[Cite as *Yang v. Cleveland*, 2018-Ohio-3312.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106519

CAROL VANG, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-861452

BEFORE: S. Gallagher, J., Stewart, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: August 16, 2018

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SEAN C. GALLAGHER, J.:

{¶1} Carol Vang, Andrew Philbin, and Luis Sandoval appeal the trial court's decision affirming the decision of the Cleveland Board of Zoning Appeals to grant Thomas Lenghan an area variance on the 20-foot rear-yard size requirement under the applicable zoning regulations.

{¶2} Lenghan owns a property upon which he intends to build four townhomes. The lot is 54 feet deep. It is undisputed that the property is "substantially more shallow" than others on the street. *Vang v. Cleveland*, 8th Dist. Cuyahoga No. 104994, 2017-Ohio-4187, ¶ 2 ("*Vang I*"). Because of this smaller lot size, Lenghan sought a variance from the 20-foot rear-yard requirement, seeking permission to have a 5-foot rear yard that is similar to the rear yards permitted in neighboring properties, one of which was described as an industrial building. Lenghan introduced evidence that building the structures within the zoning regulations would impose practical difficulties in selling because such a home would be substantially smaller and not marketable in that neighborhood. After hearing objections, most of which pertained to the size of the proposed structure and not the variance to the rear-yard size requirement, the zoning board granted the variance. In the written decision, the zoning board concluded that the property at issue was shallower than others on the same street; that the shallower depth precluded the owner from building a saleable structure with the 20-foot rear yard required by the zoning regulations; and because other nearby properties had similarly sized rear yards as the one being requested, that the variance would not be contrary to the purposes and intent of the zoning code. *Id.*

{¶3} Vang, Philbin, and Sandoval appealed the agency's decision to the Court of Common Pleas of Cuyahoga County under R.C. 2506.04. The trial court, acting in its capacity to provide appellate review of the agency decision, affirmed. The objectors directly appealed the trial court's decision in *Vang I*. In that first appeal, the objectors claimed that the trial court abused its discretion in affirming because the zoning board's decision was not supported by the requisite evidence under R.C. 2506.04. The trial court's decision was reversed, and the matter was remanded for the court to "conduct the evidentiary analysis required by the statute and generate an entry capable of review by this court" because it could not be determined "whether the trial court fulfilled its obligation under the statute" to review the record.[1] *Vang I* at ¶ 14.

{¶4} Upon remand, the trial court issued an order, which included a recitation of the facts,[2] restating its conclusion that the board's decision to grant the area variance was supported by a preponderance of reliable, probative, and substantial evidence upon consideration of the evidence presented in the record. The objectors again appealed; however, only Philbin and Sandoval pursued the appeal, setting out the same argument as advanced in *Vang I* — that the trial court abused its discretion in affirming the area variance because there was no evidence supporting the zoning board's decision. For the following reasons, we affirm.

{¶5} The common pleas courts and the courts of appeals apply different standards of review for administrative appeals. *McMillan v. Lakewood*, 8th Dist. Cuyahoga No. 105463, 2018-Ohio-94, ¶ 16, citing R.C. 2506.04. In appeals of an administrative agency's decision to the common pleas court, the trial court "'considers the 'whole record,' including any new or

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[1]The city did not seek discretionary review of *Vang I* with the Supreme Court of Ohio.

[2] We reiterate that a trial court is not required to issue a detailed opinion in an administrative appeal, and no findings of fact or conclusions of law under Civ.R. 52 are required. *Vang I* at ¶ 13, citing *Warrensville Ctr., Inc. v. Warrensville Hts*., 20 Ohio App.3d 220, 222, 485 N.E.2d 824 (8th Dist.1984).

additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.'" *Id.*, quoting *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433. The standard of review "to be applied by an appellate court reviewing a judgment of a common pleas court in an R.C. 2506.04 appeal is narrower, more limited in scope, and more deferential to the lower court's decision." *McMillan* at ¶ 17, citing *Cleveland Clinic Found. v. Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 25. Our review, expressly permitted under R.C. 2506.04, is limited to questions of law, "which does not include the same extensive power to weigh" the evidence. *Henley* at 147.

{¶6} Because R.C. 2506.04 limits our review to questions of law, there are two fundamental principles that we must adhere to with respect to the evidentiary-based arguments advanced in administrative appeals. On evidentiary matters, appellate courts are limited to reviewing to determine whether the trial court's decision is unsupported by a preponderance of reliable, probative, and substantial evidence. *Cleveland Found.* at ¶ 27. "In this context, a reversal 'as a matter of law' can occur only when, having viewed the evidence most favorably to the decision, *there are no facts to support*" the trial court's decision. (Emphasis added.) *Kurutz v. Cleveland*, 8th Dist. Cuyahoga No. 105899, 2018-Ohio-2398, ¶ 8. However, if the trial court considers evidence outside the administrative record by allowing additional evidence under the statutory scheme, the review of those determinations falls under the abuse of discretion standard of review. *Id.* at ¶ 9. Importantly, the prohibition on a court of appeals weighing evidence in an administrative appeal means that the appellate court cannot find that the court of common pleas abused its discretion in the manner in which it weighed evidence. *Id.*

{¶7} The zoning board has authority to grant an area variance under Cleveland Codified Ordinances 329.03 if (1) the property owner demonstrates a practical difficulty peculiar to the property because of physical size, shape, or other characteristics of the property that create a difficulty caused by a strict application of the zoning code; (2) that the refusal of the variance will deprive the owner of substantial property rights; and (3) granting the variance will not be contrary to the purpose and intent of the zoning code. The standard for granting an area variance is that the property owner is required to show "practical difficulty," which requires a showing that the application of an area zoning requirement to the property is inequitable. *Duncan v. Middlefield*, 23 Ohio St.3d 83, 85-86, 491 N.E.2d 692 (1986). "The key to the [practical difficulties] standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable." *Duncan* at 86. No single factor controls the outcome. *Id*.

{¶8} In *Duncan*, the Supreme Court of Ohio set forth the following factors "to be considered and weighed" in determining if a property owner has encountered practical difficulties in the use of his property, including but 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.

Id. at 86.

{¶9} In this case, the zoning board concluded as follows:

> [T]he owner has established that: there are practical difficulties due to the fact that the lot is substantially more shallow than others on the street, only one variance is

> requested, the neighboring properties have similarly shallow rear yards, the townhouses will positively impact property values, the proposed development is consistent with the neighborhood, which is very densely developed, and the City, Councilman, Block Club and Ohio City, Inc. all support the project as being consistent with the zoning code and the City's plans for the neighborhood and therefore denial would deprive the appellant of substantial property rights and the variance is consistent with the purpose and intent of the zoning code.

Vang I at ¶ 4. It was undisputed that the property was shallower than others on the street and that the neighboring properties had smaller than 20-foot rear yards similar to the variance being requested, simultaneously satisfying the practical-difficulty inquiry and demonstrating that the variance is consistent with the purpose and intent of the zoning code under C.C.O. 329.03. There was also evidence that the property could not sustain an adequately sized structure for resale purposes while keeping within the 20-foot rear-yard requirement, which demonstrated the refusal of the variance would deprive the owner of a substantial property right. And, on this point, no one challenged the evidentiary foundations of the zoning board's conclusions.

{¶10} In this appeal, Philbin and Sandoval solely claim that there is no evidence in support of the board's decision to grant the area variance, but they do so by asking this court to weigh their evidence and arguments and arrive at a different conclusion from those reached below. Importantly, there is no claim that the administrative order is otherwise unconstitutional, illegal, arbitrary, capricious, or unreasonable, so our review is limited to the evidentiary argument. As already discussed, the board articulated a reason for its decision and that decision was supported by the evidence in the record. Although both sides presented the zoning board with countervailing evidence in support of their respective positions based on the *Duncan* factors, it is not for this court to weigh that competing evidence or question the manner in which the evidence was weighed below. *Henley,* 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433, at 147.

{¶11} Further, the trial court did not err in applying its standard of review, which based on the arguments presented, was limited to determining whether the zoning board's decision was unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. *Vang I* at ¶ 10. The trial correctly considered the board's authority to grant an area variance under C.C.O. 329.03 and the zoning board's consideration of the non-exhaustive factors that should be considered in granting or denying that area variance. *Id.*, citing *Duncan*, 23 Ohio St.3d 83, 491 N.E.2d 692 (1986). This is not a situation in which no evidence was presented in support of the board's decision. *See, e.g., Kurutz.* Evidence was presented in support of each party's respective position that the board resolved in favor of the property owner. The trial court applied the correct standard in reviewing the board's evidentiary considerations. Because the zoning board's decision is not unsupported by the whole record, the trial court's decision is affirmed.

{¶12} Finally, we also note that Philbin and Sandoval claim the trial court erred in concluding that their concerns, demonstrated with extensive evidentiary submissions to the zoning board regarding possible sewer issues, depletion of green space to absorb runoff, the effects of the larger building on the air and light into nearby properties, and the general "massiveness" of the proposed building, were not supported by evidence and were purely speculative. It appears that the objections to the development project are focused on the size of the structures and not the reduction in the rear-yard area that is the subject matter of the area variance at issue. As the board and the trial court both explained, the requested area variance focused on the rear-yard size requirement. The structures being built were well within the permitted uses of the property.

{¶13} Nevertheless, Philbin and Sandoval's concerns were part of the calculus the zoning board considered in granting the area variance. On the other side of that equation was the evidence demonstrating the shorter depth of this particular property, the owner's inability to situate a saleable structure on the property in compliance with the rear-yard zoning regulations as written, and that the variance is in line with the characteristics of the neighborhood, based on the undisputed fact that other neighboring properties did not have the required 20-foot rear yard required under the zoning code. Whether Philbin and Sandoval's arguments were supported by evidence is irrelevant. Even if we assume their arguments were supported with evidence, it is not the function of this court to reweigh conflicting evidentiary submissions in administrative appeals.

{¶14} The zoning board considered Philbin and Sandoval's concerns and found that the owner's evidence weighed in favor of granting the variance. The trial court held that the zoning board's conclusion was supported by the preponderance of the evidence. We are limited on evidentiary matters within the scope of review permitted under R.C. 2506.04. We can only reverse an administrative appeal based on evidentiary arguments if we conclude there is no evidence in support of the agency's decision. This is not that case; therefore, the decision of the trial court is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
ANITA LASTER MAYS, J., CONCUR