

STATE OF MICHIGAN
COURT OF APPEALS

NORMA CAMP, EUGENE CHARDOUL, NAN
RUTH CHARDOUL, ELDON E. JOHNSON,
JOHN REIS, and EUGENE SAENGER, JR.,

UNPUBLISHED
October 26, 2010

Plaintiffs-Appellees,

v

CITY OF CHARLEVOIX, GERRY HARSCH,
and DIANNE MANORE,

No. 291473
Charlevoix Circuit Court
LC No. 07-082121-CH

Defendants-Appellees,

and

JAMES ANDERSON, PATRICIA ANDERSON,
and APJ PROPERTIES, LLC,

Defendants-Appellants.

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

The Anderson defendants¹ appeal as of right the trial court's order for superintending control remanding this matter to the Charlevoix Zoning Board of Appeals (ZBA) for consideration of plaintiffs' claims. We reverse and remand.

This appeal relates to a zoning permit issued by the Charlevoix Zoning Administrator to the Anderson defendants on March 26, 2007, which authorized construction of a single-family residence with an attached boathouse. The complicated procedural history provided below followed, leading to our review today.

¹ Defendants James and Patricia Anderson are the sole members of defendant APJ Properties, LLC, which owns one of the impacted parcels. We will refer to defendants-appellants collectively as the Anderson defendants. Additionally, we note that defendant Gerry Harsch died on September 16, 2010, during the pendency of this appeal.

On May 14, 2007, plaintiff Eldon Johnson, a neighbor of the Anderson defendants, filed an application to appeal the issuance of the zoning permit with the ZBA, and also requested the interpretation of several provisions of the Charlevoix Zoning Ordinance (“the Ordinance”), which were relevant to the issuance of the permit. The ZBA held a hearing on July 18, 2007, and determined that the appeal could not be addressed because it had been brought more than 30 days after the Zoning Administrator’s initial decision had been made, and was therefore beyond the jurisdictional deadline set forth in section 5.309 of the Ordinance.² Johnson appealed the decision in the trial court, which affirmed. Johnson then filed a claim of appeal in this Court, which was denied on jurisdictional grounds.³ Johnson’s motion for reconsideration was likewise denied,⁴ as was his delayed application for leave to appeal.⁵ Finally, Johnson’s application to our Supreme Court was denied. *Johnson v Charlevoix Zoning Bd of Appeals*, 483 Mich 984 (2009).

While the previous matters were progressing, plaintiffs, who were all neighbors of the Anderson defendants, filed the complaint in the instant matter. In Count I, plaintiffs requested declaratory and injunctive relief, arguing that issuance of the zoning permit would lead to “immediate violation of numerous provisions” of the Ordinance and result in the overburdening of an easement that provided the only access to the Anderson defendants’ properties. In Count II, plaintiffs alleged the issuance of the zoning permit condoned multiple zoning violations without a public hearing, which constituted a violation of their substantive due process rights. In Count III, plaintiffs raised a procedural due process claim, arguing they were entitled to notice and a public hearing prior to issuance of a zoning permit at variance with the Ordinance.

The case was removed to federal district court, which thereafter issued an opinion staying plaintiffs’ federal claims and remanding the state claims to state trial court. *Camp v Charlevoix*, unpublished opinion of the United States District Court, Western District of Michigan, issued September 8, 2008 (Docket No. 1:07-CV-980). After a hearing on the parties’ cross-motions for summary disposition, the trial court issued an order for superintending control on March 24, 2009, requiring the ZBA to review the issuance of the zoning permit. Thereafter, the ZBA held a hearing and found that the majority of plaintiffs’ arguments concerning zoning ordinance violations were without merit, but nevertheless revoked the permit because certain features of the boathouse violated the Ordinance.

² Although they do not specify any dates as to when they each learned of the zoning permit, plaintiffs contend they were not aware of the existence of the permit until after the 30-day deadline to appeal had already passed.

³ *Johnson v Charlevoix Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered November 30, 2007 (Docket No. 282008).

⁴ *Johnson v Charlevoix Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered January 24, 2008 (Docket No. 282008).

⁵ *Johnson v Charlevoix Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered August 25, 2008 (Docket No. 284193).

The Anderson defendants argue on appeal that the trial court exceeded its authority in remanding this matter to the ZBA under the power of superintending control. We review a trial court's decision related to an order for superintending control for an abuse of discretion, *In re Grant*, 250 Mich App 13, 14; 645 NW2d 79 (2002), and a decision pertaining to a motion for summary disposition de novo, *Associated Builders & Contractors v Consumer & Indus Servs Dir*, 472 Mich 117, 123; 693 NW2d 374 (2005).

Before addressing the merits of their arguments, we reject plaintiffs' claim that this appeal is moot because the ZBA reviewed the permit and revoked it after finding portions of the plan in nonconformance with the Ordinance. Because our decision today necessitates that the ZBA's decision be vacated, this matter is not moot.⁶

MCR 3.302 governs the power of superintending control and provides in relevant part as follows:

(A) Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.

(B) Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. .

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* * *

(D) Jurisdiction.

(1) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts or tribunals. . . .

(2) . . . If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

Our Supreme Court addressed the issue of superintending control in *Pub Health Dep't v Rivergate Manor*, 452 Mich 495, 500-501; 550 NW2d 515 (1996), and noted that such remedy is not available "as a substitute for an appeal or to evade a statutory prohibition of an appeal." Here, it appears that the trial court's order allowed an appeal to the ZBA that was time barred by section 5.309 of the Ordinance. The Ordinance specifically precludes the ZBA from hearing an appeal related to the issuance of a zoning permit after more than 30 days has passed. A review of the ZBA's decision following the remand by the trial court reveals that the ZBA only considered plaintiffs' claims that the permit was issued in error because it would result in

⁶ Moreover, we will not search for authority to support this broad assertion where plaintiffs have failed to do so. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

numerous zoning violations. These claims were the same claims previously considered time barred by the Ordinance.

In addition, superintending control will not lie unless there has been a showing of a failure to perform a clear legal duty as well as the absence of an adequate legal remedy. *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993). The ZBA did not fail to perform a clear legal duty in this case. The parties agree that when there is no variance necessary on the face of a permit, no notice regarding the zoning permit is required. Here, the zoning permit at issue referenced no required variances. Additionally, plaintiffs have not established that their right to appeal within 30 days was an inadequate remedy. Although plaintiffs contend they were effectively denied their right to appeal because they did not learn of the zoning permit until after the 30-day deadline to appeal had passed, there is no notice or knowledge requirement contained in section 5.309 of the Ordinance or in MCR 3.302.

Thus, the trial court erred in issuing an order for superintending control. Our conclusion mandates that the ZBA's subsequent decision to revoke the Anderson defendants' permit be vacated. Given our conclusion on this issue, we need not address the Anderson defendants' alternative arguments on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly