

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

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| MERLE W. KUHNS, | : | OPINION |
| Appellee, | : | |
| - vs - | : | CASE NO. 2010-P-0002 |
| CITY OF KENT, | : | |
| Defendant, | : | |
| | : | |
| CITY OF KENT BOARD OF ZONING APPEALS | : | |
| Appellant. | : | |

Administrative Appeal from the Portage County Court of Common Pleas, Case No. 2008 CV 0633.

Judgment: Affirmed.

Scott J. Flynn, Flynn, Keith & Flynn, 250 South Water Street, P.O. Box 762, Kent, OH 44240 (For Appellee).

James R. Silver, City of Kent Law Director, and *Eric R. Fink*, Assistant Law Director, 215 East Summit Street, Kent, OH 44240 (For Appellant).

DIANE V. GRENDELL, J.

{¶1} Appellants, the City of Kent and the City of Kent Board of Zoning Appeals (collectively “Kent”), appeal the decision of the Portage County Court of Common

Pleas, reversing the Board of Zoning Appeals' ("BZA") denial of an area variance in favor of appellee, Merle Kuhns. For the following reasons, we affirm the decision of the lower court.

{¶2} Kuhns owns approximately one acre of residential, triangular-shaped property located at 1296 Middlebury Road in Kent, Ohio, which is zoned R-1, low density residential. The front of the property faces Middlebury Road and the Cuyahoga River. Kuhns has no neighbor located to one side of his property and Kuhns' uncle lives next to the other side of the property. Kuhns has no immediate neighbors to the back side of his property because of a large easement held by Akron Waterworks. Kuhns owns a large dump truck that he uses for work purposes and parks on his property. Kuhns sought to build a large, detached garage on the property to store the truck. However, Kent Codified Ordinance 1161.14(a) states that no "[a]ccessory buildings detached from the main building *** shall be located less than sixty (60) feet from any street right-of-way line." Kuhns was unable to build the garage more than sixty feet back from Middlebury Road because of an easement held by Akron Waterworks on the back portion of his land. In order for Kuhns to build the garage on his property, he requested a variance from the BZA.

{¶3} On November 19, 2007, a hearing was held by the BZA to determine whether a variance should be granted. At this hearing, Kuhns explained that the proposed structure would be 64 feet by 40 feet. Kuhns requested a 53.75-foot variance, which would allow the garage to be set back 6.25 feet from the Middlebury Road right-of-way. The BZA denied the variance and stated that they were concerned with the large size of the proposed garage.

{¶4} Kuhns retained counsel and filed another request for a variance. In this request, Kuhns asked for a 49.75-foot variance. He also proposed that the structure would be 50 feet by 32 feet. Staff from the City of Kent Department of Development (“City Staff”) recommended that the BZA grant the variance. They made this recommendation based on Kuhns’ amended plans and also based on the fact that Kuhns “has shown a hardship in that [his] lot has an irregular shape that makes constructing any detached structure difficult without asking for variances.”

{¶5} On February 18, 2008, the BZA held a hearing concerning whether to grant the variance. At this hearing, counsel for Kuhns, Scott Flynn, advised the BZA that Kuhns was willing to accept a variance of 41.75 feet instead of 49.75 feet, due to the decrease in size of the proposed structure. At this time, only three of the five board members were present and the issue was tabled.

{¶6} On March 17, 2008, a second hearing was held, at which time the BZA denied the variance by a vote of 5-0. BZA members gave various reasons for denying the variance, including that they did not have an accurate survey of the property and that granting the variance would be against the public interest. Kuhns appealed the BZA’s decision to the Portage County Court of Common Pleas.

{¶7} The court reversed the BZA’s decision, stating that the BZA took into account factors that were “far beyond the specific criteria outlined in [Kent Codified Ordinance] Section 1115.09(b)(2),” such that the BZA did not lawfully exercise its authority in making its decision and that the decision was arbitrary and capricious.

{¶8} Kent timely appeals and raises the following assignments of error:

{¶9} “[1.] The common pleas court committed prejudicial error by failing to apply the appropriate standard of review for an administrative appeal.

{¶10} “[2.] The common pleas court committed prejudicial error by abusing its discretion basing its decision in irrelevant evidence and snippets of the record while failing [to] consider other evidence contained within the whole record.”

{¶11} Judicial review of decisions by the City of Kent Board of Zoning Appeals is authorized by R.C. 2506.01(A), which states that “every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.”

{¶12} When a trial court reviews the decision of a board of zoning appeals, the court “may reverse the board if it finds that the board’s decision is not supported by a preponderance of reliable, probative and substantial evidence. An appeal to the court of appeals, pursuant to R.C. 2506.04, is more limited in scope and requires that court to affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence.” *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. “While the court of common pleas has the power to weigh the evidence, an appellate court is limited to reviewing the judgment of the common pleas court strictly on questions of law.” *Carrolls Corp. v. Bd. of Zoning Appeals*, 11th Dist. No. 2005-L-110, 2006-Ohio-3411, at ¶10 (citations omitted).

{¶13} The Kent Codified Ordinances set forth factors to be considered by the BZA when determining whether to grant a variance. “In carrying into effect its powers to grant or to recommend variances, the Board shall be guided by the following criteria: (a) In general, the power to authorize a variance from the terms of this Zoning Ordinance shall be sparingly exercised and only under peculiar and exceptional circumstances[;] (b) Any variance granted shall be the minimum needed to alleviate the difficulty or hardship involved[;] (c) A limitation upon the financial gain from the land in use shall not in and of itself constitute a hardship[;] (d) Any difficulty or hardship constituting the basis for a variance shall not be self-created[;] (e) Mere evidence that a variance was previously granted under similar circumstances shall not be considered sufficient grounds for granting a variance.” Kent Codified Ordinance 1115.09(b)(2). “In every instance where the Board grants or recommends a variance, there must be a finding by the Board that: (a) The strict application of the provisions of the Zoning Ordinance would result in practical difficulties or unnecessary hardship inconsistent with the general purpose and intent of the Zoning Ordinance[;] (b) There are exceptional or extraordinary circumstances or conditions applying to the property involved or to the intended use or development of the property that do not apply generally to other properties or uses in the same zoning district[;] (c) The granting of such variance will not be of substantial detriment to the public interest or to adjacent property or improvements in such district in which the variance is sought, and will not materially impair the purpose of the Zoning Ordinance.” Kent Codified Ordinance 1115.09(b)(3).

{¶14} The standard for granting an area variance requires the applicant to demonstrate “practical difficulties”; i.e., “the property owner is required to show that the application of an area zoning requirement to his property is inequitable.” *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 86; *Kisil*, 12 Ohio St.3d 30, at syllabus. “The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner’s predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.” *Duncan*, 23 Ohio St.3d 83, at syllabus.

{¶15} Here, the BZA addressed many of the the factors set forth in *Duncan*, mainly concerned with the fact that the character of the neighborhood would be substantially altered and that Kuhns had knowledge of the zoning ordinances when he took possession of the property. The court did not explicitly discuss the *Duncan* factors but made findings favorable to Kuhns on several factors. Applicable to factor two, the court noted that the variance request had been decreased in size when compared to

the previous request, in an effort to make the request less substantial. Relevant to factor three, the court noted that there was no evidence from which the BZA could have concluded that the variance would be a detriment to the public interest and that no adjoining properties disapproved of the variance. The character of the neighborhood is such that Kuhns has only one immediate neighbor, who is also his uncle. Relevant to factor six, the court found that there was a hardship in Kuhns' case because he was unable to build the garage on other portions of his property due to a large easement held by Akron Waterworks.

{¶16} A zoning board and a common pleas court must only consider relevant factors and do not have to make express findings on each factor. *Carrolls*, 2006-Ohio-3411, at ¶20. In weighing the *Duncan* factors, it has often been observed that no single factor is dispositive or controlling. *Duncan*, 23 Ohio St.3d at 86. There is also no requirement that the factors be applied mathematically. *Winfield v. Painesville*, 11th Dist. No. 2004-L-053, 2005-Ohio-3778, at ¶28.

{¶17} Although not all of the factors were addressed by either the BZA or the court, it appears that the court did have several reasons supporting its conclusion that a variance should have been granted.

{¶18} In its first assignment of error, Kent argues that the common pleas court did not apply the appropriate standard of review for an administrative appeal. Kent contends that the court did not review the evidence within the whole record because the court quoted specific statements made by board members but did not consider the reasons given by the BZA in its statement of findings of facts and conclusions of law. Kent asserts that the court “substitute[d] its own judgment for that of the BZA.”

{¶19} The court, in its Journal Entry, states the appropriate standard of review, that the court, after weighing the whole record, may reverse the board if it finds that the board's decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by a preponderance of reliable, probative, and substantial evidence. Kent fails to present any specific evidence showing how the court failed to apply this standard of review. Here, the court concluded that the BZA's decision was unsupported by the evidence offered at the hearings. The BZA offered a few reasons for denying the variance, mainly focusing on the fact that granting the variance would be detrimental to the public interest and that Kuhns did not have a hardship. Based on the record, it does not appear that this conclusion is supported by reliable, probative, and substantial evidence. The evidence presented at the BZA hearings showed that Kuhns has very few close neighbors and that these neighbors did not protest the variance. Additionally, several board members, as well as the City Staff, pointed out at the hearing that a hardship did exist, but then ultimately ruled that a hardship did not exist, without a definitive explanation of why they made this determination. Based on the fact that the BZA lacked sufficient evidence to deny the variance, which will be further discussed in the second assignment of error, there is nothing in the record to demonstrate that the court failed to apply the appropriate standard.

{¶20} That the court did not discuss every finding of fact and conclusion of law reached by the BZA does not indicate that the court failed to consider the whole record. As noted previously, the court does not have to make explicit statements on every finding of fact made by the BZA in order for the court's decision to be valid. Absent any showing by the appellant that the court did not apply the appropriate standard, we must

conclude that the court applied the proper standard stated by the court in its Order and Journal Entry.

{¶21} The first assignment of error is without merit.

{¶22} In its second assignment of error, Kent argues that the common pleas court abused its discretion by failing to consider the whole record but only snippets of the record and thus failed to appreciate that the BZA's decision was based on a preponderance of substantial, reliable, and probative evidence. Kent makes several arguments as to why the findings made by the BZA in support of denying Kuhns' request for the variance were substantial, reliable, and probative. Kent argues that Kuhns did not suffer a hardship because he took the property knowing of the easement and irregular shape. Kent asserts that the proposed variance was excessive because the garage could have been made smaller and still housed the dump truck. Kent also argues that Kuhns' request would be a detriment to the community and would alter the character of the neighborhood because the truck was used for a commercial purpose. Kent finally asserts that Kuhns did not clearly articulate his variance request and failed to submit properly surveyed drawings of the property.

{¶23} Although Kent may make persuasive arguments for denying Kuhns' variance request, these arguments require us to re-weigh the evidence before the trial court, which this court is not permitted to do. Appropriate review is limited whether, as a matter of law, the court's decision was supported by a preponderance of reliable, probative, and substantial evidence. See *Carrolls*, 2006-Ohio-3411, at ¶10. “[W]ithin the ambit of “questions of law” for appellate court review would be abuse of discretion

by the common pleas court.” *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 148, 2000-Ohio-493, citing *Kisil*, 12 Ohio St.3d at 34.

{¶24} It is clear here that no abuse of discretion occurred. The court found that the BZA’s decision was not supported by reliable, probative and substantial evidence. The court found that the BZA had no evidence before it that could allow it to reach the conclusion that Kuhns did not have a hardship. The evidence showed that the property owned by Kuhns had been in the family for many years and that Kuhns purchased the property to keep it within his family. Additionally, several board members commented that the triangular shape of the property and the easements did in fact create a hardship. They did not clearly explain why they later changed this determination.

{¶25} There is also little evidence supporting the BZA’s determination that the variance was excessive. Although the size of the proposed garage was large, it would be housing a very large dump truck as well as other personal vehicles. Additionally, Kuhns had made several modifications to the size of the garage to make it smaller than originally proposed, attempting to make the variance and building size as reasonable as possible, while still allowing the structure to serve its intended purpose.

{¶26} Additionally, as the trial court noted, the BZA had no evidence to support its finding that the public interest would be harmed by granting a variance. In fact, evidence presented at the BZA hearing showed that there would be very little harm to the public. Kuhns lives in a rural residential area and has only one close neighbor, who is also his uncle. This uncle submitted a letter to the BZA, explaining that he supported granting the variance. Additionally, Kuhns wished to build the garage in order to keep his dump truck out of view, thus improving the look of his property. The evidence does

not show that Kuhns was operating a commercial business off of his property. Kuhns simply stored his truck on the property but did not conduct any business from his home. Therefore, the character of the neighborhood would not be changed.

{¶27} Kent also asserts that the court erred by considering the recommendation of the Kent City Staff instead of the opinion of the BZA. Kent also states that whether to grant a variance is within the sound discretion of the BZA. *Mentor Lagoons, Inc. v. Zoning Bd. of Appeals of Mentor Twp.* (1958), 168 Ohio St. 113, 118.

{¶28} Kuhns argues that the recommendation of the City Staff was just one piece of evidence considered by the court. The court did not rely solely on the recommendation of the City Staff but also considered the rest of the record.

{¶29} While it is true that whether to grant a variance is within the discretion of the BZA, the court did not err in considering the recommendation of the City Staff when determining whether the BZA's decision was based on a preponderance of substantial, reliable, and probative evidence. The court expressed concern that the BZA's decision was unsupported by evidence. One area of concern was that the City Staff's recommendation was not addressed at all by the BZA, although the City Staff were familiar with the case and had researched whether the variance should be granted. The court may consider the whole record to determine whether the BZA's decision was arbitrary and capricious and therefore the court was correct in considering the recommendations made by the City Staff to the BZA. A failure to consider the City Staff's recommendation helps support the conclusion that the BZA's decision was arbitrary.

{¶30} After making these determinations, the court could not find a basis for denying Kuhns the requested variance. Based on this record, we cannot conclude, as a matter of law, that the court's decision was unsupported by a preponderance of reliable, probative, and substantial evidence or was an abuse of discretion.

{¶31} The second assignment of error is without merit.

{¶32} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, reversing the decision of the BZA denying a variance to Kuhns, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.