STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF L E E L A N A U

CHARLES F. KNIGHT and JOANNE P. KNIGHT,

Plaintiffs,

vs.

File No. 89-2404-AW
HON. PHILIP E. RODGERS

GLEN ARBOR TOWNSHIP, GLEN ARBOR TOWNSHIP ZONING BOARD OF APPEALS,

Defendants.
/

Louis A. Smith (P20687)
Attorney for Plaintiffs

Richard W. Ford (P13569)
Attorney for Defendants

DECISION AND ORDER

Plaintiffs submit a Renewed Motion for Summary Relief/Peremptory Reversal of the decision of the Glen Arbor Township Zoning Board of Appeals (ZBA). Plaintiffs assert the subject Ordinance, Article XI, Section 11.5, is unconstitutional, that Plaintiffs' equal protection right was violated, that the ZBA abused its discretion, and that pursuant to Section 11.5, a variance was not required. Plaintiffs maintain that the ZBA has failed to advance any legitimate governmental interest through an unreasonable and arbitrary enforcement of the zoning ordinance.

This matter has been before the Court, where the Court decided the issue was not fully developed for review. By Order of this Court, a remand hearing was to be held to develop a record of the ZBA's consideration of the constitutional issues raised by the Plaintiffs' Complaint. The ZBA did not address the issue and refused to consider the Board's previous approvals of variances. Plaintiffs now renew the motion and in support offer

significant facts and evidence upon which the Court can make a determination.

As owners of residential cottages on Glen Lake, Plaintiffs have sought several variances from the Township's Zoning Board (Board) to make an addition to their property identified as the "Red Cottage." These attempts began in October of 1988. Throughout the course of Plaintiffs' appeals to the ZBA, various modifications were made to the purposed addition in each of the three requests for a variance. Each request was denied by the ZBA, offering no substantial reason for such denials. Of significance is the fact that 34 other requests for variances have been granted and, of these, one specific variance which is similarly situated to that requested by Plaintiffs, was granted eight months after Plaintiffs' was denied. Plaintiffs assert throughout their attempts to receive a variance the ZBA never denied a variance to Plaintiff for a completely new structure, but denied the proposed addition of a bedroom and adjoining bathroom. Plaintiffs' lot size is approximately 14,260.00 square feet. This proposed addition would have a total of 2,046 square feet.

The procedural aspects of this appeal and the standard of review are described in the Township Rural Zoning Act, MCLA 125.293(A); MSA 5.2963 (23a) (The Act). The Act limits this Court's review to a determination as to whether the ZBA's decision complies with the Constitution and laws of the State, is procedurally proper, and whether it is supported by competent, material, and substantial evidence on the record and represents reasonable exercise of discretion granted by law. The standard of review was most recently discussed by the Michigan Supreme Court in Macenas v Michiana, 433 Mich 380, 395; 446 NW2d 102 (1989). There, the Supreme Court wrote as follows regarding the standard of review:

> "The statute instructs courts to defer to determinations of fact made by an appeals board if supported by competent, material, and substantial evidence on the record, MCL 125.585(11)(C); MSA

5.2935(11)(c). The board's decisions based on those determinations of fact are to be deferred to provided they are procedurally proper, MCL 125.585(11)(b); MSA 5.2935(11)(b); and are a reasonable exercise of the board's discretion, MCL 125.585(11)(d); MSA 5.2935(11)(d). This deference, however, does not undercut the authority of the court to decide questions of law as they arise in the course of a review of appeals board actions and to negate actions that are so unreasonable as to rise to the level of unconstitutionality. How the court's scope of review should operate in the face of mixed questions of fact and law has been neatly summarized as follows:

> 'Where the primary question is whether the ordinance provision applies in the given situation, there are two questions for determination:
>
> (1) What are the facts which, taken together, can be said to describe the situation?
>
> (2) How does the ordinance apply to those facts?
>
> Determination of the first question is for the board to decide; if its determination with respect to this is reasonable and is supported by substantial evidence in the record, even though debatable, it should be accepted by the court on review. Determination of the second question; i.e., what the ordinance means in relation to the facts, is a question of law for the courts to decide. [Rathkopf, supra, p 42-70].' pp 395-396."

Plaintiffs have sought three proposed variance requests to construct an addition of 290 square feet to their current non-conforming cottage. The initial request for a lake and road right-of-way was denied. The second alternative request reduced the size of the addition on the lake side, eliminating the lake side variance, leaving the road variance request. This alternative was subsequently denied. In a third proposal, the road right-of-way variance was requested with no lake side variance needed, placing the addition further away from the lake setback.

The subject of this motion is Section 11.5 of the Ordinance, stating:

> "Any nonconforming use and any building or structure devoted to a nonconforming use under the terms of this ordinance may be altered or enlarged so as to extend said nonconforming use within the limits of the parcel of land devoted to said nonconforming use on the date that this ordinance takes effect. Such extended use must conform to all of the requirements of this ordinance as they pertain to such use in the districts wherein they are permitted. If such nonconforming use is not permitted in any district, then such alteration or enlargement must conform to the set-back lines and side yard requirements for the district in which such nonconforming use is located."

Affidavits submitted by Donald J. Lewis (present member of ZBA) and John DePuy (former member of ZBA) attest to the intent or design of the drafters of the ordinance as it pertains to the allowance of extension of nonconforming uses. Both affidavits state that the second and third sentences of Section 11.5 were intended to require property owners who wanted to extend a nonconforming use to conform to all the requirements of the ordinance as they pertain to use or active (not area) in the districts where they are permitted. Both affidavits state that many of the variances approved by the ZBA since the enactment of the ordinance in 1975 were for structures rendered nonconforming. Both affidavits state the first sentence of the section would apply to a situation as Plaintiffs', where a nonconforming use would be permitted to extend their nonconforming use to the lot line without the need for a variance. The variance request became a practice of the board although not required by the Ordinance.

Under the general provisions of Article IV, Section 4.6, setback restrictions for dwellings are controlled.

> "No dwelling shall be built closer to the adjoining right-of-way than forty (40) feet nor closer to the water's edge than forty (40) feet except where compliance with both of these restrictions on a lot platted before the institution of this ordinance creates a hardship in which case the right-of-way restriction may be reduced as deemed necessary by the Board of Appeals, but in no case shall be set-back from the water's edge be less than twenty-five (25) feet."

Plaintiffs maintain that their equal protection rights were violated by the unconstitutional ruling of the ZBA to deny the requests for a variance made by Plaintiffs. Based upon a similarly-situated request for a variance, the Court believes Plaintiffs' rights were denied. The Pfeiffers, also residents of Manitou Trail in Glen Arbor, requested a variance to demolish their existing structure and build a new residence. The proposed variance increases the already nonconforming use by bringing the structure eight (8) feet closer to the water's edge, leaving fifteen (15) feet of more buildable space on the road right-of-way side of the property. The ZBA approved this variance.

The variance granted to the Pfeiffers was similar to Plaintiffs, with the nonconforming setbacks reversed. Pfeiffer became nonconforming on the water's edge, while Plaintiffs would be nonconforming on the road right-of-way. The Plaintiffs' third variance request placed the proposed addition five (5) feet from the road right-of-way and within the water's edge setback. The "Red Cottage" without the proposed addition is four (4) feet at its closest point and six (6) feet at its furthest point from the road right-of-way.

A "pattern of development" exists that shows the ZBA has a "lack of commitment" to the Ordinance as indicated by the granting of 34 other variances on and around Glen Lake, and the granting of a similarly-situated variance request to the Pfeiffers. Troy Campus v City of Troy, 132 Mich App 441, 349 NW2d 177 (1984). Those residents who sought and received

variances from the setback provisions are for structures rendered nonconforming by the enactment of the ordinance in 1975. The granted nonconforming extensions of structures are to Pfeiffer, 1989, Vierk, 1988, Bratt, 1987, and 1982, Whiteside, 1981, Woodward, 1981, Klosterman, 1980, Keuning, 1978, Cook, 1978, Schmerchel, 1977, Weaver, 1976, and Brooks, 1976.

The fact that the ZBA granted numerous variances on the setback provision and granted the Pfeiffer variance request does show the significant discriminatory application of the Ordinance to the Plaintiffs' rights under the Michigan and U.S. Constitutions. Twp of Blackman v Koller, 357 Mich 186, 189 (1989). In Twp of Blackman, the Court discussed its previous decision on this issue of discriminatory application of an ordinance in Morris G. Laramie & Son, Inc v Southfield Twp Building Inspector, 326 Mich 410, 414:

> "In that case we squarely held that when the township suffered others to use their property in a similar nonconforming manner, that to uphold the zoning ordinance against defendant alone would be discriminatory and unlawful."

Clearly, the ZBA has developed a history of partial or unequal enforcement of the Ordinance since its enactment in 1975 against some property owners, while permitting substantially the identical nonconforming uses of the setback provisions of the Ordinance to other property owners within the zoned area of Glen Arbor. This constitutes an unequal and unlawful discriminatory application of the Ordinance.

In reviewing the hearing records for January 9, 1989, April 11, 1991, and May 14, 1991, there is no substantial evidence on the record that would indicate the reasons for the denial of the three variance requests made by Plaintiffs in view of those granted to others similarly situated to Plaintiffs. This Court is precluded from a reversal of the ZBA's ruling except "upon the traditional grounds of showing of arbitrary action or a clear abuse of discretion." Tireman-Joy-Chicago Improvement Assoc v

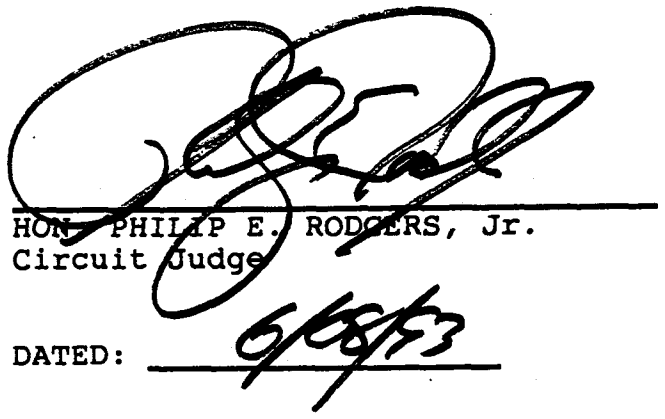
is within the same zoning district. Under Section 11.5 of the ordinance, non-conforming use:

> "Shall mean any building or land lawfully occupied by a use, at the effective date of this ordinance or amendment thereof, which does not conform after passage of the ordinance or amendment thereto with the requirements of the district in which it is situated."

Under Section 11.5, Plaintiffs may alter or enlarge nonconforming use within the limits of the parcel of land devoted to said nonconforming use, as this nonconformity applies to the setback restrictions within the residential district, not as it applies to activity as defined by the ordinance.

The Glen Arbor Township Zoning Board of Appeals violated Plaintiffs' constitutional right to equal protection by an arbitrary enforcement of this Zoning Ordinance where Section 11.5 has not been applied to other applications for a variance by similarly-situated residents of Glen Arbor. Such discriminatory rejection of Plaintiffs' request and the lack of factual support for such a rejection by the ZBA cannot be said to advance any legitimate government interest, and is therefore violating Plaintiffs' right to equal treatment and protection as these rights pertain to the enactment and enforcement of the Glen Arbor Township Zoning Ordinance. The ZBA failed to establish on the record, after remand from this Court, that it complied with the Constitution and laws of this State, that the decision was based upon proper procedure supported by competent, material and substantial evidence on the record, and that the decision was made in a reasonable exercise of discretion granted by law. Plaintiffs' Motion for Summary Relief/Peremptory Reversal is granted, and the decision of the Glen Arbor Zoning Board of Appeals is reversed. MCLA 125.585(13); MSA 5.2935(13)

IT IS SO ORDERED.



HON. PHILIP E. RODGERS, Jr.
Circuit Judge

DATED: 6/6/13

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

CHARLES F. KNIGHT & JOANNE P. KNIGHT,

Plaintiffs,

v

File No. 89-2404-AW
HON. PHILIP E. RODGERS, JR.

GLEN ARBOR TOWNSHIP and GLEN ARBOR TOWNSHIP ZONING BOARD OF APPEALS,

Defendants.
_____/

Louis A. Smith (P20687)
Attorney for Plaintiffs

Richard W. Ford (P13569)
Attorney for Defendants

DECISION AND ORDER

This litigation reflects a protracted struggle between the parties regarding the decision of the Glen Arbor Township Zoning Board of Appeals (ZBA) to deny Plaintiffs a variance to construct an addition onto their property identified as the "red cottage." In fact, this litigation reflects several attempts by Plaintiffs to seek variances, all of which have been denied. These attempts began in October, 1988.

The first ruling by this Court was an Order of Remand to the ZBA for a hearing where the ZBA might develop a record of its consideration of the constitutional issues raised by the Plaintiffs' complaint. This Court previously held that the ZBA did not appropriately address these issues on remand and did not provide the requisite factual basis upon which this Court might predicate a finding of reasonable enforcement of the Zoning Ordinance with respect to Plaintiffs' parcel and competing parcels for which variances were granted.

This Court's findings were contained in its Decision and Order of June 8, 1993. Defendants filed a motion for reconsideration to

which the Plaintiffs timely responded.

I

While the Court does recognize one factual error[1] in its opinion and three dictation errors[2], all of which are discussed below, it does not find a palpable error. MCR 2.119(F)(3). For reasons that will now be discussed, the Defendant's motion for reconsideration is denied.

Motions for reconsideration are subject to a precise standard of review. This standard is described in MCR 2.119(F)(3) as follows:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable

---

[1]This Court incorrectly stated that 34 other requests for variances had been granted. In fact, of the 34 requests for variances, 29 had been granted, one had been denied where a residential use was proposed to be transformed into a commercial use, and four had been denied based upon the availability of reasonable alternatives. As the Court more accurately noted on p 6 of its Decision, "the ZBA has developed a history of partial or unequal enforcement of the Ordinance since its enactment in 1975 against some property owners, while permitting substantially the identical nonconforming uses of the setback provisions of the Ordinance to other property owners within the zoned area of Glen Arbor."

[2]The Court does acknowledge misstating the square footage of the proposed addition on p 2 of its Decision. There, the Court described the proposed addition as one of 2,046 square feet. However, on the next page, the Court did properly note that the addition was of 290 square feet. Second, the Court mistakenly referred to Plaintiffs' real property on p 2 of its Decision as a "lot." It is not a "lot," but rather a parcel of approximately 14,260 square feet. It was correctly referred to as such on pp 7 and 8. Third, in discussing the affidavits of Mr. Lewis and Mr. DePuy, the Court noted that their impact on a construction of Section 11.5 of the Ordinance was to confirm an intent "to require property owners who wanted to extend a nonconforming use to conform to all of the requirements of the Ordinance as they pertain to use or active (not area) in the districts where they are permitted." The words "or active" do not belong in the sentence and were overlooked by the Court in the proofreading of its opinion.

> implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The Court apologizes for the failure to proofread its opinion more closely. Having acknowledged the errors in the Opinion, the Court does not find that the substance of its ruling must change.

II

The primary focus of Defendants' motion for reconsideration lies in its objection to the Court's use of the Lewis and DePuy affidavits. The Court recognizes that an appeal from the ZBA is on a certified record. The affidavits were submitted and the Court cannot find where, in this exhaustive record, a timely objection was made with respect to them. In the absence of such an objection, use of the affidavits by the Court as a part of the record was waived. Charbeneau v Wayne Co General Hospital, 158 Mich App 730, 733 (1987). Additionally, the affidavits only confirm what is plain from the clear language of Sections 4.6 and 11.5 of the Ordinance. Section 11.5 describes nonconforming uses, extensions of structures devoted those uses and the obligation of the property owner to conform the extended use to the requirements of the Zoning Ordinance as it pertains to that use in districts where they are permitted.

> Extension - Any non-conforming use and any building or structure devoted to a non-conforming use under the terms of This Ordinance may be altered or enlarged so as to extend said non-conforming use within the limits of the parcel of land devoted to said non-conforming use on the date that This Ordinance takes effect. Such extended use must conform to all of the requirements of This Ordinance as they pertain to such use in the Districts wherein they are permitted. If such non-conforming use is not permitted in any District, then such alteration or enlargement must conform to the set-back lines and side yard requirements for the District in

which such non-conforming use is located.

The third sentence of Section 11.5 only addresses the issue of area or setback requirements in the context of extending a structure devoted to a nonconforming use that is not permitted in any district. Assuming for the sake of argument that the affidavits of Mr. Lewis and Mr. DePuy are struck from this record, the unambiguous language of Section 11.5 is still directed to nonconforming uses and a requirement that extensions of structures relating thereto only meet the requirements applicable to that use in districts where the use is permitted. The affidavits are merely cumulative evidence of what can be plainly read in the Ordinance itself.

The Townships reliance on a theory of *nonconforming* structures is simply without a legal basis in the language of its own Ordinance. In fact, the Defendants admit that the Ordinance lacks any definition of a nonconforming structure.

As this Court has already written, the setback restrictions do not apply to the proposed improvements to Plaintiffs' cottage as such extended use is of a residential nature located within a residential district. The use of Plaintiffs' current structure and its proposed extension is not nonconforming. The ZBA may well have developed a practice of reviewing extensions of nonconforming uses within a compatible use district through Section 11.5, but the basis for this practice has not been shown to the Court in the clear language of the Zoning Ordinance. More importantly, the application of Section 11.5 to others has resulted in variances being granted on 29 out of 34 occasions. See, previous Decision and Order at p 8.

The Ordinance at Article II, Definitions, defines a nonconforming use in the following language:

> Shall mean any building or land lawfully occupied by a use, at the effective date of This Ordinance or amendment thereof, which does not conform after passage of The Ordinance or Amendment thereto with the

> requirements of the District in which it is situated.

The alteration or enlargement of a residential structure in a residential district does not require a variance. Of course, expansion of a structure devoted to a commercial nonconforming use in a residential district would require a variance. If the Township wishes to regulate nonconforming structures and make the enlargement of a nonconforming structure devoted to a use within a compatible zoning district subject to setback requirements, it may do so. However, this Court simply finds no support for the Defendants' argument in the Ordinance.[3]

The Defendants have referred the Court to Section 4.6 of the Ordinance, arguing that these setback provisions preclude the Plaintiffs from enlarging their cottage without a variance. Section 4.6 states as follows:

> No dwelling shall be built closer to the adjoining right-of-way than forty (40) feet nor closer to the water's edge than forty (40) feet except where compliance with both of these restrictions on a lot platted before the institution of This Ordinance creates a hardship in which case the right-of-way restriction may be reduced as deemed necessary by the Board of Appeals, but in no case shall the set-back from the right-of-way be less than twenty (20) feet nor the set-back from the water's edge be less than twenty-five (25) feet.

Here, the Defendants' argument fails because the language of Section 4.6 is directed at new construction. If the Township wishes to have the setback requirements applicable to dwellings and additions thereto, it can very simply amend its Ordinance and say

---

[3]While the Defendants argue that Section 11.5 of the Glen Arbor Township Ordinance is not a part of the record, this argument is without merit. The Court may take judicial notice of the law whether or not a copy of the law is transmitted as a part of the certified record. The Court cannot engage in a process of construing an ordinance without reviewing the entire ordinance and the relationship of its parts to its whole.

so. While the Court does not find the Ordinance to be ambiguous, any ambiguity would have to be resolved in favor of the property owner. Talcott v Midland, 150 Mich App 143, 147 (1985). For the Court to accept a construction of the Ordinance consistent with the Defendants' position, the Court must ignore the plain language of Sections 11.5 and 4.6, develop a definition of a nonconforming structure and, essentially, rewrite the Ordinance with language different than that chosen by its drafters.

The Court would also have to ignore the interpretive history of the Ordinance which is clearly a part of this record. This history is discussed best by the Plaintiffs and reveals that numerous variances have been granted subsequent to the promulgation of the Ordinance which resulted in construction within the 20 foot setback from the right of way. In their response to the Defendants' motion, Plaintiffs have chosen to highlight the variances granted to Justice Weaver for her residence and the Township for its own fire hall. The Plaintiffs also redirect the Court's attention to the Schmeichel residence and the Old Kent Bank. All of these structures are within the right-of-way setback, arguably precluded by Section 4.6.

The Court is not indifferent to the possibility that it may have offended the Defendants with its ruling. However, the Court must confess that it does not find the basis for palpable error in the motion for reconsideration or substantial competent evidence to support the ZBA decision.

Simply stated, the plain language of the Ordinance does not require a variance. The practice of the Township has been to insist upon the issuance of variances. Despite the Townships' statement that it has not provided variances from the 20-foot right-of-way setback limitation, the record clearly indicates to the contrary. The Defendants simply are not free to arbitrarily and capriciously pick and choose among their residents for the granting of such important property rights. An effort was made to remand this case to the ZBA to develop an appropriate record to

support their determination and the Defendants have not done so.[4]

The Court does not dispute the wisdom of an Ordinance which would limit the construction of, or addition to, structures within 20 feet of the highway right of way. Yet, the Defendants have not promulgated an Ordinance which unambiguously applies such limitations to other than new construction, has granted variances to others within the 20-foot setback and chosen to adopt an Ordinance without any definition of nonconforming structures.

III

Accordingly, for all the foregoing reasons, the Defendants' motion for reconsideration is denied. A building permit shall be promptly issued to the Plaintiffs, no variance being necessary. In the alternative, if a variance is determined to be required after a review of this case by an appellate court, then this Court believes that the variance has been unconstitutionally withheld and a building permit should be issued based upon the Plaintiffs' third proposal, i.e., a request for a variance from the road right of way setback only without any need for a lake side variance.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/29/95

[4]A view of the several parcels in dispute with counsel did not suggest any rational basis for the distinction between Plaintiffs' parcel and those where variances were granted.