

STATE OF MICHIGAN
COURT OF APPEALS

MIRIAM HISER,

Appellant,

v

VILLAGE OF MACKINAW CITY and VILLAGE
OF MACKINAW CITY ZONING BOARD OF
APPEALS,

Appellees,

and

JOHN PAQUET and CATHY PAQUET,

Intervenors-Appellees.

UNPUBLISHED

October 21, 2021

Nos. 354806; 354807

Emmet Circuit Court

LC Nos. 20-106876-AA;
20-106931-AA

Before: REDFORD, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

In these consolidated cases,¹ appellant, Miriam Hiser, appeals by right in Docket No. 354807 and by delayed leave granted² in Docket No. 354806³ the circuit court’s determination that she failed to establish “aggrieved party” status under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, specifically MCL 125.3605, a requirement to invoke the circuit

¹ *Hiser v Mackinaw City*, unpublished order of the Court of Appeals, entered December 21, 2020 (Docket Nos. 354806 and 354807).

² *Hiser v Mackinaw City*, unpublished order of the Court of Appeals, entered December 21, 2020 (Docket No. 354806).

³ Both cases involve identical issues. Appellant filed both appeals in an attempt to preserve her appellate rights.

court's appellate jurisdiction regarding her appeals of decisions of the Mackinaw City Zoning Board of Appeals (ZBA). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Hiser previously appealed to this Court decisions by the circuit court essentially related to the same operative facts. In this Court's previous decision, *Hiser v Mackinaw City*, unpublished per curiam opinion of the Court of Appeals, issued November 20, 2018 (Docket Nos. 338175 and 338843), this Court considered and determined issues different from those now raised in these consolidated appeals. This Court set forth the following factual and procedural background that we incorporate herein:

Plaintiff [Miriam Hiser] owns improved real property on the Straits of Mackinac, as do the Paquets. The Straits are situated to the north of their properties, and a roadway, Lakeside Drive, runs along the southern border of their lots. A strip of land lying directly adjacent to the east side of plaintiff's property separates plaintiff's parcel from the Paquets' land, with the strip of land being situated directly adjacent to the west side of the Paquets' property. This land sitting between the properties was conveyed to the village early last century by way of a deed, which provided, "Said property to be improved by [the village] and used as a street only."

With respect to zoning, the properties are located in a single-family residence district (R1 district). The Paquets' property has a one-story family residence, and they decided to construct a three-stall garage with full living quarters located above the garage as a second story of the structure (hereafter the "garage addition"). Under the plan, the garage addition was to be used by the Paquets as a temporary residence upon razing their existing house and while building a new larger two-story home at the site that would be attached to the garage addition. Preparation for the construction included cutting down trees, grading, and the addition of limestone on the village's property, as the village's land was to be used for purposes of ingress and egress relative to the garage addition and Lakeside Drive. Ultimately, the garage doors of the garage addition were to face the village's lot to the west, not Lakeside Drive, with the concrete driveway extending into the village's lot. The Paquets, after submission of permit applications and a site plan, successfully secured the necessary permits, and the construction of the garage addition was completed in the summer of 2015. Numerous photographs of the garage addition and surrounding area are contained in the record.

Notwithstanding plaintiff's extensive efforts to quash the project, the ZBA ultimately approved of the village's actions in granting the building permit and allowing the construction, finding no violations of the Mackinaw Zoning Ordinance (MZO). The circuit court affirmed the ZBA's decision. In a separate civil action brought by plaintiff against the Paquets and the village, the circuit court entered an order granting summary disposition in favor of defendants. The circuit court also denied plaintiff's request to amend her complaint. Plaintiff appeals the circuit

court's decisions to affirm the ZBA's findings, to summarily dismiss plaintiff's complaint, and to deny amendment of the complaint.

* * *

Plaintiff chartered three different courses in challenging the Paquets' construction project, which courses ran on a nearly parallel time-track. Plaintiff first challenged the zoning administrator's building permit that authorized the construction of the garage addition, filing an appeal with the ZBA, followed by an appeal of the ZBA's decision to the circuit court. And plaintiff now seeks reversal of the circuit court's decision in this Court. Second, in a direct circuit court appeal not entailing the ZBA, plaintiff challenged permits issued by the superintendent of the village's Department of Public Works (DPW) that authorized the construction of the driveway. Although the circuit court ruled against plaintiff and upheld the permits, plaintiff did not file an appeal in this Court relative to the circuit court's ruling. Finally, plaintiff filed an original action in the circuit court against the Paquets and the village, alleging a violation of the street-only language in the deed, the existence of a dedication, nuisance per se premised on violations of the MZO, and a separate nuisance count focused on property drainage issues. The circuit court summarily dismissed all of the counts in the complaint, and plaintiff challenges that ruling in this appeal. [*Hiser*, unpub op at 2-3 (alteration in original).]

This Court affirmed in part and reversed in part the circuit court's earlier decision because the circuit court had based its decision on the ZBA's ruling which failed to adequately make findings of facts and conclusions of law on several issues sufficient for the circuit court to decide some of the matters before it. This Court remanded for the ZBA to make more adequate determinations. This Court affirmed the circuit court's decision in *Hiser*'s civil case that the village could use its right-of-way land for purposes other than a street because the grant did not limit its use, and therefore, the Paquets and the village had not violated the deed and the land's ownership did not revert to *Hiser*. *Id.* at 11. On remand, the ZBA held a hearing and affirmed the issuance of zoning permits to the Paquets. *Hiser* appealed and on September 6, 2019, the circuit court reversed and remanded for further proceedings by the ZBA consistent with its opinion and this Court's previous opinion. Following a public hearing on May 7, 2020, the ZBA approved the Paquets' application for a variance from the height limitation for their garage addition and set forth its reasons for doing so. *Hiser* appealed the issuance of the permits and the variance in the circuit court. The Paquets moved to intervene in *Hiser*'s appeals and the circuit court granted their motion on May 20, 2020, respecting one appeal and the Paquets were allowed to intervene in the variance appeal by an order entered by stipulation on June 22, 2020. The Paquets moved to dismiss each of *Hiser*'s appeals for lack of jurisdiction under MCR 2.116(C)(4) on the ground that *Hiser* failed to establish "aggrieved party" status as required under MCL 125.3605. The circuit court held a hearing in each appeal case and set forth its decision in an opinion dated August 14, 2020. The circuit court held that the jurisdiction issue could not be waived and collateral estoppel did not bar the court from determination of the jurisdictional issue. The circuit court concluded that *Hiser* failed to allege harms from the zoning decisions that satisfied the "aggrieved party" standard to invoke the circuit court's jurisdiction to hear and decide her appeals, and therefore granted the Paquets' motion and dismissed *Hiser*'s appeals. *Hiser* now challenges the circuit court's ruling.

II. STANDARD OF REVIEW

We review de novo whether a circuit court has subject-matter jurisdiction over a case. *Quality Market v Detroit Bd of Zoning Appeals*, 331 Mich App 388, 393; 952 NW2d 603 (2019). We review de novo a circuit court's decision whether a party is an "aggrieved party" under MCL 125.3605 of the MZEA with a right to invoke the jurisdiction of the circuit court to appeal a ZBA decision. *Olsen v Chikaming Twp*, 325 Mich App 170, 185-187, 194; 924 NW2d 889 (2018). On appeal, we "determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA's] factual findings." *Id.* at 180 (quotation marks and citation omitted; alteration in original). We review de novo the interpretation and application of statutes and ordinances. *Id.* We also review de novo a decision on summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). "A summary disposition motion pursuant to MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction." *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004).

III. ANALYSIS: "AGGRIEVED PARTY" STATUS

These appeals arise from the circuit court's determination that it lacked jurisdiction to hear Hiser's appeals from the ZBA's decisions. Hiser presents several arguments seeking reversal of the circuit court, none of which have merit.

We begin our interpretation of a statute by analyzing its plain language. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). The statute must be examined "as a whole, reading individual words and phrases in the context of the entire legislative scheme," and by giving "effect to every word, phrase, and clause [to] avoid an interpretation that would render any part surplusage or nugatory." *Id.* An unambiguous statute will be "enforced as written." *Id.*

MCL 125.3605 provides that "[t]he decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under [MCL 125.3]606." MCL 125.3606(1) provides that "[a]ny 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." MCL 125.3606(1) further requires:

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.

Contrary to Hiser's argument, this Court made clear in *Olsen* that "a party seeking relief from a decision of a ZBA is not required to demonstrate 'standing' but instead must demonstrate to the circuit court acting in an appellate context that he or she is an 'aggrieved' party." *Olsen*,

325 Mich App at 180-181, citing MCL 125.3605. “An aggrieved party is not one who is merely disappointed over a certain result.” *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006). Instead, an aggrieved party “must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.” *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948) (quotation marks and citation omitted).

In *Olsen*, 325 Mich App at 185 (quotation marks, alterations, and citations omitted), this Court explained:

Given the long and consistent interpretation of the phrase “aggrieved party” in Michigan zoning jurisprudence, we interpret the phrase “aggrieved party” in § 605 of the MZEA consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, as is the mere entitlement to notice.

“Generally, a neighboring landowner alleging increased traffic volume, loss of aesthetic value, or general economic loss has not sufficiently alleged special damages to become an aggrieved party because those generalized concerns are not sufficient to demonstrate harm different from that suffered by people in the community generally.” *Id.* at 183 (citation omitted). In *Olsen*, this Court held that the appellees failed to establish aggrieved-party status because their “[a]esthetic, ecological, and practical harms are insufficient to show special damages not common to other property owners similarly situated” and failed to “establish that they [had] special damages different from those of others within the community” beyond complaints of “anticipated inconvenience and aesthetic disappointment that any member of the community might assert.” *Id.* at 186, 193 (citations omitted). Further, this Court held that mere ownership of a neighboring property does not make a party aggrieved. *Id.* at 185.

In *Olsen*, this Court explained that parties that alleged a variety of harms from the grant of a zoning variance failed to establish that they were aggrieved parties under MCL 125.3606 because they “failed to show that they suffered a unique harm different from similarly situated community members, they failed to establish that they are parties aggrieved by the decision of the ZBA.” *Id.* at 186.

This Court also rejected the same argument made by Hiser here, that the Paquets waived the “aggrieved party” jurisdiction issue by not raising it before the ZBA:

The ZBA was not the appropriate forum to address whether appellees were empowered to appeal the ZBA’s decision as aggrieved parties. The question who may seek review of the ZBA decision before the circuit court is a question for initial

determination by the circuit court, not by the ZBA. Moreover, at the time of the proceedings before the ZBA, the ZBA had not yet granted the variance and thus any challenge to appellees' ability to appeal that future decision would have been premature. So, although appellees had a right to participate in the ZBA's public hearing, the issue whether appellees were parties "aggrieved by the decision" of the ZBA under the MZEA with the right to appeal the decision of the ZBA in the circuit court was a question properly raised for the first time before the circuit court. Indeed, it could not have been raised any earlier. [*Id.* at 191-192.]

Accordingly, under *Olsen*, the Paquets did not and could not waive their jurisdiction argument by not raising it before the ZBA; indeed, that argument could be raised only in the circuit court. Therefore, Hiser's waiver argument fails as a matter of law.

Hiser also argues that, because the ZBA made a finding of fact and conclusion of law that Hiser constituted an "aggrieved person" under the Village Zoning Ordinance, the Paquets and the circuit court were bound by that determination. In relation to this argument, Hiser asserts that she met the aggrieved-person status under MCL 125.3604(1) which, essentially she claims negated her need to establish her "aggrieved party" status under MCL 125.3605. She contends that, because *Olsen* addressed MCL 125.3605 instead of MCL 125.3604, *Olsen* is inapplicable to this case. We disagree.

The portion of MCL 125.3604(1) on which Hiser relies provides: "An appeal to the zoning board of appeals may be taken by *a person aggrieved* or by an officer, department, board, or bureau of this state or the local unit of government." The plain language of MCL 125.3604 and MCL 125.3605 addresses different appeals. MCL 125.3604 addresses who may appeal *to the ZBA*; whereas, MCL 125.3605 addresses who may appeal *from* the ZBA's decision to the circuit court. See, e.g., *Connell v Lima Twp*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353871); slip op at 13 (stating that MCL 125.3604(1) "applies to appeals filed with the Board of Appeals," i.e., the ZBA); *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 458-459; 957 NW2d 47 (2020) (stating that MCL 125.3605 governs appeals *to* the circuit court *from* a township board or municipal zoning commission). Because the two statutory provisions apply to separate and distinct appeals, the ZBA's determination that Hiser could appeal local zoning decisions had no bearing on the circuit court's analysis and separate determination under MCL 125.3605 regarding whether Hiser had aggrieved-party status permitting her to invoke the jurisdiction of the circuit court. The circuit court had the obligation to analyze and decide the jurisdiction issue. Neither the circuit court nor the Paquets were or could be bound by the ZBA's decision. Therefore, Hiser's arguments in this regard fail as a matter of law.⁴

Hiser had the burden of demonstrating her aggrieved-party status under MCL 125.3605, by alleging and proving she suffered some special damages not common to other property owners

⁴ Hiser's argument that the Paquets were collaterally estopped from raising the jurisdiction issue based on the ZBA's finding that she constituted an aggrieved person under MCL 125.3604(1) similarly lacks merit for these same reasons, and also fails because the issue regarding the circuit court's jurisdiction had not been raised or decided at any time previously by the circuit court. Nor did this Court address and decide the issue in Hiser's previous appeal to this Court.

similarly situated. *Olsen*, 325 Mich App at 185. The circuit court also recognized that Michigan law permits challenges to subject-matter jurisdiction at any time. See *Kuhlgert v Michigan State Univ*, 328 Mich App 357, 380; 937 NW2d 716 (2019).

Respecting the circuit court's jurisdiction decision, the record reflects that the court considered Hiser's allegations and affidavit testimony regarding harms she asserts that she suffers, the evidence in the record regarding the village's right-of-way land and its use, the Paquets' home construction and garage addition, and the zoning permits and variance granted to the Paquets. The record reflects that the circuit court thoroughly analyzed all in light of the principles articulated in *Olsen*. The record in this case establishes that the circuit court did not misapprehend or grossly misapply the substantial evidence test to the ZBA's factual findings. *Olsen*, 325 Mich App at 180. In her affidavit, Hiser complained of the size of the Paquets' residence, contending that it constituted a multifamily structure such that Hiser's "parking, noise, privacy and trespassing issues . . . [and her inability to access her property would] only worsen once the" residence has been built. The circuit court properly determined that Hiser's objections to the Paquets' residence and garage size and her noise and privacy complaints constituted generalized aesthetic harms no different than those suffered by people in the community and, therefore, failed to establish Hiser's aggrieved-party status. Further, Hiser's complaint regarding the height of the Paquets' garage failed to articulate any cognizable harm. The circuit court did not err in this regard.

The circuit court also considered Hiser's assertion that the Paquets' use of the village's land right-of-way caused her harm. The circuit court noted from the evidence that Hiser's property is not contiguous with the Paquets' land but separated by the 30-foot right-of-way. The record reflects that the circuit court appropriately discerned that Hiser's alleged harms flowed from the village's right-of-way decision, which the circuit court had previously affirmed and she had not appealed, and not from the zoning permits for the garage and residence or the variance for the height of the garage. The circuit court correctly ruled that the right-of-way use final decision could not serve as a harm arising from the garage related zoning permits and variance. The circuit court also correctly concluded that Hiser's claims in her civil suit regarding the right-of-way use had previously been dismissed by the circuit court and this Court affirmed its decisions. The court's previous adjudication of such claims as lacking merit precluded her from relying on them as a factual basis to establish jurisdiction.

The harms listed in Hiser's affidavit regarding parking on the right-of-way land, vehicle fumes and noises from that land use, lack of privacy from vehicle headlights from that land, the surveillance camera located on the Paquets' property, were unrelated to the zoning permits and variance decisions. The circuit court did not err in this regard. Moreover, these alleged harms recite incidental inconveniences such as general aesthetic or common environmental changes that are insufficient to establish that Hiser constituted a party aggrieved by the zoning decisions.

All of the alleged harms did not involve the permits at issue in this appeal. In fact, the ZBA determined that the permits did not allow parking in the right-of-way; therefore, Hiser's complaints related to *enforcement* of the permits, not the *issuance* of the permits themselves. Any issues of trespass on Hiser's property similarly did not relate to the permits because the permits did not authorize the Paquets or their visitors to go onto Hiser's property.

Additionally, Hiser's security camera allegation did not relate to the permits. Moreover, regardless of whether the permits were granted, the Paquets could install a security camera facing appellant's cabin. This was not a unique harm in any way related to the permits. Hiser also vaguely contended that she could see and hear inside the Paquets' garage. Hiser, however, failed to show how she suffered unique harm or, in fact, any harm at all in that regard. She did not specify that the noise was continuous or unusually loud or differed in any manner from sound of activities within a neighbor's garage. The circuit court, therefore, properly concluded that such harm fell into the category of incidental inconveniences, general aesthetic or common environmental changes, none of which sufficed to establish aggrieved-party status. Although Hiser contended that only her property bordered the village's right-of-way land and the only property owner affected by the alleged harms, mere proximity is insufficient. *Olsen*, 325 Mich App at 185.

The circuit court correctly held that Hiser failed to allege unique harms that caused special damages from the zoning decisions that satisfied the aggrieved-party requirement to invoke the circuit court's jurisdiction. The circuit court, therefore, did not err by granting the Paquets' motion and dismissing Hiser's appeals for lack of jurisdiction.

Affirmed.

/s/ James Robert Redford
/s/ Kirsten Frank Kelly
/s/ Anica Letica