[Cite as *Redilla v. Avon Lake Bd. of Zoning Appeals*, 2010-Ohio-4653.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

JACK REDILLA, et al. Appellees v. CITY OF AVON LAKE, BOARD OF ZONING APPEALS, et al. Appellants	C. A. Nos. 09CA009731 09CA009735 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CV158796

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

MOORE, Judge.

{¶1} Appellants, City of Avon Lake Board of Zoning Appeals and Michael and Carol Bongers, appeal from the judgment of the Lorain County Court of Common Pleas. This Court reverses.

I.

{¶2} Appellees, Jack Redilla, Donna Dolezal and Green Sun Research, LLC (collectively "Green Sun"), are the owners of a parcel of lakefront property in Avon Lake, Ohio. Redilla and Dolezal are the sole members of Green Sun. The parcel in question, Parcel C, was recently owned by a developer, Neil Bower. Bower also owned two neighboring parcels, Parcel B and Parcel A. Parcel A sits to the east of Parcel B on Lake Road, while Parcel C sits to the west of Parcel B on Lake Road. The Bongers purchased Parcel A and Parcel B from Bower and built a home on Parcel A. Parcel B was undeveloped and the Bongers have retained it as an investment property. Parcel B conforms to the Avon Lake zoning regulations and is considered a

buildable lot. The frontage requirement in an R-1 residential district, in which the parcels are situated, is 60 feet. Parcel C, although approximately 1.26 acres in size, does not conform to the frontage requirements. It has only 32.28 feet of frontage on Lake Road. From Lake Road, Parcel C travels north in a thin strip, widening into a flag or paddle shape at its northern end where it meets Lake Erie.

{¶3} Between 2006 and 2008, Bower experienced a financial reversal and the bank foreclosed on Parcel C. Title to Parcel C eventually transferred to Sopramco CV 7, LLC. Green Sun entered into a contract with Sopramco to purchase Parcel C. Prior to closing, Green Sun sought a variance from the frontage requirement in order to allow construction of a large home.

{¶4} On July 22, 2008, a hearing took place before a bare quorum of the Board. Although two of the members present voted in favor of the variance, a unanimous vote would have been necessary to approve the variance. As a result, the matter was tabled until the Board's next meeting. On August 26, 2008, the Board reconvened and the matter was presented to four of the Board's five members because one was recused due to a conflict of interest. After presentations by Redilla and the Bongers, along with their respective counsel, and after hearing testimony from area residents, the Board unanimously voted against the variance. According to Green Sun's brief and the trial court's order, Green Sun took title to Parcel C shortly after denial of the variance at the August Board meeting.

{¶5} Green Sun, Redilla and Dolezal appealed to the Lorain County Court of Common Pleas. The Bongers filed an unopposed motion to intervene, which was granted. The trial court reversed the Board's decision, finding it unsupported by the weight of the evidence.

{¶6} The Bongers and the Board timely filed notices of appeal, raising three assignments of error for our review. Because the assignments of error are related, we consider them together.

II.

BONGER ASSIGNMENT OF ERROR I

> "THE TRIAL COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE AVON LAKE BOARD OF ZONING APPEALS."

BONGER ASSIGNMENT OF ERROR II

> "THE EVIDENCE SUPPORTS THE AVON LAKE BOARD OF ZONING APPEALS' DENIAL OF THE REQUESTED VARIANCE AND THUS THE TRIAL COURT ERRED."

BOARD ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN REVERSING THE DECISION OF THE ZONING BOARD OF APPEALS BECAUSE THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE."

{¶7} In their assignments of error, the Bongers and the Board essentially contend that the trial court abused its discretion and substituted its judgment for that of the Board when it reversed the Board's denial of the area variance sought by Green Sun.

> "A zoning board or planning commission which is given the power to grant variances is vested with a wide discretion with which the courts will not interfere unless that discretion is abused. Whether a hardship or exceptional or extraordinary circumstances exist to justify the issuance of a variance is a question of fact to be determined by the zoning board or commission." *Schomaeker v. First Natl. Bank of Ottowa* (1981), 66 Ohio St.2d 304, 309.

{¶8} "The denial of a variance request 'is presumed to be valid, and the burden of showing the claimed invalidity rests upon the party contesting the determination.'" *Castle Manufactured Homes, Inc. v. Tegtmeier* (Sept. 29, 1999), 9th Dist. No. 98CA0065, at *4 quoting *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 240.

{¶9} R.C. Chapter 2506 governs administrative appeals of a final order, adjudication, or decision of a township board of zoning appeals. *Grissinger v. LaGrange Zoning Bd.* (Mar. 14, 2001), 9th Dist. No. 00CA007682, at *2. A trial court does not sit as a trier of fact in an administrative appeal; rather, when reviewing an administrative appeal, a trial court may not substitute its judgment for that of the agency unless there is a lack of a preponderance of reliable, probative, and substantial evidence to support the agency's decision. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 35; see, also, R.C. 2506.04.

{¶10} With respect to the review of administrative appeals such as this one, the Supreme Court of Ohio has held that when

> "[c]onstruing the language of R.C. 2506.04, we have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the whole record, including any new or 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." (Internal quotations and citations omitted.) *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147.
>
> "We caution, however, to add that this does not mean that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is 'preponderance.' If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand." *Dudukovich v. Lorain Metropolitan Housing Authority* (1979), 58 Ohio St.2d 202, 207.
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> "The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is *more limited* in scope. This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on questions of law, which 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. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. *** The fact that the court of appeals, or this court, might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the

> approved criteria for doing so." (Emphasis sic.) (Internal citations and quotations omitted.) *Henley*, 90 Ohio St.3d at 147.

{¶11} "An appeal to the court of appeals, pursuant to R.C. 2506.04, *** 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*, 12 Ohio St.3d at 34.

{¶12} "An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties." Id. at the syllabus. "'Practical difficulties' are encountered whenever an area zoning requirement unreasonably deprives a property owner of a permitted use of the property." *Burkholder v. Twinsburg Twp. Bd. of Zoning Appeals* (1997), 122 Ohio App.3d 339, 343. "A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions." *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 86, citing *Kisil*, 12 Ohio St.3d at 33.

> "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." (Emphasis added.) Id. at 86.

{¶13} Section 1217.07 of the Codified Ordinances of the City of Avon Lake ("Avon Lake Ordinances") contains all seven *Duncan* factors and adds three factors to be used in determining the appropriateness of issuing a variance:

> "A. Whether special conditions and circumstances exist which are peculiar to the land or structure involved and which are not applicable generally to other lands or structures in the same zoning district; [such as] exceptional irregularity, narrowness, shallowness or steepness of the lot[;]
>
> "***
>
> "G. Whether special conditions or circumstances exist as a result of actions of the owner;
>
> "***
>
> "J. Whether the granting of the variance requested will confer on the applicant any special privilege that is denied by this regulation to other lands, structures, or buildings in the same district."

{¶14} In reaching its decision, the Board considered all ten factors embodied in section 1217.07 of the Avon Lake Ordinances. The trial court's decision, however, reviewed only the seven *Duncan* factors. Therefore, the trial court erred in failing to fully review the whole record and all factors the Board considered when determining whether the Board's decision was appropriately supported. *Henley*, 90 Ohio St.3d at 147. Moreover, the trial court appears to have reviewed the *Duncan* factors independently and substituted its judgment for that of the trial court; instead, it should review the Board's decision and determine whether it is supported by a "preponderance of reliable, probative and substantial evidence[.]" *Dudukovich*, 58 Ohio St.2d at 207. We reverse the decision of the trial court and remand the matter to the trial court so that it can review all the appropriate factors in light of the whole record and the established legal standard.

{¶15} The Board's and the Bongers' assignments of error are sustained.

III.

{¶16} The Board's and the Bongers' assignments of error are sustained. The judgment of the Lorain County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
CONCURS, SAYING:

{¶17} I concur in the judgment of the majority. While the court of common pleas cited to legal authority setting forth the proper standard of review and noted that the Avon Lake Zoning Board's decision was guided by the *Duncan* factors, in analyzing some of the *Duncan* factors, it appears the court exceeded the scope of its review. The court of common pleas' analysis gives the impression that it independently analyzed these factors instead of considering whether the zoning board's analysis of the factors was supported by the preponderance of substantial, reliable and probative evidence. Thus, I agree that remand is appropriate in this instance so that the trial court can clarify its decision. Therefore, I concur in the result reached by the majority.

APPEARANCES:

WILLIAM J. KERNER, SR., Attorney at Law, for Appellants.

PATRICK J. MCINTYRE, and SHAWN W. MAESTLE, Attorneys at Law, for Appellant-Intervenors.

FRANK CARLSON, Attorney at Law, for Appellees.