FILED BY CLERK
APR 26 2007
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DONALD TATOM, a single man; THOMAS KUZMA, a single man, Plaintiffs/Appellants, v. PIMA COUNTY, a municipal corporation, Defendant/Appellee.	)))))))))))))	2 CA-CV 2006-0154 DEPARTMENT A <u>MEMORANDUM DECISION</u> Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20051431

Honorable John E. Davis, Judge

AFFIRMED

Tim D. Coker — Phoenix
Attorney for Plaintiffs/Appellants

Barbara LaWall, Pima County Attorney
By Scott McDonald — Tucson
Attorneys for Defendant/Appellee

P E L A N D E R, Chief Judge.

¶1 In this declaratory relief/zoning action, plaintiffs/appellants Thomas Kuzma and Donald Tatom (collectively "Kuzma") appeal from the trial court's grant of summary judgment in favor of defendant/appellee Pima County. Kuzma argues the trial court erred in ruling that his request for a change of zoning condition had to be presented to and approved by the Board of Supervisors (the Board) rather than the Board of Adjustment (BOA). Finding no error in that ruling, we affirm.

BACKGROUND

¶2 Although the parties agree the facts are largely undisputed, on appeal from a summary judgment, we view the facts "in the light most favorable to the party against whom judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2, 965 P.2d 47, 49 (App. 1998). Kuzma and his then business partner, David Carroll, purchased a five-acre parcel of property in 1989. At that time, the property was zoned with a suburban ranch (SR) designation, and Carroll applied to have the property rezoned to a rural residential (GR-1) designation. The property had one uninhabited residence on it, but in his application for rezoning Carroll stated he wanted to "install two 24'x70' manufactured homes" on the property. On a sketch included with his request, he also stated the existing residence on the property was "to be used for storage only."

¶3 In a "staff report" to the Pima County Planning and Zoning Commission, Pima County Planning and Development Services staff recommended that certain "standard and special requirements should be considered." Those included "[r]ecording a covenant to the effect that there will be no further subdividing or lot splitting without the written approval

of the Board of Supervisors," "[a]dherence to [the] sketch plan as presented," and "[n]o more than two residences on the subject property." Enacting an ordinance that related only to Kuzma's property, the Board of Supervisors approved the rezoning of the property, "subject to the standard and special requirements" suggested in the staff report.[1]

¶4 About a month later, because "he could not get financing on the property to develop it as he wished without splitting the parcel," Carroll requested that the property be split into three parcels. The Board granted that request as well, still "subject to [the county staff's] recommendations." Thus, the property was split into three parcels denominated A, B, and C on the county assessor's map, with the two manufactured homes situated on parcels B and C, and the uninhabited, storage structure on parcel A.[2]

¶5 Thereafter, Kuzma and his new partner, Tatom, sought to repair and convert the uninhabited structure on parcel A "as a residence" and subsequently "as a workshop with an additional request to install a manufactured home" on that parcel. The county's zoning administrator denied those requests, characterizing them as a request for "modification of [the existing] rezoning condition[s]," as well as Kuzma's request to go

---

[1]At oral argument in this court, Kuzma asserted he did not know why or how the limiting conditions were imposed on the property and included in the County's rezoning ordinance. But the record does not reflect that either Carroll or Kuzma protested or otherwise objected to the conditions at or around the time the rezoning ordinance was adopted.

[2]The record is somewhat confusing as to the designation of the parcel on which the uninhabited structure is situated. Although Kuzma's complaint refers to that parcel as parcel C, other portions of the record, including his affidavit, refer to the parcel in question as parcel A, as we do here.

before the BOA, concluding that Kuzma was requesting a "substantial change" that required Board of Supervisor approval.

¶6 Kuzma then filed this action, seeking "[a] declaration that the Board of Adjustment has jurisdiction to consider [his] contentions on the merits." The trial court (Judge Eikleberry) denied the County's motion to dismiss the complaint pursuant to Rule 12(b)(6), Ariz. R. Civ. P., 16 A.R.S., Pt. 1. After the case was reassigned, the court (Judge Davis) granted the County's motion for summary judgment, ruling that the "Board of Adjustment has no jurisdiction to grant variances from re-zoning restrictions adopted by the Board of Supervisors in its legislative capacity." This appeal followed.

DISCUSSION

¶7 Kuzma contends the trial court erred in granting summary judgment because "[a] change to a 'zoning condition' is an 'administrative action' not a 'legislative action'" and, therefore, is "within the jurisdiction of the Board of Adjustment," not the Board of Supervisors as the trial court found. Kuzma further maintains that the "[c]ounty's ordinances[, on which the county primarily relies,] improperly limit the jurisdiction of the Board of Adjustment." "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell*, 192 Ariz. 313, ¶ 8, 965 P.2d at 50. We also review de novo "issues involving statutory interpretation." *Id.*

¶8 We first note that the merits of Kuzma's request for a change in the zoning conditions on the property are not before us. The only issues Kuzma presented below or

on appeal relate to the forum in which he must proceed and, therefore, we address only that question. Additionally, although the parties agree that this is technically not a "rezoning" action, they dispute the nature of the relief Kuzma is seeking and the terminology that should be applied to it. Kuzma maintains alternately that the change he seeks is, inter alia, a "variance" or something "analogous to a 'special use permit.'" The County, on the other hand, describes the requested action as an "Amendment or Waiver of Rezoning Conditions." For ease of understanding, and because Kuzma seeks relief from conditions the Board placed on his property during its previous rezoning, we will refer to the requested action herein as a "change in zoning conditions."

¶9 Pima County Code § 18.91.100(A)(3), on which the County relies but which Kuzma challenges, provides: "All requests for the amendment or waiver of approved or adopted rezoning conditions shall require a noticed public hearing and action by the board of supervisors." If valid, that code section applies to and controls this situation. Kuzma, however, argues that provision "improperly limit[s] the jurisdiction of the Board of Adjustment" and "circumscribes statutory intent."

¶10 As Kuzma points out, "the county board of supervisors may exercise no powers except those specifically granted by statute and in the manner fixed by statute." *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420, 586 P.2d 978, 981 (1978); *see also State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363, 430 P.2d 122, 125 (1967) ("[T]he board of supervisors possesses only such power as is expressly conferred by statute, or is necessarily implied therefrom."). Indeed, the County Code itself states "[t]he

powers of the board of supervisors, . . . [and] the several boards of adjustment . . . shall be strictly limited by the expressed intent of the legislature." Pima County Code § 18.01.030(A)(1). Thus, we must determine if the County has overstepped its statutory authority by assigning the change of zoning conditions procedure to the Board instead of the BOA.[3] *See* Pima County Code § 18.91.100(A)(3).

¶11 Section 11-251.05(A), A.R.S., provides that the Board may, "[i]n the conduct of county business, adopt, amend and repeal all ordinances necessary or proper to carry out the duties, responsibilities and functions of the county which are not otherwise specifically limited by § 11-251[4] or any other law or in conflict with any rule or law of this state." When the Board granted Kuzma's conditional zoning request in the first instance, it did so by ordinance. Thus, Kuzma's requested change in zoning conditions essentially sought an amendment to an ordinance, an activity specifically provided for in § 11-251.05. The question remains, however, whether the legislature has limited the Board's authority to amend ordinances of this nature in its grant of power to the BOA.

¶12 Section 11-807, A.R.S., which grants power to "[b]oards of adjustment," provides that a BOA may,

---

[3]The record does not reflect that the BOA itself rejected any application for variance or, for that matter, that Kuzma ever actually filed such an application with the BOA. Various County employees, however, repeatedly advised Kuzma that the BOA could not act on his request and that "[o]nly an action of the Board of Supervisors can remove a condition imposed on a property by a rezoning ordinance." To the extent the County essentially blocked Kuzma from even pursuing any recourse with the BOA, we discourage that practice.

[4]Section 11-251, A.R.S., does not limit the Board's authority in any way relevant to this action.

> 1. Interpret the zoning ordinance when the meaning of any word, phrase or section is in doubt, when there is dispute between the appellant and enforcing officer, or when the location of a district boundary is in doubt.
>
> 2. Allow a variance from the terms of the ordinance when, owing to peculiar conditions, a strict interpretation would work an unnecessary hardship, if in granting such variance the general intent and purposes of the zoning ordinance will be preserved.

§ 11-807(B).

¶13 Kuzma argues the BOA, pursuant to its powers under subsection (B)(1), "must determine the precise meaning of 'substantial change.'" He averred below that county employees had denied his request based, at least in part, on their belief that he was requesting a "'substantial change.'" Under Pima County Code § 18.91.020(A)(7), a "substantial change" is one in which "the number of residences per acre . . . increases by . . . [t]en percent or greater." If granted, it appears that Kuzma's request would result in such an increase. But the county maintains that this is immaterial because "[t]he only difference between a substantial change and any other change [requiring the Board of Supervisors' approval] is that a substantial change triggers a hearing before the Planning and Zoning Commission 'prior to public hearing by the supervisors.'" *See* Pima County Code § 18.91.100(A)(4). We agree and, therefore, turn to Kuzma's argument based on § 11-807(B)(2).

¶14 Kuzma maintains he essentially seeks a variance and the statute expressly grants sole authority to the BOA to grant or deny "a variance from the terms of [an] ordinance." § 11-807(B)(2). Therefore, Kuzma argues, county Code § 18.91.100(A)(3) is

"void as applied because [it] improperly restrict[s] the authority and jurisdiction—both express and implied—given to the [BOA] by A.R.S. § 11-807." We disagree.

¶15 Unfortunately, the law does not clearly or precisely differentiate a variance from a change in zoning condition, particularly in situations such as this where the zoning condition is imposed by a zoning ordinance itself that applies to only one property (albeit divided into three parcels). *See Troup v. Bird*, 53 So. 2d 717, 720 (Fla. 1951) ("Admittedly, it is difficult to draw a definite, distinct line of demarcation between rezoning and the granting of a variance from, or an exception to, zoning rules and regulations."). In general, a variance is defined as "[a] license or official authorization to depart from a zoning law." *Black's Law Dictionary* 1588 (8th ed. 2004). And, in *Nicolai v. Board of Adjustment*, 55 Ariz. 283, 288, 101 P.2d 199, 201 (1940), our supreme court equated variances with "special exceptions to the terms of the [zoning] ordinance." Similarly, the court in *Nicolai* spoke of variances as a means of remedying "'minor and practical difficulties,'" but cautioned against a BOA, "'an administrative agent merely, . . . set[ting] aside and in effect annul[ling] an ordinance, a legislative act'" of the Board. *Id*. at 289, 101 P.2d at 201, *quoting Walton v. Tracy L. & T. Co.*, 92 P.2d 724, 727 (Utah 1939).[5]

---

[5]The county relies in part on the distinction between a "use" and an "area" variance, arguing that Kuzma's requested change would result in a "use" variance of the kind our supreme court forbid a BOA from making in *Nicolai*. "A 'use' variance is one which permits a use of land other than that allowed by the zoning ordinance. . . . 'Area' variances involve such matters as . . . density regulations . . . ." *Ivancovich v. City of Tucson Bd. of Adjustment*, 22 Ariz. App. 530, 536, 529 P.2d 242, 248 (1974). Because the zoning ordinance limited Kuzma to "[n]o more than two residences on the subject property," which included all three original parcels, the parcel at issue here is zoned with a residential designation, but is, albeit oddly, restricted from having a residential structure on it. And,

¶16 "Essentially, when a variance is granted, the ordinance—and zoning pursuant to the ordinance—is left unchanged. However, a particularized exception to the provision of the ordinance is permitted." *Green Oak Twp. v. Munzel*, 661 N.W.2d 243, 247 (Mich. Ct. App. 2003). Here, however, the change Kuzma seeks entails not merely an exception to the zoning ordinance for his property, but rather, a change to the ordinance itself by eliminating the conditions to which he objects. At oral argument in this court, Kuzma asserted that both the Board and the BOA have concurrent jurisdiction in this matter and that the choice of forum is solely his to make. But he also acknowledged that he could not definitively characterize his requested change as a variance and that it indeed would require alteration of the ordinance itself. Because the nature and scope of Kuzma's request cannot be neatly categorized as a variance, we agree with the County that § 11-807(B)(2) is inapplicable and does not authorize the BOA to act on Kuzma's request.

¶17 Moreover, under § 11-807(B)(2), the BOA can only grant a variance "if in granting such variance the general intent and purposes of the zoning ordinance will be preserved." Here, however, the change in zoning condition Kuzma seeks would not preserve the "general intent and purposes of the zoning ordinance" because it necessarily would undermine the zoning ordinance itself. *See Ivancovich v. City of Tucson Bd. of Adjustment*,

---

although the conditions also required "[a]dherence to [the] sketch plan as presented," the plan provided only that the "existing home [was] to be used for storage only," not that the entire parcel could only be used for storage. Thus, the change in zoning conditions Kuzma requested would not change the permitted residential use of the land. Although the application of *Nicolai*, therefore, is limited in this context, we find useful and pertinent its general description of variances and its discussion of a BOA's scope of authority.

22 Ariz. App. 530, 535, 529 P.2d 242, 247 (1974) ("The Board [of Adjustment] cannot amend or repeal any zoning ordinance . . . ."); *cf. Livingston v. Peterson*, 228 N.W. 816, 819 (N.D. 1930) (BOA not authorized "to annul and vary the [zoning] ordinance itself").

¶18 A conditional zoning ordinance includes not only a general zoning designation but also the conditions attached to it that are integral to its intent and purpose. Thus, the change Kuzma seeks entails not just a departure from the applicable zoning law, but rather, a wholesale change to the ordinance at issue. Though arguably unusual, that ordinance aims to maintain the property as residential, but without additional residential structures. Under its § 11-807 authority, the BOA does not have power to grant a change that would totally defeat that aim. *See Arkules v. Bd. of Adjustment of Town of Paradise Valley*, 151 Ariz. 438, 440, 728 P.2d 657, 659 (App. 1986) ("Courts have uniformly held that a board of adjustment has no powers except those granted by the statutes creating it . . . .").

¶19 That other properties in the surrounding area might be zoned SR or GR-1 without condition, and therefore can be used for residential structures, does not change the fact that a residential structure on parcel A is not allowed under the zoning ordinance applicable to the property at issue here. Contrary to Kuzma's implicit assumption throughout his briefing, his property is not subject to a pure GR-1 designation. Rather, as a result of the earlier rezoning, the property is now subject to that designation with

conditions, essentially as a discrete zoning district.[6] Thus, the change he requests is not merely a variance from the GR-1 designation, but instead, via a proposed amendment of the conditions, a change from the property's current "GR-1 with conditions" designation to unrestricted GR-1 status. Under the particular circumstances presented here, only the Board is authorized to effect that change.

¶20 In arguing to the contrary, Kuzma relies primarily on *Depue v. City of Clinton*, 160 N.W.2d 860 (Iowa 1968), which he maintains is "identical" to this case. In that case, however, the city had referred applications for "special uses" to the city council and those for "special exceptions" to a board of adjustment, which was given exclusive jurisdiction over such exceptions. *Id.* at 862. The court found that the term "special exceptions" included "special uses" and that the city had therefore exceeded its authority. *Id.* In contrast, as noted earlier, the requested change in zoning conditions at issue here is not the same as a variance and is in fact a change in a zoning ordinance, which is under the Board's jurisdiction. *See* § 11-251.05; *cf. Pioneer Trust Co. v. Pima County*, 168 Ariz. 61, 65, 811 P.2d 22, 26 (1991). Thus, the County has not exceeded its statutory authority in granting the Board jurisdiction to hear requests for a change in zoning conditions under Code § 18.91.100(A)(3). In view of this conclusion, we do not address the parties' arguments on

[6]We express no opinion on the validity or wisdom of the ordinance in question or the conditions imposed therein. In his reply brief, Kuzma argues "the two residence cap in this case is not reasonably conceived." But, as pointed out above, neither the validity of the zoning conditions nor the question of whether the Board should grant the requested change in conditions is before this court.

whether any action by the BOA on Kuzma's request would constitute legislative or administrative action.

¶21 In sum, the trial court did not err in granting summary judgment in favor of the County and finding that the "Board of Adjustment has no jurisdiction to grant variances from re-zoning restrictions adopted by the Board of Supervisors in its legislative capacity."

DISPOSITION

¶22 The judgment of the trial court is affirmed.

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
GARYE L. VÁSQUEZ, Judge