[Cite as *Ward v. Cuyahoga Falls Bd. of Zoning*, 2016-Ohio-7091.]

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

JONATHAN WARD Appellant v. CUYAHOGA FALLS BOARD OF ZONING, et al. Appellee	C.A. No. 27848 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2014-09-4491

DECISION AND JOURNAL ENTRY

Dated: September 30, 2016

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, Jonathan Ward, appeals the judgment of the Summit County Court of Common Pleas that affirmed in part and reversed in part the decision of the Cuyahoga Falls Board of Zoning Appeals ("BZA") denying his requested zoning variances. For the reasons set forth below, we affirm the trial court's judgment.

I.

{¶2} On September 11, 2013, Ward received a permit from the City of Cuyahoga Falls, Ohio to construct a 16-foot x 40-foot shed on his property located on Bailey Road. The permit allowed the shed to be 17 feet in height, which was two feet higher than the maximum height allowed for accessory structures under the Cuyahoga Falls General Development Code. Ward purchased a pre-engineered and pre-fabricated shed from Home Depot. Home Depot subcontracted the shed's construction, and that subcontractor then subcontracted the job to a local builder.

{¶3} On November 22, 2013, after a substantial portion of the shed had been erected, the City received complaints from Ward's neighbors regarding the construction of the shed. After investigating these complaints, the City determined that the shed did not match the plans that were submitted in Ward's permit application. Specifically, the City discovered that the shed exceeded the 17-foot height allowance by two feet, eight inches and that the shed included an extended roof, which the City classified as a carport.[1] Carports are a specifically-prohibited structure in the City's General Development Code. As a result, the City issued a stop work order. Ward filed an application requesting three variances to allow the shed to remain unchanged on his property. The first variance was to allow the extended roof to remain attached to the shed. The second variance was for an expansion of square footage allowed to be covered by accessory buildings.[2] The third variance was an area variance for the shed's height.

{¶4} The BZA conducted a hearing about Ward's variance requests on July 23, 2014, after which the Board voted to deny all of them. Ward then requested a second hearing on grounds that he sought to present new and pertinent evidence that he was unable to introduce at the first hearing. The BZA held a second hearing on August 27, 2014, where it heard testimony from Ward and the complainants. After the hearing, the BZA again voted to deny Ward's variances and ordered Ward to bring the structure into compliance with the City's Development Code by: (1) removing the extended roof; (2) painting the shed to match the Tudor style of

[1] Ward emphatically rejects the City's classification of the extended roof as a carport. He insists that the roof extension is a lean-to structure that was never intended to shelter a vehicle. For the purposes of this appeal, we will refer to this disputed structure as an "extended roof."

[2] Ward's property on Bailey Road is allowed a total of 1,350 square feet for all of its accessory structures. With the shed and the extended roof, Ward's property has 1,740 square feet covered with accessory buildings.

Ward's house; and (3) modifying the height of the shed in order to comply with the 17-foot height limit.

{¶5} On September 30, 2014, Ward filed an administrative appeal in the Summit County Court of Common Pleas challenging the BZA's denial of his variances. The trial court ultimately determined that the shed, in its present state, does not comply with the original parameters that the City approved in the zoning permit. However, the trial court recognized that Ward was not at fault for the shed being built in excess of 17 feet and found that it would be cost prohibitive to force Ward to correct this error. Thus, the trial court reversed the BZA's decision and found that Ward is not required to modify the height of the shed. However, the trial court affirmed the BZA's decision ordering Ward to remove the extended roof and to paint the shed to match the style of his house.

{¶6} Ward filed this timely appeal, raising one assignment of error for our review. The City did not file a cross-appeal in this matter.

II.

Assignment of Error

> **Appellant's administrative appeal results were against the manifest weight of the evidence provided and were not supported by a preponderance of reliable, probative and substantial evidence.**

{¶7} In his sole assignment of error, Ward argues that the trial court erred to the extent that it affirmed the BZA's decision to deny his variance requests. Ward does not challenge on appeal the trial court's decision as it pertains to the painting of the shed to match the color of his house. With regard to the extended roof, Ward contends that he is entitled to his requested variance because he demonstrated several practical difficulties and hardships to the BZA.

{¶8} Pursuant to R.C. 2506.04, a common pleas court examining an appeal from a zoning board's decision "may find that the * * * decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." The common pleas court may affirm, reverse, vacate, or modify the commission's decision in accordance with its findings. *Id.*; *Frantz v. Ohio Planning Comm. of Wooster,* 9th Dist. Wayne No. 12CA0025, 2013–Ohio–521, ¶ 6. R.C. 2506.04 further provides that "[t]he judgment of the [common pleas] court may be appealed * * * on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

{¶9} In *Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142 (2000), the Supreme Court of Ohio clarified that "[t]he standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is 'more limited in scope'" than the standard of review applied by the trial court. (Emphasis deleted.) *Id.* at 147, quoting *Kisil v. Sandusky,* 12 Ohio St.3d 30, 34 (1984). "'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.'" *Id*., quoting *Kisil* at 34, fn. 4.

{¶10} Ultimately, the standard of review that we apply in this administrative appeal "is designed to strongly favor affirmance. It permits reversal only when the court of common pleas errs in its application or interpretation of the law or its decision is unsupported by a preponderance of the evidence as a matter of law." *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals,* 141 Ohio St.3d 318, 2014-Ohio-4809, ¶ 30.

{¶11} The Supreme Court of Ohio has delineated two standards depending on the type of variance at issue: (1) the "practical difficulties" standard for granting a variance that relates only to area requirements and (2) the "unnecessary hardship" standard for granting a variance that relates to a use variance. *Kisil* at 32–33; *Duncan v. Middlefield*, 23 Ohio St.3d 83, 85-86 (1986). In adopting the lesser practical difficulties standard, the Supreme Court stated: "[w]hen the variance is one of area only, there is no change in the character of the zoned district and the neighborhood considerations are not as strong as in a use variance.'" *Kisil* at 33, quoting *Hoffman v. Harris*, 17 N.Y.2d 138 (1966). Both Ward and the City agree that Ward's requested variances are area variances, and thus the practical difficulties standard applies in this matter.

{¶12} The Supreme Court of Ohio has handed down the following guidance for assessing an area variance request under the practical difficulties standard:

> 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 at the syllabus.

{¶13} Although Ward correctly articulates this Court's limited standard of review in his appellate brief, his argument effectively asks us to reweigh the evidence and reapply the *Duncan* factors. This we cannot do. As noted above, 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. *Henley*, 90 Ohio St.3d at 147. 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. 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. *Id*.

{¶14} In reviewing the BZA's decision, the trial court looked for guidance from *Duncan*, which Ward agrees is the appropriate authority that governs this case. Throughout its judgment, the trial court clearly and thoughtfully discussed the evidence in the record and its application to the various *Duncan* factors. As such, we conclude that the trial's judgment was supported by a preponderance of substantial, reliable, and probative evidence to support the BZA's denial of the requested variances that are at issue in this appeal.

{¶15} Additionally, Ward contends that the trial court erred by prohibiting him from submitting a number of documents that he claims were submitted to the BZA, but were missing from the administrative record on appeal before the trial court. When an appeal is taken under R.C. Chapter 2506 from a decision of an administrative agency, the appellant must file a praecipe with the administrative agency, who must then file a complete transcript of all the original papers, testimony, and evidence that was offered, heard, and taken into consideration in issuing the order appealed from. R.C. 2506.02. "The hearing of an appeal taken in relation to a final order, adjudication, or decision * * * shall proceed as in the trial of a civil action, but the court shall be confined to the transcript as filed under [R.C. 2506.02] * * *." R.C. 2506.03(A). However, the trial court is not confined to the transcript as filed under R.C. 2506.02 and may

supplement the record with new or additional evidence if it appears on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

(1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:

(a) Present the appellant's position, arguments, and contentions;

(b) Offer and examine witnesses and present evidence in support;

(c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;

(d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;

(e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.

(3) The testimony adduced was not given under oath.

(4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.

Id.

{¶16} A review of the record does not reflect the presence of any of the aforementioned circumstances that are enumerated in R.C. 2506.03(A)(1)-(5). Moreover, Ward did not file an affidavit with the trial court attesting that one of these circumstances existed. The trial court was therefore confined to the transcript as filed under R.C. 2506.02 by the BZA. Accordingly, we conclude that the trial court did not err by prohibiting Ward from filing additional evidence. Lastly, Ward's appellate brief contains information and exhibits regarding newly discovered evidence that has come to light since the trial court's ruling below. As this evidence was not presented to the trial court, this Court may not consider it. *State v. Ishmail*, 54 Ohio St.2d 402, 406 (1978) (explaining that a reviewing court is "limited to what transpired in the trial court as reflected by the record made of the proceedings.").

{¶17} Accordingly, Ward's assignment of error is overruled.

III.

{¶18} Ward's sole assignment of error is overruled and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Summit, 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(C). 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 Appellant.

JULIE A. SCHAFER
FOR THE COURT

CARR, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

JONATHAN WARD, pro se, Appellant.

RUSSELL W. BALTHIS, Director of Law, JANET M. CIOTOLA, Deputy Law Director, and MATTHEW A. DICKINSON, Assistant Director of Law, for Appellee.