STATE OF MICHIGAN

COURT OF APPEALS

MARY EVELEIGH,

Appellant,

v

CITY OF CHARLEVOIX,

Appellee.

UNPUBLISHED
October 21, 2021

No. 354984
Charlevoix Circuit Court
LC No. 19-095726-AA

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

PER CURIAM.

Plaintiff, Mary Eveleigh, appeals by right the circuit court's dismissal of her appeal of a decision of the City of Charlevoix's Zoning Board of Appeals (ZBA) for lack of jurisdiction. We affirm.

I. FACTUAL BACKGROUND

The Charlevoix County Zoning Administrator issued a building permit to the owners of a lot neighboring plaintiff's property for the construction of a house. Plaintiff appealed that decision to the ZBA on the ground that the property constituted an illegal nonconforming lot. The ZBA found that the property constituted a legal nonconforming lot and affirmed the zoning administrator's decision to issue the building permit. The ZBA formally adopted the order as final on April 1, 2019. Plaintiff sought rehearing but the ZBA denied her request. In July 2019, plaintiff filed suit against the City of Charlevoix, the ZBA, and the ZBA's chairperson seeking a writ of mandamus ordering the ZBA to hold a rehearing. The ZBA held a public meeting on September 18, 2019, at which plaintiff's counsel advocated for rehearing. The ZBA determined by unanimous vote that no exceptional circumstances warranted rehearing. Plaintiff ultimately filed a claim of appeal of the ZBA's decision to the circuit court on December 6, 2019, seeking reversal of the ZBA's decision and invalidation of the permit. The circuit court dismissed plaintiff's appeal for lack of jurisdiction because it concluded that plaintiff was not a party aggrieved by the ZBA's decision as required under MCL 125.3605 to invoke the appellate jurisdiction of the circuit court. Plaintiff now appeals the circuit court's ruling.

II. STANDARDS 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 Michigan Zoning Enabling Act (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). We review de novo whether a party has standing. *Id*. at 180. We also review de novo questions of statutory interpretation. *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015). Further, we review de novo whether the trial court afforded the parties due process. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). We review de novo "[w]hether a period of limitations applies to preclude a party's pursuit of an action." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

III. ANALYSIS

Pursuant to MCL 125.3605, a "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 125.3605. 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."

"Standing" refers to the right of a plaintiff to invoke the power of a circuit court in order to adjudicate a claim injury. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). "[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*, 475 Mich at 291-292. 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 plaintiffs failed to "establish that they [had] special damages different from those of others within the community" beyond "anticipated inconvenience and aesthetic disappointment." *Id*. at 193. Mere ownership of a neighboring property does not make a party aggrieved. *Id*. at 185; *Unger v Forest Home Twp*, 65 Mich App 614, 618; 237 NW2d 582 (1975).

Plaintiff argues on appeal that the building permit issued to her neighbor interfered "with the use of [plaintiff's] private driveway." However, as plaintiff admits, she shares this driveway with the owners of the neighboring property. Plaintiff complains of the noise and traffic on the *shared* driveway, but not that her exclusive easement rights have been violated. Plaintiff argued that the "increase in traffic and a noise is not because of the driveway itself" and that there was not "any interference with the use of [plaintiff's] driveway until after a building permit was issued." Plaintiff appears to contend that the owners of the neighboring lot are not permitted to use the driveway that they admittedly have rights to use. Although this shared driveway distinguished plaintiff from other neighbors, the alleged harm resulting from increased traffic and water runoff does not constitute special damages sufficient to establish plaintiff as an aggrieved party. See *Olsen*, 325 Mich App at 185. Plaintiff's allegations were vague, and it is unclear if the increased traffic occurred simply due to construction and merely temporary, or if it simply included the owners of the property traveling to their home. Regardless, although this is an impact on plaintiff alone, it is not harm sufficient to establish plaintiff as an aggrieved party. See *id*.; *Unger*, 65 Mich App at 617. Likewise, plaintiff's allegation that water runs onto her property features a common ecological concern, and her concern that it could be dangerous in the winter constituted mere "speculation or anticipation of future harm." *Olsen*, 325 Mich App at 186. The neighboring property owners will be required to abide by building requirements as they proceed with their construction, and there is no indication that replacing an old home with a new home that conforms with all requirements will cause any specific harm to plaintiff. See *id*.

Plaintiff also alleges an increase in "noise" as a result of the building permit. Plaintiff's allegations are vague and do not specify whether this is a situation of temporary construction, which is an inconvenience all property owners experience when neighbors have construction projects, or if there is some longer lasting, specific unreasonable noise issue. See *Ansell v Delta Co Planning Comm*, 332 Mich App 451; 957 NW2d 47 (2020). The record evidence shows that the zoning administrator approved a permit for a single family dwelling, without any indication that this new construction would result in any worse interference than the old dwelling or any other neighboring home.

Although plaintiff argues that defendant did not raise the issue of her being an aggrieved party and, therefore, waived the issue, defendant has not challenged that plaintiff had the right to appeal the zoning administrator's decision to the ZBA. The issue here is whether plaintiff had the right to appeal the ZBA's decision *to the circuit court*, and she did not. See *Federated Ins Co*, 475

Mich at 291. The trial court did not err by finding that plaintiff failed to establish her aggrieved party status under MCL 125.3605 enabling her to invoke the jurisdiction of the circuit court. See *Olsen*, 325 Mich App at 188, 194.

Moreover, in *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 544; 656 NW2d 215 (2002) (citations omitted), this Court explained:

> Defects in subject-matter jurisdiction cannot be waived and may be raised at any time. The lack of subject-matter jurisdiction is so serious a defect in the proceedings that a tribunal is duty-bound to dismiss a plaintiff's claim even if the defendant does not request it. Indeed, having determined that it has no jurisdiction, a court should not proceed further except to dismiss the action.

Likewise, the question whether a party is aggrieved for purposes of appealing to the circuit court may be raised at any time. See *Olsen*, 325 Mich App at 191.

Specifically, plaintiff argues that she did not have a "meaningful opportunity" to establish her aggrieved party status and relies on *Al-Maliki v LaGrant*, 286 Mich App 483, 488-489; 781 NW2d 853 (2009), a case in which the trial court raised a causation issue sua sponte but declined to consider the plaintiff's causation evidence when offered and this Court reversed the trial court's grant of summary disposition because the plaintiff had not been given an appropriate opportunity to respond. *Al-Maliki*, however, did not raise or address the fundamental subject-matter jurisdiction issue presented in this case and is inapposite. To the extent that the case raised a due-process concern because of the trial court's procedure, that issue is not present here.

In this case, the circuit court properly raised the issue of its jurisdiction and asked plaintiff's counsel if he had familiarity with *Olsen* and provided plaintiff an opportunity for argument on the jurisdiction issue during the hearing. Although plaintiff's attorney requested time to provide a supplemental brief and the circuit court denied the request, the record reflects that the court lacked nothing at that point in the proceedings that precluded its determination of the jurisdiction issue. Further, plaintiff moved for reconsideration and fully briefed the issue. The circuit court considered plaintiff's motion and arguments and fully analyzed plaintiff's position on the issue and properly found that it lacked merit. Although plaintiff argues that the circuit court did not consider her arguments in her motion for reconsideration, the circuit court's opinion and order denying plaintiff's motion reflects that the circuit court thoughtfully considered plaintiff's arguments and applied controlling law. Although the order did not specifically refer to plaintiff's driveway claims, plaintiff had merely raised the same issues that she originally argued at the hearing. The record reflects that the circuit court appropriately gave plaintiff notice and opportunity to be heard on the jurisdiction issue.

On appeal, plaintiff relies on *Lamkin v Hamburg Twp Bd of Trustees*, 318 Mich App 546, 549; 899 NW2d 408 (2017), in which this Court held that the trial court erred by dismissing the plaintiff's case because she failed to establish that her neighbor's conduct resulted in special damages. However, in this case, the circuit court did not dismiss the case merely on the pleadings, but, instead, both parties had fully briefed the issues and presented a complete record, and the circuit court held a hearing during which both parties had the opportunity to be heard. Because plaintiff failed and could not establish that she was an aggrieved party, by failing to establish any

special harm or anything more than mere speculation of potential future harm, the circuit court did not err by dismissing her appeal for lack of jurisdiction. See *Olsen*, 325 Mich App at 186.

Plaintiff argues next that the circuit court erred by finding her appeal untimely. We disagree.

"The time limit for filing an appeal in the circuit court is jurisdictional; a circuit court lacks jurisdiction over an untimely filed claim of appeal." *Quality Market*, 331 Mich App at 393. MCL 125.3605 provides that a "decision of the zoning board of appeals shall be final" and that a "party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under section 606." MCL 125.3606(3) provides:

> An appeal from a decision of a zoning board of appeals shall be filed within whichever of the following deadlines comes first:
>
> (a) Thirty days after the zoning board of appeals issues its decision in writing signed by the chairperson, if there is a chairperson, or signed by the members of the zoning board of appeals, if there is no chairperson.
>
> (b) Twenty-one days after the zoning board of appeals approves the minutes of its decision.

Further, MCR 7.122(B), which specifically applies to appeals of zoning ordinance determinations, provides:

> Time Requirements. An appeal under this rule must be filed within the time prescribed by the statute applicable to the appeal. If no time is specified in the applicable statute, the appeal must be filed within 30 days after the certification of the minutes of the board or commission from which the appeal is taken or within 30 days after the board or commission issued its decision in writing, whichever deadline comes first.

To determine "whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits." *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 262; 566 NW2d 514 (1997), quoting 56 Am Jr 2d Municipal Corporations, § 374, pp 408-409. City of Charlevoix Zoning Ordinance 153.038(A)(2) provides that a ZBA decision "shall be final," but a "person having an interest affected by this chapter may appeal to the Circuit Court for review pursuant to the Zoning Act." ZBA Bylaw 9.1 states that decisions are final "[e]xcept as provided in this subsection" and provides that the "ZBA may grant a rehearing under exceptional circumstances."

Although plaintiff claims that MCL 125.3605 supports her argument that the ZBA's decision was not final until the ZBA denied plaintiff's request for a rehearing, the plain language of MCL 125.3605, MCL 125.3606(3), and MCR 7.122(B) support the opposite conclusion. See *Quality Market*, 331 Mich App at 394. MCL 125.3605 provides that a ZBA decision "shall be final." MCR 7.122(B) states that an appeal of a zoning ordinance determination "must" be filed within the statutory deadline. MCL 125.3606(3) explicitly provides that these appeals "shall" be

filed either 30 days after the ZBA issues a signed decision or 21 days after the ZBA approves the minutes of its decision. Further, the language of these provisions is unambiguous and must be enforced as written. See *Quality Market*, 331 Mich App at 394. The statutes do not provide for any exceptions. The ZBA heard and decided plaintiff's appeal of the zoning administrator's decision on January 23, 2019, and the chairperson signed and adopted the decision on April 1, 2019 rendering finality to the matter. Plaintiff then had 30 days in which to appeal that decision to the circuit court pursuant to MCL 125.3606(3)(a), which the circuit court properly found did not occur.

Further, MCL 125.3605 provides that a party aggrieved may appeal *to the circuit court*. There is no mention of a right to a rehearing or a tolling of the deadlines that MCL 125.3606(3) provides. City of Charlevoix Zoning Ordinance § 153.038(B)(1) requires that the ZBA "shall hear and decide appeals" when an appellant alleges an error and when the appellant is aggrieved, meaning he or she has a "property interest and sufficient standing as recognized under the law to challenge the decision." There is no such requirement to grant a rehearing. Additionally, Zoning Ordinance 153.038(A)(2) explicitly provides that a decision by the ZBA is final and that the proper recourse is to appeal *to the circuit court* "pursuant to the Zoning Act." There is no mention of applying for a rehearing or a tolling of the specific deadline set forth in MCL 125.3606(3).

The ZBA bylaws may provide for an *opportunity to request* a rehearing, but that potential procedure does not make the ZBA's decision less than final merely upon a person's request for rehearing. Further, the bylaws do not supersede the clear statutory language providing the proper procedure and timelines for appealing to the circuit court. See *McVeigh v Battle Creek*, 350 Mich 214, 217; 86 NW2d 279 (1957) (holding that zoning boards of appeal do not have the inherent power to grant a rehearing and neither by statute nor ordinance was the zoning board of appeals authorized to conduct rehearings). Although plaintiff points to ZBA Bylaw 9.1 as providing an exception to the finality of the ZBA's decision, the bylaw provides that exceptional circumstances may warrant a rehearing, which would except a previous decision from being considered final, but it does not provide that a *request* for a rehearing is an exception to the finality of the ZBA's decision. Further, there is no mention that a request made pursuant to ZBA Bylaw 9.2 tolls the deadline for applying to the circuit court. Therefore, the statute provides the timeline in which plaintiff had to file her appeal to the circuit court and the circuit court lacked jurisdiction over an untimely filed claim of appeal. *Quality Market*, 331 Mich App at 394.

Moreover, plaintiff's choice to file her July lawsuit requesting a writ of mandamus to require a rehearing did not stay the statutory deadline to file her claim of appeal to the circuit court. Plaintiff filed her claim of appeal to the circuit court on December 6, 2019, over eight months after the ZBA denied her appeal. Therefore, the trial court did not err by finding plaintiff's claim of appeal untimely requiring dismissal.

Plaintiff additionally argues that the zoning administrator erred as a matter of law when he determined that the property at issue was a legal nonconforming lot of record; that the zoning administrator did not have the authority to issue a building permit for a home on that property; and that the ZBA erred by affirming the zoning administrator's decision. Because the circuit court

properly dismissed plaintiff's appeal on these grounds for lack of jurisdiction, we need not address these arguments.

Affirmed.

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