

of Appeals (ZBA) denied the requested variances, and the trial court affirmed the ZBA's decision.

On appeal, the petitioners generally argued that the decision of the ZBA was not supported by competent, material, and substantial evidence on the record, and that the ZBA failed to apply the applicable use and nonuse variance standards in rendering its decision. The petitioners' initial contention was that no market existed in a price range where they could make a profit without the variances because of the high infrastructure costs. The Court of Appeals found that

"petitioners did not present specific figures to show how the infrastructure costs would be reduced and how those decreases would impact a reasonable rate of return. In addition, the ZBA noted that the estimated infrastructure costs were based on all of the property being developed and did not exclude the eight acres, which were not going to be developed. Further, the ZBA found that petitioners' inability to get a greater rate of return was primarily due to them paying too much for the property. In addition to noting these limitations, the ZBA made several findings, applied those findings to the standards for variances, and concluded that the request should not be granted."

The petitioners also argued that it was improper for the ZBA to express a concern in making its decision about noise and other "trouble" that is associated with duplexes, and note that the city has had difficulty in the past controlling "some of the things that go on in duplexes." The Court disagreed, finding that such concerns "directly corresponded with the ZBA's obligation to ensure that public safety is secured, which is an essential element in granting both a use and nonuse variance. Thus, consideration of these concerns was not improper."

The Court of Appeals also disagreed with the petitioners' argument that the ZBA inappropriately required the petitioners to have a sketch plan depicting their proposed use for the property, when the ordinance does not require petitioners to submit such a plan. In this regard, the Court concluded that "the ZBA's finding about the lack of a sketch plan was not improper considering that it was a comment on the lack of information, i.e., that the ZBA was not provided with any information from which to draw a conclusion as to how the property would actually be developed."

In sum, the Court of Appeals concluded that "the ZBA clearly articulated substantial factual findings and applied those findings to the standards for use and nonuse variances resulting in there being competent, material, and substantial evidence on the record to support the ZBA's decision."

[SJ]

ZBA/Variance/Sand Dune

The Zoning Board of Appeals denial of a setback variance was upheld on the basis that design alternatives were available that would eliminate the need for the variance, Michael P. Risko, et al. v Grand Haven Charter Township Zoning Board of Appeals, 284 Mich App 543. Decided June 16, 2009.

Petitioners sought to construct a house on a 2.46-acre lot that was located in a "critical dune zone," which limited the buildable area to only a portion of the lot and required Michigan Department of Environmental Quality (MDEQ) approval of the plans. Grand Haven Charter Township's zoning ordinance requires a 50-foot front setback. The petitioners' plans included an attached two-car garage that would encroach 9.5 feet into the 50-foot setback area. Accordingly, the petitioners applied for a variance with the township Zoning Board of Appeals (ZBA). Petitioners claimed that the encroachment into the setback was necessary because the critical dunes in the rear of the lot forced part of the structure to be moved closer to the front property line.

The ZBA denied the variance on the basis that "they felt that the owner had alternate design options which would enable him to construct a new home and attached garage without the need for a variance. Specifically, it was determined that there appeared to be adequate room to construct a side-loading garage, which would eliminate the front yard encroachment."

The petitioners appealed the ZBA's decision to the circuit court, arguing that changing their plans would require significant additional expense and delay due to the fact that they would have to prepare revised plans and go through the MDEQ approval process a second time. The trial court reversed the decision of the ZBA, and the township appealed.

The Court of Appeals identified the practical difficulty element involved as being whether the variance is "necessary for the preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district." The Court noted that the petitioners did not contest the claim that there was an alternate design for the garage that would negate the need for the variance, but instead petitioners argued that such an alternate design would cause significant additional expense and delay in the process. As a result, the Court pinpointed the issue as being "whether a 'substantial property right' includes construction of a particular design."

After examining various case precedents regarding what constitutes a substantial property right, the Court ruled as follows:

"In sum, we find that the phrase 'substantial property right' as used in the

[Township] ordinance encompasses the right to build a garage on property regulated for residential use, but does not encompass the right to build according to a preferred design...therefore, it was proper for the Board to consider whether petitioners had alternative designs available that negated the need for the variance."

Accordingly, the decision of the trial court was reversed, and the decision of the ZBA was affirmed. [SJ]

Riparian Rights/Platted Roadway

Where a road separating plaintiffs' property from the lake shore was dedicated for unlimited public use, plaintiffs do not have riparian rights to the lake. 2000 Baum Family Trust, et al. v William Babel, et al. and Al Gooch, et al. v Charlevoix Township. 284 Mich App 544. Decided June 23, 2009.

The eight plaintiffs in this case own lots in a subdivision that was platted in 1911. The platted subdivision includes a total of 49 lots, and also includes six streets, five of which run parallel to Lake Charlevoix. The dedication of these roadways includes the following language: "The streets and alleys as shown on said plat are hereby dedicated to the use of the public." None of the plaintiffs' lots touch the shoreline, instead Beach Drive abuts the shoreline and separates them from Lake Charlevoix.

It is undisputed in the case that the roads were dedicated pursuant to the plat and the County Board of Supervisors accepted the plat and street dedications in 1911. It is also undisputed that the legal descriptions of the lots do not extend to the lake's edge, nor is there a grant of riparian rights to the plaintiffs in their deeds of record. Nevertheless, multiple docks erected by the plaintiffs extend into the lake from Beach Drive. Other backlot property owners also utilize this area of the lake and claim rights to do so, which ultimately gave rise to the filing of this lawsuit.

Plaintiffs sued the backlot owners, the Charlevoix County Road Commission, and Charlevoix Township. The road commission filed a counterclaim alleging that plaintiffs had encroached upon the dedicated roadway. Plaintiffs filed a motion asking the trial court to summarily rule against the road commission without a trial on the basis of their claim that there were no disputed facts and they were entitled to riparian rights as a matter of law. The trial court denied plaintiffs' motion, ruling that they did not have any riparian rights.

On appeal, the Court of Appeals framed the issue as follows: "Whether plaintiffs have riparian rights where their lots abut a roadway that runs contiguous to the lake-