[Cite as *Shultz v. Mantua*, 2012-Ohio-1459.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

VERNARD E. SHULTZ, III, a.k.a. BUTCH SHULTZ,	:	**O P I N I O N**
	:	
Appellant,	:	**CASE NO. 2011-P-0054**
- vs -	:	
VILLAGE OF MANTUA, et al.,	:	
Appellees.		

Administrative Appeal from the Portage County Court of Common Pleas, Case No. 2010 CV 0536.

Judgment: Affirmed.

Diana J. Prehn, Giulitto Law Office, L.L.P., 222 West Main Street, P.O. Box 350, Ravenna, OH 44266-0350 (For Appellant).

John D. Latchney, Tomino & Latchney, L.L.C., L.P.A., 803 East Washington Street, Suite 200, Medina, OH 44256 (For Appellees, Village of Mantua and Mantua Board of Zoning Appeals).

James E. J. Ickes, *David E. Williams*, and *Joel A. Holt*, Williams, Welser, Kratcoski & Can, L.L.C., 11 South River Street, Suite A, Kent, OH 44240 (For Appellees, Scott A. Vyhnal and Christina C. Roth-Vyhnal).

MARY JANE TRAPP, J.

{¶1} Vernard E. Schultz, III, appeals from a decision of the Portage County Court of Common Pleas, affirming the Village of Mantua Board of Zoning Appeals' ("BZA") denial of two requested zoning variances. Mr. Schultz sought variances in 2009 for buildings he erected on his property between 2003 and 2008, which failed to

conform with set-back and square-footage requirements delineated in the Village of Mantua Zoning Code ("Zoning Code").

{¶2} Because we find that the BZA's denial of the variances was supported by substantive, reliable and probative evidence, and that the trial court did not abuse its discretion in affirming the BZA's determination, we affirm the judgment of the Portage County Court of Common Pleas.

Substantive Facts and Procedural History

{¶3} Vernard Schultz owns an "L" shaped piece of property in the downtown district of Mantua. He acquired the property in 2001, and has made substantial improvements and developments to the property since then. Scott and Christina Vyhnal, intervenors in this matter, purchased the residential property adjacent to the eastern border of Mr. Schultz' property in 2003. The Vyhnals and Mr. Schultz share an approximately 88-foot long fence-line, running north-south between their properties.

The 32 x 40 foot Garage Addition and Alterations to the Existing Garage

{¶4} In 2003, Mr. Schultz applied for a zoning permit from the Mantua Village Zoning Inspector ("Zoning Inspector") to build a 32 by 40 foot garage to be attached to the back of an already existing 12 by 24 foot garage. The existing garage sat on the eastern portion of Mr. Schultz' property. This application, no. 2003-027, which was approved by the Zoning Inspector, indicated that the building would be used for vehicle and materials storage; it would be 16 feet tall and consist of only one story. The addition would add 1280 square feet of floor area.

{¶5} A drawing of the proposed garage addition, which was submitted to the BZA, indicated that the new structure would have a 12 foot set-back from the Vyhnals' property, as well as a 12 foot set back from the northern border of the property.

{¶6} In 2004, Mr. Schultz spoke with the Zoning Inspector about altering the proposed new garage addition's roof to a pitched roof. The Zoning Inspector indicated that the change would not require a new or amended zoning permit, so long as no other changes were made to the building. Mr. Schultz also wished to add a 12 by 24 foot addition to the older garage's roof, to go "up not out." By this time the new 32 by 40 foot garage had already been attached to the older 12 by 24 foot garage. He memorialized this in a new zoning application, no. 2004-006.

{¶7} During construction of the 12 by 24 foot pitched roof, Mr. Schultz was informed by the builders that, for a small charge, a second floor could easily be added. Mr. Schultz had the Zoning Inspector come to the property to discuss this change, and was told he had to stay within the Village's height requirements. Mr. Schultz then had the builder go forward with construction of the second floor. While doing so, it appears Mr. Schultz also had the building extended outward, westerly toward the Vyhnals' property line, and the building's height rose from 16 feet to 35 feet. This extension was contrary to the zoning permit, and effectively eliminated any set-back between Mr. Schultz' property and the Vyhnals'.

Notice of Code Violations

{¶8} In early January of 2009, Mr. Schultz received written notice from the Zoning Inspector that he was in violation of the Zoning Code; he was given 30 days to attempt to resolve or correct the violations. Mr. Schultz took no identifiable action, and on February 12, 2009, the Village of Mantua solicitor sent Mr. Schultz a formal "Notice of Violation," pursuant to Section 650.05 of the Zoning Code. Mr. Schultz does not appear to have taken any action in response to the solicitor's letter until November of 2009, when he applied for a retroactive zoning permit for the newly constructed second

floor and westward expansion in application no. 2009-14. The Zoning Inspector denied the application. Mr. Schultz then filed an appeal with the BZA.

The Adjoining Property Owners Object at the BZA Hearing

{¶9} A hearing was held before the BZA on February 12, 2010, in which the Vyhnals participated and submitted formal written objections to the requested zoning variances.

{¶10} The Vyhnals made specific objections as to each of the desired variances; many of their arguments overlapped and supported their objection to both variances. They pointed out that the square-footage permitted by the Zoning Code is 6,000 square feet of building for every 20,000 square feet of land, but that the square footage of Mr. Schultz' buildings equaled 9,102 square feet on a lot equaling only 12,414.6 square feet. Further, they pointed out that the Zoning Code required commercial properties to have a set-back of at least 20 feet from abutting residential properties in a side-yard and 30 feet for rear yards, but that no set-back existed between the garage and their property as Mr. Schultz built the garage right up to the fence line.

{¶11} The Vyhnals argued that: (1) Mr. Shultz's property can be put to beneficial use without the variances; (2) the variances requested are substantial, given that they request permission to maintain two to three times the allowable square footage of buildings on the property, and to maintain no set-back whatsoever between the Schultz property and the Vyhnal property; (3) they will suffer substantial detriment because their enjoyment of the property has been diminished due to the garage's interference with light, air and sunshine, as well as a view of the park, their safety has been jeopardized as a result of the building placement right up against their fence, and the value of their property is decreased making it difficult for them to sell their home as a direct result of

the over-sized garage building; (4) the variances would adversely affect delivery of governmental services, in that the size, configuration, and density of the buildings create a potential fire hazard that will be difficult to contain if realized; (5) Mr. Schultz purchased the property with full knowledge of the zoning restrictions, and created the violations himself rather than inheriting them; and (6) granting of the variances would fail to preserve the spirit and intent of the zoning requirements because the general objectives of the Zoning Code are to ensure orderly development to protect and enhance the character and value of residences, protect and preserve the historical character of the village, provide adequate open spaces for light and air, and prevent overcrowding.

{¶12} The Vyhnals also argued that substantial justice would not be accomplished by granting the variances because it would be tantamount to spot zoning, and would empower residents to make additions first and seek permission later. They also noted granting of the variances would amount to a taking of their property in violation of their constitutional rights because Mr. Schultz actually built the north corner of the garage on their property.

{¶13} After hearing arguments from the Vyhnals, Mr. Schultz, and witnesses Mr. Schultz arranged to testify on his behalf, and upon review of the evidence submitted by both sides (which included the written objections, photographs, zoning applications, drawings, plans, surveys and affidavits), the BZA denied Mr. Schultz' application. He subsequently filed an appeal in the Portage County Court of Common Pleas.

Appeal to the Common Pleas Court

{¶14} The trial court, sitting as a court of appellate review, considered whether substantive, reliable and probative evidence existed in the administrative record to

support the BZA's denial of the requested variances. Reflecting on the non-exclusive factors to be considered in granting or denying an area variance established in *Duncan v. Middlefield*, 23 Ohio St.3d 83 (1986), the trial court found the BZA's denial to be rooted in substantive, reliable and probative evidence. The trial court stated in a well-reasoned and comprehensive opinion: "Considering the *Duncan* factors, in each case the variances are substantial, have negatively changed the character of the immediate neighborhood, and will limit governmental fire protection services to Appellant's building and the adjoining residence. It is plain that approval of either variance will not preserve the spirit and intent of the zoning regulations.

{¶15} "Further, Appellant had feasible alternatives in continuing his business in the 32 x 40 garage permitted in 2003 or construct his enlarge[d] business buildings elsewhere.

{¶16} "Finally, Appellant created this situation through unapproved expansion of his building. At [the] hearing Appellant apparently claimed that the 2009 building was not a new expansion and the Zoning Inspector had verbally approved it. But that evidence was disputed. * * * As Appellant has created his own hardship, neither substantial justice nor equity allows approval of these variances."

{¶17} Mr. Schultz now appeals from the decision of the trial court, bringing the following assignments of error:

{¶18} "[1.] The trial court erred in failing to fully apply and consider the practical difficulties test."

{¶19} "[2.] The trial court erred in failing to properly weigh competing interests of Schultz against that of the community to achieve substantial justice."

{¶20} Because Mr. Schultz' assignments of error both relate to the application of *Duncan* factors, we will review them together.

Standard of Review

{¶21} "Administrative appeals taken from a township board of zoning appeals are governed by R.C. Chapter 2506. * * * The appeal is first addressed to the court of common pleas of that county. [R.C. 2506.01.] The common pleas court's standard of review is set forth in R.C. 2506.04: '[T]he court may find that the order * * * or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. * * *'

{¶22} "R.C. 2506.04 grants a court of appeals reviewing the decisions of administrative agencies limited powers to review the judgment of the court of common pleas only on 'questions of law.' *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34 fn. 4, 12 Ohio B. 26, 465 N.E.2d 848. It does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court in its review of such decisions. Id. The appellate standard of review of such 'questions of law' is whether the court of common pleas abused its discretion. Id." *Rickard v. Trumbull Twp. Zoning Bd. of Appeals*, 11th Dist. Nos. 2008-A-0024, 2008-A-0025, 2008-A-0026, 2008-A-0027, and 2008-A-0028, 2009-Ohio-2619, ¶47-48.

{¶23} "A trial court abuses its discretion when it fails 'to exercise sound, reasonable, and legal decision-making.'" *Jackson v. Jackson*, 11th Dist. Nos. 2011-L-016 and 2011-L-017, 2012-Ohio-662, ¶25, quoting *Muscarella v. Muscarella*, 11th Dist. Nos. 2010-T-0091 and 2010-T-0098, 2011-Ohio-1159, ¶17, citing *State v. Beechler*, 2d

Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004)

The Judgment is Not at Odds with the Evidence

{¶24} Although Mr. Schultz correctly articulates our limited standard of review, his argument effectively asks us to reweigh the evidence and reapply the *Duncan* factors. This we may not do, because we are limited to the question of whether, as a matter of law, a preponderance of reliable, probative, and substantial evidence exists to support the trial court's findings. *See Smith v. Granville Twp. Bd. of Trustees*, 81 Ohio St.3d 608, 613 (1998). A court of appeals must affirm the trial court's judgment unless the decision is not supported by a preponderance of reliable, probative and substantial evidence, and, in making such a determination, the court of appeals applies an abuse-of-discretion standard. *See Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000). Whether the trial court abused its discretion is within the ambit of "questions of law" for appellate review. A court of appeals may not determine the weight of the evidence offered in the proceedings below, and the fact that the appellate court might have arrived at a different conclusion than did the administrative agency is immaterial. *Kohrman v. Cincinnati Zoning Bd. of Appeals*, 165 Ohio App.3d 401, 2005-Ohio-5965 (1st Dist.); *Henley*, *supra*, at 147.

{¶25} Mr. Schultz sought an area variance (as opposed to a use variance). The standard for granting an area variance is whether the party seeking the variance faces practical difficulties in the use of his property if not provided with the variance. *Kisil v. Sandusky*, 12 Ohio St.3d 30 (1984). In *Duncan, supra*, the Supreme Court of Ohio stated that "[t]he 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*, *supra*, at syllabus.

{¶26} The trial court, in reviewing the BZA's decision, looked for guidance from *Duncan*. There has been no suggestion by Mr. Schultz that *Duncan* is not the appropriate guidance mechanism in this case, and this court has previously found that the non-exclusive factors enumerated in *Duncan* set the appropriate framework for consideration of an area variance. *See, e.g.*, *Schabel v. Troyan*, 11th Dist. Nos. 2010-G-2953 and 2010-G-2954, 2011-Ohio-2452; *Salotto v. City of Wickliffe Bd. of Zoning Appeals*, 193 Ohio App.3d 525, 2011-Ohio-1715 (11th Dist.); *Stoval v. City of Streetsboro*, 11th Dist. No. 2006-P-077, 2007-Ohio-3381.

{¶27} The Vyhnals fashioned their objections from *Duncan*, and the trial court utilized *Duncan* to evaluate the BZA's denial, applying the evidence in the administrative record to the various factors. Throughout its opinion, the trial court clearly and thoughtfully discussed the evidence in the record and its application to various *Duncan* factors, therefore, we cannot say the trial court abused its discretion in finding

substantive, reliable and probative evidence to support the BZA's denial of the variance applications.

{¶28} Although evidence was submitted to support both sides of the issue, the trial court was obligated to defer to the determination of the BZA, so long as it was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence. The trial court stated that "[a]s the [BZA's] decision is lawful and supported by substantial and probative evidence on the whole record, Appellant's appeal on the Board's denial of the variances cannot be granted." Finding evidence in the record to support denial of the variances, and failing to find the determination unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence, the trial court correctly affirmed the BZA's decision.

{¶29} Because we find the trial court did not abuse its discretion in affirming the BZA's denial of Mr. Schultz' applications for area variances, we affirm the judgment of the Portage County Court of Common Pleas.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.