[Cite as *Kennedy v. Milton Twp. Bd. of Trustees*, 2010-Ohio-1405.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAVID KENNEDY, APPELLANT, - VS - BOARD OF TRUSTEES OF MILTON TOWNSHIP, et al., APPELLEES.	)))))))))	CASE NO. 08 MA 263 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 07 CV 4031.
JUDGMENT:	Affirmed.
APPEARANCES: For Appellant:	Attorney Michael Marando 3722 Starr Centre Drive P.O. Box 9070 Youngstown, OH 44513
For Appellees:	Attorney Paul Gains Mahoning County Prosecutor Attorney Donald Duda, Jr. Assistant Prosecuting Attorney 761 Industrial Road Youngstown, OH 44509 For Appellee, Milton Township Attorney David Detec Attorney Thomas Lipka 201 E. Commerce St., Atrium Level 2 Youngstown, OH 44503-1641 For Appellees Linda Spence and Donald Spence
JUDGES: Hon. Mary DeGenaro Hon. Gene Donofrio	

Hon. Cheryl L. Waite

Dated: March 12, 2010

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Plaintiff-Appellant, David A. Kennedy, appeals the decision of the Mahoning County Court of Common Pleas affirming the decision of the Milton Township Board of Zoning Appeals which granted a side-yard area variance sought by Appellees, Donald and Linda Spence. On appeal, Kennedy argues that the court erred as a matter of law in affirming and adopting the magistrate's decision without undertaking an independent review as to the objected matters. He also claims the Board lacked jurisdiction and exceeded its authority in granting the variance, and that the trial court erred as a matter of law by upholding the Board's decision for this reason. Finally, Kennedy argues that the trial court's decision affirming the Board was not supported by a preponderance of reliable, probative and substantial evidence as a matter of law. Upon review, Kennedy's arguments are meritless.

{¶2} There is no indication that the trial court failed to consider the objections to the magistrate's decision. Moreover, the Board had jurisdiction to grant the variance in this case. Finally, the trial court's decision upholding the Board's grant of the variance was supported by a preponderance of reliable, substantial and probative evidence as a matter of law. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} The Spences own a piece of property on Lake Milton, in Milton Township, which is zoned "R-1." On September 10, 2007, they applied for a variance from Section 6 of the Milton Township Zoning Code which pertains to R-1 districts and states: "[t]here shall be a sideyard of not less than 10 feet." Specifically, the Spences requested a 4.5 foot side-yard variance on the north side of their property which abuts Kennedy's parcel. They initially also requested a 4 foot variance on the west side of the property which abuts Lake Milton, but later withdrew this request. Thus, on appeal the only issue is the

side-yard variance. The Spences requested the side-yard variance to enable them to make additions to the existing house on their property.

{¶4} The Spences attached a letter to their application which detailed the justifications for the variance. First, they claimed that "special conditions exist peculiar to their property," namely that their lot has approximately 100 feet of frontage on Lake Milton but their sidelines are not perpendicular to the lakefront line. They noted that their current residence sits 21 feet from the side-yard property line they share with Kennedy. They claimed that "good architectural design" dictates that any proposed addition to their house be constructed parallel and perpendicular to the existing residence. They stated that an addition to the south would not be possible due to a side-yard variance granted several years ago to their other neighbor. They noted that any addition towards the lake would likely obstruct their neighbor's view of the water.

{¶5} Second, the Spences claimed that a "literal interpretation of the ordinance" would deprive them of "rights enjoyed by other property owners." They claimed that side-yard clearances less than the prescribed 10 feet are common especially where lots are irregularly shaped. They noted that their immediate neighbor to the south was granted a side-yard variance several years prior. They stated that their residence meets and exceeds the minimum clearance requirements on all sides as it stood at the time of the application. They asserted that even with the approval of their requested 4.5 foot side-yard variance their property would "on average, continue to exceed minimum township standards."

{¶6} Third, the Spences stated that the special conditions do not result from their actions. To that end, they stated that since 1995 their lake cottage had been primarily used in the summer months only, but that since their last child has left for college they now plan to spend considerably more time there and possibly plan to make a permanent move. The Spences anticipated their children returning there for family events and thus believed they would require more bedrooms and a garage to accommodate their growing needs.

{¶7} Finally, the Spences stated that the requested variance is the minimum

variance that will allow a reasonable use of the land or buildings. They noted that a slightly larger side-yard variance was granted to them back in July 2004, but that due to unforeseen financial issues they were unable to build as planned. Overall, they stated that "the proposed addition reflects the optimal balance between functional and aesthetic design, and that Milton township, neighboring property owners, as well as the Spences will benefit from this project."

{¶8} A public hearing was held on September 26, 2007. Don Spence first testified in support of his variance request. He reiterated that he had applied for an almost identical variance in 2004 which was approved by the Board. He said that due to financial issues he was unable to begin construction as planned, but was ready to proceed now and therefore requested the variance again. Spence noted that he withdrew his lake-side variance request to yield to the expressed concerns of his neighbors. He further testified that if the variance is granted there will still be access to the lake through the side-yard and that it would be nicely landscaped. He stated he talked to other Lake Milton residents who expressed their support for his project.

{¶9} Architect Randall P. Baker also testified in support of the variance. He designed the existing residence on the Spences' property in 1995, and was working on plans for the proposed addition. Baker is also a Lake Milton resident. He explained that the Spences want to add the addition to accommodate the needs of their growing extended-family. He testified that there is currently a 20-foot side-yard on the north side of the Spences' property. He said that in order to make the addition "worthwhile" it would be necessary to encroach 4.2 feet into the required 10-foot side-yard area. Baker said he has designed numerous homes around Lake Milton and that the proposed addition to the Spences' property has architectural merit and makes aesthetic sense. He said it would make the existing house even more attractive. He explained they wanted to build toward the north side in order to use the existing roof-line of the house.

{¶10} Appellant Kennedy, the owner of the property to the north of the Spences' spoke against the variance. He noted that he does not actually reside on the property but said his father does. He testified he had more of a problem with the lake-side variance

request, but was then reminded that the lake-side request had been withdrawn. With regard to the side-yard variance he stated that "going sideways is not a big issue."

{¶11} Kennedy's father, Austin Kennedy Sr., who resides on Kennedy's property, also testified against the variance. He questioned the need for the Spences to build on the north side of their property when there was ample space to the east, i.e., going toward the street. He stated he lives on the property year-round and questioned: "why should I be a sardine between these two houses." Kennedy's brother, Austin Kennedy Jr., a resident of Youngstown, also spoke against the variance in support of his father. He opined that with all the bigger houses being built around Lake Milton it was beginning to look cluttered.

{¶12} The Board unanimously approved the variance and Kennedy appealed that decision to the Mahoning County Court of Common Pleas. Appellees (the Spences and the Board of Trustees of the Township of Milton) filed a motion to dismiss the appeal based on lack of standing, which was overruled on May 20, 2008. The case came before a magistrate to decide based on the record and the briefs filed by the parties. In a decision October 8, 2008, the magistrate concluded that the Board's decision to grant the variance should be upheld. Kennedy filed timely objections. The trial court overruled the objections and adopted the magistrate's decision on November 20, 2008.

Standard of Review

{¶13} A trial court reviews the decision of a zoning board of appeals to determine whether the decision was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. The administrative decision is presumed to be valid, and the burden of proving its invalidity rests upon the contesting party. *Solid Rock Ministries Internatl. v. Monroe Bd. of Zoning Appeals* (2000), 138 Ohio App.3d 46, 50, 740 N.E.2d 320.

{¶14} Pursuant to R.C. 2506.04, an appellate court's review of an administrative appeal is even more limited in scope. *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433. The appellate court is only to review the

decision of the trial court on questions of law, and is not to weigh the evidence. Id. "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 [the Ohio Supreme 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." Id., quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264. Thus, absent an error as a matter of law, this court must not disturb the judgment of the trial court.

Objections to the Magistrate's Decision

{¶15} In Kennedy's first of three assignments of error, he asserts:

{¶16} "The trial court erred as a matter of law in affirming and adopting the magistrate's decision without undertaking an independent review as to the objected matters."

{¶17} Kennedy contends that by failing to specifically address the objections within its judgment entry, the court failed to perform its proper function of review under Civ.R. 53(D)(4)(d) and therefore committed reversible error.

{¶18} Civ.R. 53(D)(4)(d) states:

{¶19} "Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, *the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law*. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Civ.R. 53(D)(4)(d) (emphasis added.)

{¶20} In ruling on the objections in this case the trial court stated in entirety:

{¶21} "This matter came before the Court on Appellant's Objections to the Magistrate's Decision filed October 8, 2008, and Appellee, Milton Township's, Reply. The

Court finds that no error of law or other defect appears on the face of the Magistrate's Decision. Appellant's Objections are overruled and the Magistrate's Decision is hereby affirmed and made the action, judgment and order of this Court. Therefore, Judgment is hereby entered as follows: This Court hereby upholds the decision of Milton Township Board of Zoning Appeals granting the Appellees, Donald and Linda Spence, a Variance. Appellant's Appeal to this Court is hereby dismissed. Costs to be taxed to the Appellant. This being no just cause for delay, Judgment is entered as above specified. This is a final, appealable order."

{¶22} Kennedy claims it is clear from the judgment entry that the court conducted no independent review based on the court's statement that "no error of law or defect appears *on the face* of the Magistrate's decision." In essence, he argues that by using that language, the trial court must have applied the standard of review prescribed by Civ.R. 53(D)(4)(c), which deals with magistrate's decisions where no objections are filed. That rule states: "[i]f no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision." Civ.R. 53(D)(4)(c).

{¶23} Appellees counter that the trial court is presumed to have undertaken an independent review of the magistrate's decision and that the party asserting error bears the burden of affirmatively demonstrating that the trial court failed to do so. See *Arnold v. Arnold,* 4th Dist. No. 04CA36, 2005-Ohio-5272 at ¶31, citing *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 7, 615 N.E.2d 617; *Inman v. Inman* (1995), 101 Ohio App.3d 115, 119, 655 N.E.2d 199 (discussing Civ.R. 53(E), the predecessor of Civ.R. 53(D)(4)(d)). Appellees claim that Kennedy has failed to affirmatively demonstrate that the trial court failed to consider the objections and that this court should therefore presume the regularity of the proceedings. We agree.

{¶24} In *Kushner v. Stubhub, Inc.*, 7th Dist. No. 07 MA 15, 2008-Ohio-3241, this court rejected an appellant's argument that the trial court's statement that it had considered the magistrate's decision "on its face" meant the court had not independently considered the objections. This court explained while there are some distinctions in how

a trial court reviews a magistrate's decision depending on whether or not objections have been filed, the use of the phrase "on its face," standing alone, did not indicate that the court ignored that distinction and failed to review the full record. Id. at ¶45. This court further noted that reviewing courts generally presume the correctness and regularity of the lower court proceedings. Id., citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384; *Youngstown v. Ortiz*, 153 Ohio App.3d 271, 2003-Ohio-2238, 793 N.E.2d 498, ¶60.

{¶25} Similarly, there is no indication in this case that the trial court failed to consider the objections. The court stated that the matter came before it pursuant to objections, and specifically overruled those objections, adopted the magistrate's decision, and entered judgment upholding the Board's decision to grant the variance. Accordingly, Kennedy's first assignment of error is meritless.

Jurisdiction of the Board

{¶26} In his second assignment of error Kennedy asserts:

{¶27} "The trial court erred, as a matter of law, in adopting the magistrate's decision as the Board lacked jurisdiction and exceeded its authority and the decision of the Board was illegal."

{¶28} This argument is meritless as the Board had jurisdiction pursuant to R.C. 519.14, and Milton Township Zoning Regulation 11C.

{¶29} R.C. 519.14 states in pertinent part:

{¶30} "The township board of zoning appeals may:

{¶31} "(A) Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25 of the Revised Code, or of any resolution adopted pursuant thereto;

{¶32} "(B) Authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice

done."

{¶33} Pursuant to R.C. 519.14, Milton Township created a Board of Zoning Appeals to administer its zoning regulations. With regard to the jurisdiction of the Board, Milton Township Zoning Regulation 11C states:

{¶34} "JURISDICTION

{¶35} "1. Appeals: To hear and decide appeals where it is alleged there is error in any interpretation, order, requirement, decision or determination by the enforcement officer of the provisions of the Ordinance.

{¶36} "2. Variances: To authorize upon application, where, by reason of exceptional narrowness, shallowness, or shape, or the exceptional topographical conditions, or other extraordinary situation or condition of a lot, the strict application of the terms of the Ordinance would result in peculiar and exceptional difficulties or undue hardship upon the owner thereof, a variance from such strict application to relieve such difficulties or hardship, provided said relief may be granted without substantial detriment to the public good and without substantially impairing the intent of the Ordinance, and provided that no variance shall be granted unless the Board finds that all of the following conditions exist:

{¶37} "a. The special circumstances or conditions applying to the building or land in question are peculiar to such lot of property and do not apply generally to other land or buildings in the vicinity.

{¶38} "b. The granting of the application is necessary for the preservation and enjoyment of a substantial property right and not merely to serve as a convenience to the applicant.

{¶39} "c. The authorizing of the variance will not impair an adequate supply of light and air to adjacent property or unreasonable [sic] increase the congestion in public streets, or increase the danger of fire or imperil the public safety or unreasonably diminish or impair established property values within the surrounding areas, or in any way impair the health, safety, convenience, or general welfare of the residents of the Township."

{¶40} Kennedy claims the Board did not make sufficient findings to support its

grant of the variance and the Board therefore lacked jurisdiction pursuant to Zoning Regulation 11C2. However, in their variance application the Spences asserted that the required conditions were met. They attached a letter detailing how their request met each of the requirements. They further argued this and presented testimony in support thereof at the hearing. By granting the variance the Board necessarily found the required conditions present. There is nothing in the Zoning Regulations stating that the Board must make written findings with regard to its grant of a variance in order to have proper jurisdiction. Accordingly, the Board had jurisdiction to grant the variance and Kennedy's second assignment of error is meritless.

The Variance

{¶41} In his third and final assignment of error, Kennedy asserts:

{¶42} "The trial court erred, as a matter of law, in adopting the magistrate's decision affirming the Board as the trial court's decision was not supported by a preponderance of reliable, probative and substantial evidence."

{¶43} As an initial matter, the parties argue about which test courts should apply in reviewing area variance cases. Since this variance involved a deviation from a side-yard area requirement, it is properly categorized as an "area variance," as opposed to a "use variance." See, e.g. *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 31-32, 12 OBR 26, 465 N.E.2d 848. In *Kisil,* the Ohio Supreme Court held that the "standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use. An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties." Id. at syllabus. Subsequently, in *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 423 OBR 212, 91 N.E.2d 692, the Court, expounding upon its *Kisil* holding, set forth a non-exhaustive list of factors to be considered and weighed in determining whether a property owner who seeks an area variance has encountered practical difficulties in the use of his property. Id. at syllabus. However, both *Duncan*, and *Kisil* involved area variances by *municipal* zoning boards.

{¶44} The Ohio Supreme Court has not specifically ruled on the issue of whether

the *Duncan* practical-difficulties test applies to area variances by *township* zoning boards. Ohio appellate courts are split on this issue, with this and the majority of districts concluding the *Duncan* test does apply to area variances in township cases. See *Strohecker v. Green Twp. Bd. of Zoning Appeals* (Mar. 24, 1999), 7th Dist. No. 97 C.A. 203; *Baker v. Mad River Twp. Bd. of Zoning Appeals*, 2d Dist. No. 2008 CA 16, 2009-Ohio-3121; *DiSanto Ents., Inc. v. Olmsted Twp.*, 8th Dist. No. 90728, 2008-Ohio-6949; *Stace Dev., Inc. v. Wellington Twp. Bd. of Zoning Appeals*, 9th Dist. No. 04CA008619, 2005-Ohio-4798; *Welling v. Perry Twp. Bd. of Zoning Appeals*, 5th Dist. No. 2003CA00303, 2004-Ohio-1289; *Hebeler v. Colerain Twp. Bd. of Zoning Appeals* (1997), 116 Ohio App.3d 182, 687 N.E.2d 324 (First District); *Zangara v. Chester Twp. Trustees* (1991), 77 Ohio App.3d 56, 601 N.E.2d 77 (Eleventh District).

{¶45} Kennedy urges this court to instead adopt the minority position, as approved by the Twelfth District in *Dsuban v. Union Twp. Bd. of Zoning Appeals* (2000), 140 Ohio App.3d 602, 748 N.E.2d 597, which applied a more stringent "unnecessary hardship" test to area variances before township boards. Accord *In re Appeal of American Outdoor Advertising, L.L.C.*, 3d Dist. No. 14-02-27, 2003-Ohio-1820.

{¶46} However, we are bound by the precedent in this district, see *Strohecker,* supra*,* and thus will apply the *Duncan* "practical difficulties" test. In *Duncan*, the Court held that factors to be considered and weighed when deciding an area variance include but are not limited to the following: "(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; [and] (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the

variance." *Duncan* at syllabus.

{¶47} Notably, the magistrate's decision below, which was adopted by the trial court, did not analyze the Spences' variance under the *Duncan* factors, but rather looked to the requirements set forth in the variance application, namely: "(a) [that] special conditions exist peculiar to the land or building in question; (b) that a literal interpretation of the ordinance (resolution) would deprive the application of rights enjoyed by other property owners; (c) that the special conditions do not result from previous actions of the applic[ant]; and (d) that the requested variance is the minimum variance that will allow the reasonable use of the land or buildings."

{¶48} These incorporate some, but not all, of the seven *Duncan* factors. However, we conclude that any error in failing to specifically analyze each of the *Duncan* factors was harmless. Analyzing this case under *Duncan* reveals the trial court's decision to uphold the Board's grant of the variance was supported by a preponderance of reliable, probative and substantial evidence as a matter of law.

{¶49} Only the first and fifth *Duncan* factors weigh somewhat against the granting of the variance. There was no testimony that the Spences' property would fail to yield a reasonable return or lack any beneficial use absent the grant of the variance, or that the Spences purchased the property without knowledge of the side-yard area requirements. However, the remaining factors all appear to weigh heavily in support of the decision to grant the variance as there was substantial probative evidence presented in support of these factors. The variance was not substantial in that it only involved a 4.2-foot encroachment on the set-back line. There was testimony that other Lake Milton property owners, including the Spences' southern neighbor, enjoy similar side-yard variances and thus the Spences' requested variance would not substantially alter the essential character of the neighborhood. Architect Baker, also a resident of Lake Milton, testified that the proposed addition would be attractive and had architectural merit.

{¶50} There was no evidence demonstrating that Kennedy's property would suffer a substantial detriment as a result of the variance. In fact, he testified at the hearing that he was not really concerned about the side-lot variance, but rather had a problem with the

lake-side variance, which was ultimately withdrawn. Kennedy's father, who lives at the Lake Milton property, but does not co-own it, testified he did not want to feel like a "sardine" between the two neighboring houses, but this was the only real criticism levied. There was no evidence that the variance would disrupt essential government services. There was testimony that access to the lake would not be restricted. Finally, the variance request, inasmuch as it was a relatively common one among Lake Milton property owners and still allowed for some side-yard area, does not appear to contravene the spirit and intent behind the zoning requirement. In addition, based on the testimony and other evidence in the record it appears substantial justice was accomplished by granting the variance.

{¶51} Further, the factors listed in *Duncan* are not exclusive and a court may consider other things in making its decision. Here the court and the Board also properly considered evidence demonstrating that the odd-shaped size of the Spences' lot contributed to their need for a variance; that the Spences themselves did not cause the condition leading to the variance request; and that the requested variance is the minimum distance that would allow for reasonable use of the land or buildings. These factors also support the trial court's decision to uphold the variance.

{¶52} Based on the foregoing, the trial court's decision upholding the Board's grant of the variance was supported by a preponderance of reliable, substantial and probative evidence as a matter of law. Kennedy's third assignment of error is meritless.

{¶53} In conclusion, all of Kennedy's assignments of error are meritless. There is no indication that the trial court failed to consider the objections to the magistrate's decision. The Board had jurisdiction to grant the variance in this case. Finally, the trial court's decision upholding the Board's grant of the variance was supported by a preponderance of reliable, substantial and probative evidence as a matter of law. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.