and the community as a whole.
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> C. Be served adequately by essential public facilities and services, such as highways, streets, police and fire protection, drainageways, refuse disposal, or that the persons or agencies responsible for the establishment of the land use or activity shall be able to provide adequately any such service.
>
> D. Not be detrimental, hazardous, or disturbing to existing or future neighboring uses, persons, property or the public welfare.
>
> E. Not create additional requirements at public cost for public facilities and services that will be detrimental to the economic welfare of the community.

The ZBA denied appellant's variance request in a letter explaining that the ZBA concluded that no practical difficulty existed based on the following findings:

> 1. Compliance with the strict letter of the restrictions of the Zoning Ordinance will not prevent the owner from constructing the required structural improvements that are indicated to be necessary by the applicant as the Building Department has indicated that those improvements can be done in another manner tha[t] does not necessarily require a variance and therefore no practical difficulty has been demonstrated for this property.
>
> 2. Granting the variance will not do substantial justice to nearby property owners as it would confer a special benefit on the applicant that is not enjoyed by other property owners in the vicinity.
>
> 3. There are no unique circumstances of the property [that] have been identified by the applicant that necessitate granting the variance.
>
> 4. The granting of the variance would be materially detrimental to the public welfare by establishing a precedent that could be cited to support similarly unwarranted variances in the future. The granting of this variance could encourage further incursions upon the Zoning Ordinance which would result in further variances being considered by the Zoning Board of Appeals and could be construed as removing the responsibility of meeting the Zoning Ordinance from applicants.

Appellant first complains that these findings do not address all of the criteria required by Rochester Hills Code of Ordinances, § 138-2.407B. She concedes that these findings address the first three criteria listed in the ordinance, but contends that the ZBA failed to make any findings with respect to the remaining criteria. As we read the ZBA's findings, however, it addresses whether the problem was self-created (the fourth criterion listed in the ordinance), and concludes that it was. The ZBA explained that appellant was requesting a variance not because she needed a variance to address the desired structural improvements but because she developed plans that required a variance to address those structural improvements. We also read the ZBA's finding as addressing the fifth criterion—"[t]he spirit of this ordinance will be observed, public safety and welfare secured, and substantial justice done." Rochester Hills Code of Ordinances, § 138-2.407B.5. The ZBA found that "[t]he granting of the variance would be materially detrimental to the public welfare," then explained why.

Appellant characterizes the ZBA's consideration of the negative precedential effect a grant of appellant's variance request could have as a prohibited consideration, but we do not read the ordinance as prohibiting any consideration. The ordinance specifies what "the [ZBA] must find"

to determine that a practical difficulty exists, but does not correspondingly prohibit other considerations. Rochester Hills Code of Ordinances, § 138-2.407B.[4]

All that said, appellant is correct that the ZBA did not make factual findings concerning the other listed criteria: "[t]here is compliance with the standards set forth in Section 138-2.400B" and "[t]here is compliance with the standards for discretionary decisions as contained in Section 138-2.302 of this ordinance." Rochester Hills Code of Ordinances, § 138-2.407B.6 and 7. A plain reading of the ordinance, however, evidences that the ZBA need not make factual findings for each of the listed criteria. Under Rochester Hills Code of Ordinances, § 138-2.407B, a variance "shall not be granted unless the [ZBA] finds that there is a practical difficulty" in the application of the ordinance to a particular property, and "[i]n determining whether a practical difficulty exists, the [ZBA] must find" all seven criteria exist to grant a nonuse variance. The ordinance does not ask for a balancing test but for the ZBA to restrict its approval of variances to occasions when it finds each criterion is met. As a result, the ZBA's finding that any one criterion is not met necessitates its denial of the variance. Because the ZBA found five criteria were not met, the denial of appellant's variance request was not only proper but mandatory under the standard governing the ZBA's discretion in this case.

IV. SUFFICIENCY OF EVIDENCE

Appellant next argues that there was insufficient evidence to support the ZBA's denial of appellant's variance request. We disagree.

At the outset, we note that appellant does not actually challenge the evidence on which the ZBA relied for its findings. Rather, appellant presents the evidence that she thinks supports her assertions that each criterion listed in the ordinance was met, then claims that the ZBA should have relied on this evidence rather than the evidence on which it actually relied. This argument tends to conflate the sufficiency of the evidence supporting the ZBA's finding with the weight that the ZBA afforded the evidence before it. This is problematic because this Court cannot reweigh the evidence; we are limited to reviewing whether the circuit court applied correct legal principles or whether it misapprehended or grossly misapplied the substantial evidence test to the ZBA's factual findings. *Pegasus Wind*, ___ Mich at ___; slip op at 7. We will therefore focus on whether the circuit court correctly applied the substantial-evidence test when reviewing the ZBA's findings, while addressing appellant's arguments to the extent that they pertain to this inquiry.

For the first criterion in Rochester Hills Code of Ordinances, § 138-2.407B, the ZBA concluded that enforcement of the zoning ordinance would not prevent appellant from constructing the structural improvements she claimed were required because the improvements could be made while complying with the ordinance. This conclusion, the ZBA stated, was consistent with the one reached by "the Building Department." The Building Department's conclusion was included

[4] Even if the ZBA was not permitted to consider anything outside of the seven criteria listed in the ordinance, it would not make a difference in this case. The ZBA still found that appellant failed to satisfy at least four other criteria listed in the ordinance, which constituted a sufficient basis to deny appellant's variance request, as explained in this opinion.

in the Staff Report to the ZBA from the Rochester Hills Department of Planning and Economic Development, which stated, "In speaking with the Building Department, they do not believe all of the structural amenities are required to be built in the locations shown by the applicant and could be accommodated in areas outside of the required setback." The ZBA's conclusion finds further support in Wolfbauer's acknowledgment at the public hearing that there were ways to correct the property's structural issues that did not require a variance (though he believed that the proposed plan was the best option to permanently fix the problem). All of this evidence together constituted competent, material, and substantial evidence to support the ZBA's finding on this criterion.[5]

For the second criterion listed in Rochester Hills Code of Ordinances, § 138-2.407B, the ZBA found that granting appellant's variance request would not do substantial justice to nearby property owners because "it would confer a special benefit on the applicant that is not enjoyed by other property owners in the vicinity." Appellant claims on appeal that this finding was not supported by the evidence because it was supposedly undisputed that "the improvements will be [aesthetically] pleasing and improve the overall neighborhood." This assertion, however, ignores that several of appellant's neighbors spoke out against the variance as unnecessary, unfair, disruptive of the uniform appearance of the neighborhood, obstructing neighbor's views, and extending construction that had already been ongoing for years. These complaints by appellant's neighbors plainly support the ZBA's conclusion that granting appellant's variance request would not do substantial justice to nearby property owners.

For the third criterion in Rochester Hills Code of Ordinances, § 138-2.407B, the ZBA found that "no unique circumstances of the property have been identified by the applicant that necessitate granting the variance." As appellee's planning manager noted, the size of appellant's lot was similar to others in the area. While appellant claims that her property "is clearly unique" because "there was no evidence presented of any other residences suffering from structural lateral shifting caused by structural problems as the subject premises," the ZBA was not required to credit appellant's assertion about these structural issues. As a member of the ZBA noted, appellant did not present any testimony or report from an engineer attesting to the wind-shear problem that appellant claimed was plaguing her property. This was not necessarily fatal to appellant's assertion, but the lack of such evidence left the ZBA with only appellant's assertion that she was suffering from this unique plight. Because the ZBA was not required to credit appellant's

[5] Appellant does not dispute that the problem with her property could be addressed while complying with the ordinance but instead argues that it would be unnecessarily burdensome to force her "to develop inferior construction plans" when she has already "spent hours and thousands of dollars to develop" the proposed plans. In effect, appellant argues that it would be unnecessarily burdensome to require her to comply with the ordinance because she has already developed plans that require a variance. To accept this circular logic would render this criterion meaningless—any property owner wishing to avoid compliance with a zoning ordinance would simply need to submit a plan requiring a variance. Then, using appellant's logic, the first criterion listed in Rochester Hills Code of Ordinances, § 138-2.407B, would be satisfied because it would be "unnecessarily burdensome" to force the property owner to develop new ordinance-compliant plans.

assertion, we conclude that the circuit court did not misapprehend or grossly misapply the substantial-evidence test when it affirmed this finding on appeal.

For the fourth criterion in Rochester Hills Code of Ordinances, § 138-2.407B, the ZBA found that appellant's problem was self-created because the improvements to the property that appellant sought could be achieved in a manner that did not require a variance. The need for the variance was thus not caused by the ordinance but by appellant's plan to implement improvements in violation of the ordinance. This Court has long recognized this type of variance request to be the result of a self-imposed hardship or practical difficulty. See, e.g., *Cryderman v City of Birmingham*, 171 Mich App 15, 22; 429 NW2d 625 (1988) (affirming that the practical difficulty facing the plaintiffs was self-imposed because it was caused not by the zoning ordinance but by the plaintiffs' proposal to develop their property in contravention of the applicable ordinance). We accordingly perceive no error with this finding or the circuit court's decision to affirm the finding.

For the fifth criterion, the ZBA found that "[t]he granting of the variance would be materially detrimental to the public welfare" because it would establish a precedent of granting unwarranted variances, which would burden the ZBA with more unwarranted variance requests "and could be construed as removing the responsibility of meeting the Zoning Ordinance from applicants." Appellant claims that no evidence was presented to support this finding, but that is not true. The ZBA's finding was supported by statements at the hearing from a neighbor who brought up the precedential effect the grant of a variance would have, particularly when its necessity had not been proven. The ZBA's reasoning, moreover, reflects its belief that granting appellant's variance request would be inconsistent with the spirit of the ordinance because such a ruling could be perceived to mean that property owners did not need to comply with the ordinance as they could simply be granted a variance. These considerations were not improper, and the evidence adequately supported the ZBA's finding for this criterion.

In sum, the circuit court did not misapprehend or grossly misapply the substantial evidence test to the ZBA's factual findings, so its order must be affirmed. *Pegasus Wind*, ___ Mich at ___; slip op at 7.

V. DUE PROCESS

In her final argument, appellant contends that the ZBA violated appellant's due-process rights by not giving her notice that expert testimony from an engineer was required. This argument was not raised by appellant before the circuit court and is therefore waived on appeal. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 359090); slip op at 3.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ Kathleen A. Feeney