STATE OF MICHIGAN

COURT OF APPEALS

RICHARD V. CONNELL and JULIA A. CONNELL, Appellants, v TOWNSHIP OF GLEN ARBOR, Appellee.	UNPUBLISHED January 12, 2026 10:00 AM No. 364833 Leelanau Circuit Court LC No. 2022-010875-AA

Before: CAMERON, P.J., and KOROBKIN and BAZZI, JJ.

PER CURIAM.

Appellants, Richard V. Connell and Julia A. Connell, appeal as of right the circuit court's order affirming appellee, Glen Arbor Township's zoning board of appeals' (the ZBA) denial of appellants' request for a variance. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In December 2021, appellants applied for rezoning or a variance. Appellants attached a letter to their application informing the ZBA that they were seeking a variance for their property, which was approximately 2.25 acres and located in an agricultural zone. Appellants stated that they could not build a home on the property because the required minimum size was 3 acres in an agricultural zone. Appellants asked the ZBA to either rezone their property as R II residential, or alternatively, grant a variance to allow appellants to build on their 2.25 acres. The ZBA denied appellants' request for a variance, finding that it was prohibited from granting the variance by the self-created hardship rule. The ZBA further determined that appellants' predecessor in title created the hardship by transforming a conforming lot into a nonconforming lot.

Appellants appealed the ZBA's denial of their request for a variance to the circuit court. Appellants argued that the ZBA's denial of their request was not supported by competent, material, or substantial evidence on the record, and that the ZBA's findings were incomplete. Appellants contended that the ZBA's denial was contrary to law and was not a reasonable exercise of the ZBA's discretion. Specifically, appellants asserted that the ZBA erred by applying the self-created

hardship rule because it was not incorporated as a standard in the ordinance. Appellants further alleged that the ZBA's findings that appellants' need for a variance was self-created was erroneous because appellants were not aware that their predecessor in title had divided the land into nonconforming lots. Appellants advanced that *Johnson v Robinson Twp*, 420 Mich 115; 359 NW2d 526 (1984), and its progeny was inapplicable to the exact fact pattern that appellants faced. Appellants also argued that they purchased their parcel from the previous owner who had illegally divided the parcel, and the ZBA failed to account for this unlawful division. Appellants contended that the ZBA neglected to establish an adequate record for their decision and failed to make adequate findings. Appellants asked the circuit court to vacate the ZBA's decision and remand for further proceedings applying the appropriate standards. The circuit court denied appellants' request and affirmed the ZBA's decision. This appeal followed.

II. SELF-CREATED HARDSHIP

Appellants argue that the circuit court erred by finding that the self-created hardship rule was controlling. We disagree.

This Court reviews the interpretation and application of an ordinance de novo. *Detroit v Detroit Bd of Zoning Appeals*, 326 Mich App 248, 254; 926 NW2d 311 (2018). MCL 125.3606 provides the standard of review for a circuit court reviewing a decision of a zoning board of appeals. *Pegasus Wind, LLC v Tuscola County*, 513 Mich 35, 44; 15 NW3d 108 (2024). MCL 125.3606(1) states:

> (1) 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:
>
> (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.

This Court reviews a circuit court's decision "regarding a zoning board of appeals' findings to assess whether the circuit court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the zoning board of appeals' factual findings." *Pegasus Wind, LLC*, 513 Mich at 45. This Court reviews whether a circuit court "misapprehended or grossly misapplied the substantial evidence test" under a clearly erroneous standard. *Id*. (quotation marks and citation omitted). "A finding is clearly erroneous if the reviewing court, on the whole record, is left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). As previously explained by this Court:

> '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." Under the substantial-evidence test, the circuit court's review is not de novo and the court is not permitted to draw its own conclusions from the evidence presented to the administrative body. Courts must give deference to an agency's findings of fact. When there is substantial evidence, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. A court may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. [*Edw C Levy Co v Marine City Zoning Bd of Appeals*, 293 Mich App 333, 340-341 (2011).]

In *Johnson*, 420 Mich 115, the circuit court reversed the zoning board of appeals' denial of the plaintiff landowners' request for variance. The defendant adopted its zoning ordinance in 1949. *Id*. The sections relevant to the appeal provided that a dwelling could not be built on a lot that was less than 99 feet wide. *Id*. The plaintiffs' grandfather owned a lot that was greater in width than 99 feet, but the family split the lot into three smaller lots. *Id*. One of the lots, which was 60 feet wide, was eventually transferred to the plaintiffs. *Id*. When the plaintiffs decided to build a home, they requested a variance from the zoning board of appeals for their undersized lot. *Id*. The zoning board of appeals denied the variance, finding that the 99-feet requirement was in force when the lots were split into smaller, nonconforming sizes. *Id*. at 118. The zoning board of appeals ruled that the hardship was not created outside of the homeowners' control, as neither a private nor a governmental agency caused the situation. *Id*.

The *Johnson* circuit court reversed the decision, resolving there was fault with the findings of the zoning board of appeals. *Id*. at 119. The circuit court determined that the zoning board of appeals improperly focused on the party responsible for creating the hardship. *Id*. The circuit court opined that the proper question was whether a hardship was imposed by the zoning ordinance. *Id*. The circuit court did not believe that the lot had any other use, beyond a residential one. *Id*. Therefore, the circuit court found a hardship because the plaintiffs' proposed use was the only valid use for the property, and any restriction of the sole valid use by the ordinance necessitated a finding of hardship. *Id*. The circuit court further disagreed with the zoning board of appeals concerning whether the plaintiffs could reconfigure the property into compliance with the ordinance. *Id*. at 119-120. This Court upheld the circuit court's decision because the plaintiffs demonstrated practical difficulties, and the defendant failed to show that the "zoning restrictions were determined by health, safety, welfare or environmental considerations." *Id*. at 121.

The Michigan Supreme Court reversed, observing that the plaintiffs had presented a "routine variance case—in the sense that owners of a single lot are attempting to demonstrate that a general requirement ought to be waived as to their particular lot." *Id*. at 125. The Supreme Court also emphasized that the circuit court's role was to "insure that the decision (a) complies with the constitution and the laws of the state, (b) is based upon proper procedure, (c) is supported by competent, material, and substantial evidence on the record, and (d) represents a reasonable exercise of discretion granted by law to the board of appeals." *Id*.

The Michigan Supreme Court further did not agree that the zoning board of appeals abused its discretion by denying the request for an area variance. *Id*. at 126. The Supreme Court opined

that the zoning board of appeals had the authority "to issue a variance where there are 'practical difficulties or unnecessary hardship in the way of carrying out the strict letter' of the zoning ordinance." *Id*. However, the Supreme Court simultaneously held that a zoning board of appeals could consider a self-created hardship in "the exercise of its discretionary power to grant area, as well as use, variances." *Id*. The Michigan Supreme Court determined because the zoning matter preceded the division of property, the plaintiffs' difficulties or hardships were not caused by the township, but by the division of the property. *Id*. The Supreme Court stated, "Since, prior to the split, this land was being properly used in conformance with the zoning ordinance, we can see no sense in which the township can be said to have unconstitutionally deprived the plaintiffs of their property rights." *Id*.

In the present case, appellants stated during the ZBA hearing that Orville Foreman, their predecessor in interest, either unintentionally or fraudulently created lots that did not conform to the 1975 enactment of the ordinance requiring a lot size of 131,000 square feet or 3 acres for a single-family dwelling. Appellants further contended that in 1977, Foreman hired engineers and attorneys to develop a subdivision and sold the parcels to appellants and four others. Appellants asserted that Foreman committed fraud by selling the parcels as buildable lots. Appellants argued that it did not matter how the lots became nonconforming because they had the option of a variance to address the nonconformity. In the circuit court, appellants asserted that Foreman may have divided the property before 1975, or without knowledge of the 1975 enactment. On appeal to this Court, appellants now argue that Foreman may have created the nonconforming parcel before the ordinance was enacted in 1975 to require a lot size of 131,000 square feet or 3 acres for a single-family dwelling, and that there is no proof that Foreman created the parcels after 1975.

"A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citation omitted). Appellants did not argue that Foreman created the parcels before 1975 at the hearing before the ZBA. Therefore, appellants cannot raise this argument on appeal.

Nonetheless, there was no evidence to support appellants' argument that Foreman divided the property before the 1975 ordinance was enacted. The evidence that both parties submitted established that four couples, including appellants, purchased the subdivided lots from Foreman in 1977. The deeds were recorded in 1978 and appeared for the first time on the tax rolls in 1979. Accordingly, the ZBA's finding that the hardship was created after the ordinance was enacted was "supported by competent, material, and substantial on the record." MCL 125.3606(1)(c).

Despite appellants' arguments that *Johnson* does not apply due to the cases' factual differences, the requests for a variance in *Johnson* and in the instant case are nearly identical. Both parties requested a variance to build on lots that did not conform with the ordinance because of size. Both parties owned lots that were previously conforming, but their predecessors in title changed the size of the lots, rendering them nonconforming. Although appellants draw a distinction based on the familial connection in *Johnson*, this Court stated in *Detroit*, 326 Mich App at 261, that "a zoning board must deny a variance on the basis of the self-created hardship rule when a landowner or predecessor in title partitions, subdivides or somehow physically alters the land *after* the enactment of the applicable zoning ordinance, so as to render it unfit for the uses for which it is zoned," indicating that a familial relationship was not required. Thus, the ZBA properly

applied the self-created hardship rule to the circumstances of this case to deny appellants' request for variance. *Johnson* is controlling precedent, and the circuit court properly denied appellants' appeal.

III. 131,000 SQUARE FEET REQUIREMENT

Appellants argue that the ZBA erred by finding that Glen Arbor Township Ordinance, § IX.9.4, required appellants to have 131,000 square feet in order to build a single-family dwelling. We disagree.

Appellants did not properly preserve this issue for appeal, as they raised it for the first time in their reply brief in the circuit court. An issue raised for the first time in a reply brief is not properly preserved for appeal. *Farish v Dep't of Talent & Economic Dev*, 336 Mich App 433, 454-455; 971 NW2d 1 (2021). If a party does not properly preserve an issue in the trial court, this Court has no obligation to address the issue. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 289; 14 NW3d 472 (2023). "However, this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and facts necessary for its resolution have been presented." *Id*. at 289-290 (quotation marks and citations omitted). We overlook appellants' failure to properly preserve their argument regarding the interpretation of § IX.4 as the issue involves a question of law and the facts necessary for its resolution have been presented.

This Court interprets and reviews ordinances "in the same manner as statues." *Grand Rapids v Brookstone Capital, LLC*, 334 Mich App 452, 457; 965 NW2d 232 (2020). Accordingly, this Court reviews the circuit court's interpretation of an ordinance and its application of the rules governing statutory interpretation to an ordinance de novo. *Id*.; *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009). As explained in *PNC Nat'l Bank*:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. 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. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*PNC Nat'l Bank*, 285 Mich App at 506 (quotation marks and citation omitted).]

In Glen Arbor Township's zoning ordinance, the requirements for the agricultural district are set forth in Article IX. Glen Arbor Township Ordinance, § IX.4 provides:

> **The Minimum Land per Dwelling**
>
> Each single-family dwelling with its accessory buildings shall be located on a legally described parcel of land of not less than one hundred thirty-one thousand (131,000) square feet of area, if it is not built as part of the main farm dwelling, with minimum road frontage of two hundred (200) feet.

At the ZBA hearing, the parties did not dispute that appellants' property was zoned as an agricultural district or that 131,000 square feet was the equivalent of 3 acres. However, in their reply brief in the circuit court and in their brief on appeal to this Court, appellants argue that the language of this section is "confusing at best."

Appellants question the meaning of the phrase "if it is not built as part of the main farm dwelling," and opine that the phrase prevents a landowner from dividing his or her land for the construction of a single-family dwelling on less than 131,000 square feet. Appellants further highlight that appellee has since amended the ordinance and removed this phrase. Independently, the first part of this section clearly and unambiguously provides that every single-family dwelling must be built on a parcel that is at least 131,000 square feet. However, that requirement is qualified by the phrase "if it is not built as part of the main farm dwelling . . . ." In the instant case, there are currently no buildings, dwellings, or structures on the parcel of land. Therefore, any proposed building would not be built as part of a main farm dwelling.

However, requiring appellants to build a single-family dwelling on at least 131,000 square feet does not render the second phrase of the section nugatory. Rather, a landowner that had an existing farm dwelling on his or her property would also be required to construct any new single-family dwelling on at least 131,000 square feet, unless the landowner intended to construct a new dwelling as part of the existing dwelling. Accordingly, the ordinance is clear and unambiguous, and the ZBA properly applied the requirement of 131,000 square feet to appellants' property.

Appellants additionally argue that Glen Arbor Township Ordinance, § IX.1, references and incorporates the building lot area requirements of Glen Arbor Township Ordinance, § V.5. In pertinent part, § IX.1 provides:

> A building or premises in this District shall be used only for one or more of the following specific uses:
>
> Including any use permitted in Residential I, II, III, and IV Districts as described under Article V of This Ordinance.

The permitted uses in Residential I are listed below:

SECTION V.5 RESIDENTIAL I - USES PERMITTED

No building, nor structure, nor any part thereof, shall be erected, altered or used, or land or premises used in part or in whole, for other than the following specific uses:

Permitted Uses - No building, nor structure, nor any part thereof, shall be erected, altered or used, or land or premises used in part or in whole, for other than the following specific uses:

A. A single family dwelling.

B. A home occupation, provided that there be no external evidence of such occupation except a non-illuminated sign and that said occupation does not require nor effect any changes in the external character of the building.

C. Accessory Residential Extension

1. Supplemental dwelling space; for example, finished room over one story garage detached from residence (dwelling)
2. Construction must meet all building requirements as set forth in zoning requirements and must comply with all building codes.
3. Supplemental space shall not exceed one room and bath. Kitchen area is not allowed.
4. Use of space may be bedroom, office, workshop or related to private one family dwelling.

D. Accessory buildings, whether attached or detached; for example, private garages, garden houses, tool houses, play houses, hobby or craft buildings, etc.

E. Boat houses.

Building Lot Area - Each dwelling or other main building hereafter erected in the Residential I District shall be located on a building lot or parcel of land having an average width of not less than one hundred (100) feet and containing not less than fifteen thousand (15,000) square feet of area unbroken by any public road, street or thoroughfare, provided that this shall not prevent the use of a building lot or parcel of land of lesser size that was of legal record or had been laid out by a registered land surveyor prior to the effective date of this ordinance.

The permitted uses are expressly listed in subsections A through E. Sections V.6 through V.8 apply to Residential Districts II through IV and provide that any use permitted in § V.5 are also permitted for those sections. Additionally, after the permitted uses portion, §§ V.6 through V.8 identify the building lot area for each district.

Appellants contend that because § IX.1 incorporates the permitted uses provided for in Article V, the building lot area for each residential district is also incorporated. The building lot area for the Residential Districts I through IV are all less than appellants' 2.25 acre or 98,250 square feet lot, and therefore, appellants argue that their lot is buildable pursuant to Article V. However, the permitted uses section specifically provides that "[n]o building, nor structure, nor any part thereof, shall be erected, altered or used, or land or premises used in part or in whole, for other than the following specific uses . . . ." This language clearly and unambiguously states that the only permitted uses are listed in subsections A through E.

"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." *PNC Nat'l Bank*, 285 Mich App at 506 (quotation marks and citation omitted). Accordingly, this Court must assume that appellee intended to limit the permitted uses to the uses provided for in that section. The section providing for the building lot area requirement is not part of the permitted use section. This separation of "Uses Permitted" and "Building Lot Area" is more clearly delineated in §§ V.6 through V.8. For example, § V.6 provides:

> No building or structure or any part thereof shall be erected, altered or used, or land or premises used in part or in whole for other than one or more of the following specific uses:
>
> A. Any use permitted in Residential I, Section V.5 of This Ordinance.
>
> B. Building Lot Area – A minimum of not less than thirty thousand (30,000) square feet of area for each dwelling unit, and having an average width of one hundred (100) feet.

In reviewing the ordinance's language, giving every word its plain meaning, extending the permitted uses to include the building lot area would violate the rule of statutory interpretation and render the 131,000 square feet requirement in § IX.1 nugatory. Therefore, the required square footage for a single-family dwelling in appellants' agriculturally zoned district was properly determined to be 131,000 square feet.

IV. EQUAL PROTECTION

Appellants argue that the ZBA denied their right to equal protection because there was no rational basis for its decision, and the ZBA failed to present any evidence and that it had denied variance requests similar to appellants' request. We disagree.

We review constitutional issues de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). The Michigan Supreme Court in *Shepherd Montessori Ctr Milan*, 486 Mich at 317-318, addressed whether the defendant township's denial of the plaintiff's request for a variance was constitutional. The Court set forth the equal protection principles guiding its decision:

> The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law. This Court has held that Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution. The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity. The general rule is that legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes the rational basis standard of review: that is, the classification drawn by the legislation is rationally related to a legitimate state interest. Under this deferential standard, "the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute[.]" [*Id*. at 318 (citations omitted; alteration in original).]

Appellants have not raised claims of disparate treatment based on a suspect or a quasi-suspect classification. Nor have appellants raised any argument that the ordinance was not facially neutral.

Appellants bear the burden of proof and they have not presented any evidence that they were treated dissimilarly. The record concerning other variances was limited to statements made by ZBA member Don Lewis at the public hearing for appellants' request. Lewis stated that at one time he invested quite a bit of time compiling a binder that contained every request or variance that had been approved or denied since 1960. Lewis shared that the binder had disappeared and he had been unable to locate it. Lewis asserted that the ZBA usually received one or two variance requests each year, and the ZBA did not receive a single request in 2021. Lewis expressed that, to his knowledge, the ZBA had never granted any variances for nonconforming lots.

Because appellants failed to offer any evidence demonstrating disparate treatment, or refuting Lewis's statements, they have failed to establish that the ZBA deprived them of their right

to equal protection. To the extent appellants direct this Court's attention to a circuit court decision commenting on appellee's unequal enforcement of its zoning ordinance more than 30 years ago, we are not persuaded that decision supports appellants' equal protection claim in this case.

Affirmed.

/s/ Thomas C. Cameron
/s/ Daniel S. Korobkin
/s/ Mariam S. Bazzi