

STATE OF MICHIGAN
COURT OF APPEALS

MATEM, LLC, and LIVINGSTON COUNTY
CATHOLIC CHARITIES,

UNPUBLISHED
December 21, 2021

Plaintiffs-Appellants,

v

No. 355166
Livingston Circuit Court
LC No. 20-000175-AW

CITY OF HOWELL and CITY OF HOWELL
ZONING BOARD OF APPEALS,

Defendants-Appellees,

and

LOUIS PADNOS IRON AND METAL COMPANY,
PADNOS MANUFACTURING, INC., and PADNOS
HOWELL, INC.,

Intervenors-Appellees.

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs, Matem, LLC, and Livingston County Catholic Charities, appeal by right the circuit court’s order granting defendants’ and intervenors’ motions for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and denying plaintiffs’ motion for summary disposition. We affirm.

I. BACKGROUND

Intervenors (collectively “Padnos”) sought a special land use permit from defendant City of Howell (“the City”). The City of Howell Planning Commission (“the Commission”) approved the permit over opposition from plaintiffs and other members of the community. Plaintiffs sought to appeal this decision to defendant City of Howell Zoning Board of Appeals (“the ZBA”), but the appeal was dismissed for lack of authority to hear such appeals. Plaintiffs disagreed with this

decision and filed in the circuit court a complaint for (1) a writ of mandamus and superintending control and (2) declaratory judgment. Plaintiffs asked the circuit court to declare that the ZBA had authority to hear their appeal from the Commission and to force it to do so. The circuit court disagreed and ruled that plaintiffs had been required to appeal directly to the circuit court and not the ZBA. By the time plaintiffs filed their complaint in the circuit court, the 30-day deadline to appeal from the Commission's decision had passed. The circuit court therefore dismissed the complaint for lack of subject-matter jurisdiction. On appeal, plaintiffs contend that the circuit court erred and that the City's ordinance explicitly allowed for appeals to the ZBA from the Commission's decisions on special land use applications.

II. ANALYSIS

A. STANDARDS OF REVIEW

The interpretation and application of statutes and ordinances are reviewed de novo, *Olsen v Chikaming Twp*, 325 Mich App 170, 180; 924 NW2d 889 (2018), as is 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). "When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Sun Communities v Leroy Twp*, 241 Mich App 665, 668; 617 NW2d 42 (2000). "Whether subject-matter jurisdiction exists is a question of law for the court." *Dep't of Natural Resources v Holloway Constr Co*, 191 Mich App 704, 705; 478 NW2d 677 (1991). "Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case" and "describes the types of cases and claims that a court has authority to address." *Usitalo v Landon*, 299 Mich App 222, 228; 829 NW2d 359 (2012) (quotation marks omitted).

B. ZONING APPEALS

Ordinances are interpreted in the same way as statutes. *Brandon Charter Twp v Tippet*, 241 Mich App 417, 422; 616 NW2d 243 (2000). "If the language is clear and unambiguous, the courts may only apply the language as written. However, if reasonable minds could differ regarding the meaning of the ordinance, the courts may construe the ordinance." *Id.* (citation omitted). Such rules are in place "in order to give effect to the legislative body's intent." *Id.* This Court may not read something into the statute (or ordinance) "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018) (quotation marks and citation omitted).

This Court previously discussed the general principles surrounding the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3101 *et seq.*:

Municipalities have no inherent power to regulate land use through zoning. Our state's Legislature, however, has granted this authority to municipalities through enabling legislation. In 2006, our Legislature consolidated three previous zoning enabling acts for cities and villages, townships, and counties into the MZEA.

The MZEA grants local units of government authority to regulate land development and use through zoning. [*Olsen*, 325 Mich App at 179 (citations omitted).]

The MZEA governs the creation and function of zoning boards of appeal. See MCL 125.3601. Most relevant to this appeal is MCL 125.3603(1), which provides:

The zoning board of appeals shall hear and decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps, and may adopt rules to govern its procedures sitting as a zoning board of appeals. The zoning board of appeals shall also hear and decide on matters referred to the zoning board of appeals or upon which the zoning board of appeals is required to pass under a zoning ordinance adopted under this act. It shall hear and decide appeals from and review any administrative order, requirement, decision, or determination made by an administrative official or body charged with enforcement of a zoning ordinance adopted under this act. *For special land use and planned unit development decisions, an appeal may be taken to the zoning board of appeals only if provided for in the zoning ordinance.* [Emphasis added.]

The City of Howell Zoning Ordinance provides that the “Zoning Ordinance shall be administered and enforced by the *Zoning Administrator* [sic] or by such deputies as the Administrator may delegate to enforce this Zoning Ordinance.” Howell Ordinance, § 3.01. Relevant to this appeal, the Zoning Administrator shall “[r]eceive and review for completeness all applications for *siteplan* [sic] review and special land uses which the Planning Commission is required to decide under this Ordinance and refer such applications to the Planning Commission for determination.” Howell Ordinance, § 3.02(a). Additionally, the Administrator shall “[i]mplement the decisions of the Planning Commission and City Council.” Howell Ordinance, §3.02(e).

Section 3.03 of the Howell Ordinance sets forth the procedures to be followed once such an application is received. See Howell Ordinance, § 3.03. One such procedure that is required is that proper notice must be given. See Howell Ordinance, § 3.03(b). Relevant to this appeal, Section 3.03(b) provides that this notice must:

- A. Describe the nature of the special land *use* request;
 - B. Indicate the property that is the subject of the special land *use* request;
 - C. State when and where the special land *use* public hearing will be held;
- and
- D. Indicate when and where written comments will be received concerning the request. [Howell Ordinance, § 3.03(b)(3)(A)-(D).]

The Howell Ordinance requires that the Commission must hold a public hearing for such special land use requests and decide whether to approve, deny, or approve with conditions such requests. Howell Ordinance, § 3.03(c)-(d). The Ordinance lists criteria that the Commission must use when making its decision. See Howell Ordinance, § 3.03(e)(1)-(7).

Article 12 of Howell Ordinances governs the ZBA, and Section 12.01 provides the general authority for the ZBA:

There is hereby established a Board of Zoning Appeals, the membership, powers, duties of which are prescribed in Act 110 of the Public Acts of the State of Michigan of 2006, as amended. The Board of Zoning Appeals, in addition to the general powers and duties conferred upon it by said Act, in specific cases and subject to appropriate conditions and safeguards, shall interpret and determine the application of the regulations established under this Zoning Ordinance in harmony with their purpose and intent as hereinafter set forth. [Howell Ordinance, § 12.01.]

The ZBA “shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit decision, or refusal made by the *Zoning Administrator* or other duly authorized enforcing agent in enforcing any provision of this Zoning Ordinance.” Howell Ordinance, § 12.04(c). Additionally, the ZBA “shall hear and decide requests for interpretation of this Zoning Ordinance or the zoning map, taking into consideration the intent and purpose of this Zoning Ordinance and the *Master Plan*.” Howell Ordinance, § 12.04(d)(1).

Notably, there is no explicit mention of appeals to the ZBA for special land use decisions made by the Commission. Rather, the ZBA decides appeals alleging errors made by the zoning administrator or other enforcing agency. Appeals to the ZBA “from a determination of the *Zoning Administrator* or other duly authorized enforcing agent” must be made within 30 days. Howell Ordinance, § 12.05(b). Regarding notice of appeal, there is language providing that the notice must:

- (1) Describe the nature of the special land use request;
 - (2) Indicate the property that is the subject of the special land use request;
 - (3) State when and where the special land use public hearing will be held;
- and
- (4) Indicate when and where written comments will be received concerning the request. [Howell Ordinance, § 12.05(c)(1)-(4).]

This language is identical to that of Section 3.03(b)(3)(A)-(D) discussed previously.

If “a zoning ordinance does not provide an aggrieved party the right to have an unfavorable decision of a township board regarding a request for special land-use permit reviewed by a zoning board of appeals, appellate review is available to the aggrieved party in the circuit court” *Carleton Sportsman’s Club v Exeter Two*, 217 Mich App 195, 203; 550 NW2d 867 (1996). We agree with the circuit court that there is nothing within the Howell Ordinance that explicitly conveys authority to the ZBA to hear appeals from the Commission’s decisions on special land use applications.

Section 3.03 clearly provides that the Commission is to decide whether to approve, deny, or approve with conditions such requests. Howell Ordinance, § 3.03(c)-(d). Section 3.01 of the Ordinance clearly conveys authority to the Administrator and delegated deputies to *enforce* the

Ordinance. In fact, the Administrator shall “[i]mplement [i.e., enforce] the decisions of the Planning Commission and City Council,” whereas the Commission is the body that *decides* matters such as special land use applications. In other words, the Administrator and deputies are the ones who enforce the Ordinance and Commission’s decisions; the Commission, on the other hand, decides matters that come before it.

This backdrop gives clarity to the provisions regarding the ZBA’s power and authority. The ZBA “shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit decision, or refusal made by the *Zoning Administrator or other duly authorized enforcing agent in enforcing any provision of this Zoning Ordinance.*” Howell Ordinance, § 12.04(c) (second emphasis added). Plaintiffs contend that this encompasses the Commission because it is an enforcement agent. This interpretation does not comport with the plain language of the Ordinance. The enforcement agents are the Administrator and deputies, not the Commission. Section 12.04 makes clear that appeals to the ZBA must involve either the Administrator or the enforcement agents that are “enforcing any provision *of the Zoning Ordinance.*” It is the Administrator and deputies who enforce the Zoning Ordinance. The Commission merely decides. Accordingly, there was no power granted to the ZBA to hear appeals from the Commission regarding special land use decisions.

We agree with the circuit court’s finding that the special land use language placed within Section 12.05 was presumably erroneously inserted there. The language is *identical* to that located in Section 3.03, and, absent a mistake, it makes no logical sense for it to be in Section 12.05. Reading this as anything other than a mistake leads to preposterous conclusions, such as that notice is required only for special land use applications or that the ZBA can *only* hear appeals regarding special land use applications. This is clearly illogical when the entirety of Section 12.05 is read as a whole along with the rest of the Ordinance. The provision gives every indication that the requirements apply to every appeal to the ZBA.

Moreover, plaintiffs’ interpretation conflicts with other ordinance provisions, such as Section 12.04(c). Section 12.05 does *not* convey power upon the ZBA; it describes the *procedures* to be followed. Section 12.04 is the provision that conveys power to the ZBA. Plaintiffs’ interpretation of Section 12.05 would make Section 12.05 another grant of power to the ZBA despite the clear delineation between power and procedure in Section 12.04 and 12.05. The power to hear appeals from the Commission on special land use decisions is absent from Section 12.04, and its presence in Section 12.05 is clearly a mistake.

Plaintiffs argue in the alternative that the circuit court should have accepted their complaint as a timely appeal from the Commission because they were misled by the confusing language in the Ordinance. Plaintiffs also argue that the past practices of the City warrant an interpretation in favor of appeals to the ZBA for special land use decisions. Plaintiffs failed to raise these arguments in the circuit court and, therefore, they are unpreserved and “not ordinarily subject to review.” *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, plaintiffs fail to cite any authority to support their assertion that the circuit court could have accepted their complaint as a timely appeal. “An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims.” *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (quotation marks and citation omitted). When “a party fails to cite any supporting legal authority for its

position, the issue is deemed abandoned.” *Id.* (quotation marks and citation omitted). Finally, the examples of supposed past practices were not provided to the circuit court. “This Court’s review is limited to the record established by the trial court, and a party may not expand the record on appeal.” *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

A writ of mandamus will only issue when “(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result.” *Lickfeldt v Dep’t of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001). Defendants had no clear legal duty to hear plaintiffs’ appeal, and plaintiffs had no clear legal right to this performance. Similarly, plaintiffs’ claim for superintending control fails. “A superintending control order enforces the superintending control power of a court over lower courts or tribunals.” MCR 3.302(A). “A superintending control order replaces the writs of certiorari and prohibition and the writ of mandamus when directed to a lower court or tribunal.” MCR 3.302(C). “When an appeal in the Supreme Court, the Court of Appeals, or the circuit court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.” MCR 3.302(D)(2). “If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed.” MCR 3.302(B). An appeal was available to plaintiffs: an appeal to the circuit court. They chose the wrong avenue by attempting to appeal to the ZBA.

Therefore, we hold that the circuit court did not err by granting summary disposition under MCR 2.116(C)(4) for lack of subject-matter jurisdiction. Plaintiffs were required to appeal directly to the circuit court and not the ZBA. Under the MZEA and the Howell Ordinance, there was no authority granted to the ZBA to hear plaintiffs’ appeal from the Commission’s decision on the special land use application. Accordingly, the circuit court had no authority to grant plaintiffs’ request for a writ of mandamus or superintending control forcing the ZBA to hear their appeal. Additionally, given that the 30-day deadline had passed, plaintiffs could no longer file a timely appeal.

Affirmed.¹

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

¹ Given our holding that the ZBA did not have authority to hear plaintiffs’ appeal, we need not address plaintiffs’ secondary argument that they were “aggrieved parties” under MCL 125.3605.