[Cite as *Massasauga Rattlesnake Ranch, Inc. v. Hartford Twp. Bd. of Zoning Appeals*, 2012-Ohio-1275.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

MASSASAUGA RATTLESNAKE RANCH, INC.,	:	**O P I N I O N**
Appellee,	:	**CASE NOS. 2011-T-0060 and 2001-T-0061**
- vs -	:	
HARTFORD TOWNSHIP BOARD OF ZONING APPEALS, et al.,	:	
Appellants,	:	
JOSEPH FIRE,	:	
Appellant.	:	

Administrative Appeals from the Trumbull County Court of Common Pleas, Case No. 2010 CV 2345.

Judgment: Affirmed.

Stephen W. Funk, 222 South Main Street, #400, Akron, OH 44308 (For Appellee).

Mark S. Finamore, 258 Seneca Avenue, N.E., P.O. Box 1109, Warren, OH 44481 (For Appellants-Hartford Township).

Thomas C. Nader, Nader & Nader, 5000 East Market Street, #33, Warren, OH 44484 (For Appellant-Joseph Fire).

DIANE V. GRENDELL, J.

{¶1} Appellants, Hartford Township Board of Zoning Appeals (BZA) and Joseph Fire, appeal the judgment of the Trumbull County Court of Common Pleas,

reversing the BZA's grant of a use variance in favor of Fire. The issue to be determined by this court is whether an individual who is aware of existing zoning restrictions at the time he purchases property may seek to obtain a use variance, predicated on unnecessary hardship, for that property. For the following reasons, we affirm the decision of the court below.

{¶2} On June 7, 2010, Fire filed an Application for Variance with the Hartford Township Board of Zoning Appeals, requesting a use variance on the property located "just south of [Route] 305 on Warner Road" in Hartford Township, also known as Trumbull County Parcel ID#05-077090. He requested the variance "to hold off-road events" on the property. The subject property was zoned "R", Residential under the Hartford Township Zoning Resolution.

{¶3} A hearing was held on the matter on July 8, 2010. The following statements were presented at the hearing.

{¶4} Joseph Fire, the owner of Fireball Motors, stated that he has been holding events called "Truck Night" for several years, on different properties in Trumbull County. He explained that Truck Night is an event where individuals can go "four-wheeling," "off-roading," or "mudding" on a certain piece of property. At these events, individuals can either participate in driving vehicles or watch, as well as purchase items such as food and alcohol.

{¶5} Fire explained that the lease on the prior land where Truck Nights were held did not work out, so he began to look for new properties. While specifically searching for properties to conduct the Truck Nights on, he had initially looked at the

subject property near Warner Road, did not pursue it because he knew "there's zoning in Hartford," but "the more [he] checked into it, the more ideal that property became."

{¶6} Fire explained that on April 5, 2010, he entered an open-ended lease agreement with Daniel Hall, with the option to buy the subject property at any time. He explained that the lease was open-ended so that if he did not obtain a variance, he was not required to either continue leasing the property or to purchase the property. Fire explained that the property is 167 acres and that approximately 35 acres had been previously used as a slag dump, where steel mills had dumped waste products. He explained that he would like to clear and dig in an area of lower elevation on the property to make a section "almost like a bowl," where the vehicles could be driven.

{¶7} Fire explained that he does not believe that he can build on the property and that "you can't really do much with it," due to the waste dumped on the property. He did not believe the property was zoned correctly because it is not useful for building a home or for agricultural use.

{¶8} Charles Matthews stated that his family owns appellee, Massasauga Rattlesnake Ranch (Massasauga Ranch), a property that abuts the subject land. He explained that there is a "Class 3 wetlands" on his property and up against the subject property. He explained that his property was the subject of a conservation easement and that he felt concerned that the Truck Night events would have a negative impact on his property, including encouraging trespassing.

{¶9} Jason Trapp, who works for the Trumbull County Sewer and Water Conservation District, also expressed a concern that the "very major Category 3 wetlands" in the area would be impacted. He explained that the "EPA does not allow

impacts" on Category 3 wetlands and that such wetlands cannot be recreated if they are destroyed.

{¶10} On August 25, 2010, the BZA issued a Decision, granting Fire's request for a use variance on the subject property and allowing the property to be used for Truck Nights, provided that certain conditions and limitations were followed. The various limitations included the following conditions: events were to take place only between April 15 and November 15; events could occur only once per week and must end at midnight; events must "not create a nuisance by reason of dust, noise, vibration or pollution, other than such is reasonable and customary"; and physical barriers and water and drainage retention systems must be provided to preserve wetlands and waterways in the area.

{¶11} In its factual findings, the BZA found that the subject property is zoned residential, which permitted only residential use of the property, "primarily single and two family dwellings." It found that "of the total approximate 167 acres, 35 acres of the property consists of slag" and other materials and that the "remaining 132 acres consist of scrub timber and brush, protected wetlands, and draining basins into Yankee Creek." The BZA found that excavation of the property to construct a residential dwelling is "physically and economically prohibitive." It concluded that the condition of the property rendered it "unlikely" to accommodate permitted uses under the Zoning Resolution, that special conditions result in an unnecessary hardship, and that granting the variance is not contrary to the public interest.

{¶12} On September 3, 2010, Massasauga Ranch, as the adjacent property owner of real property to the north and east of the subject property, filed a Notice of

Appeal from the BZA's decision in the Trumbull County Court of Common Pleas, pursuant to R.C Chapter 2506.

{¶13} On May 13, 2011, the trial court issued a Judgment Entry, finding the BZA's Decision to be unsupported by the preponderance of the evidence in the record, and reversing the Decision. The trial court found that Fire failed to meet his burden to establish an unnecessary hardship, as there was limited testimony about the suitability of his property for residential purposes. The court also held that any hardship that did occur was "self-created or "self-imposed," since Fire knew or should have known that Truck Night was prohibited by existing zoning regulations at the time he obtained the leasehold interest. Finally, the trial court held that the use variance violated R.C. 121.22 because the BZA retired to executive session for a private discussion prior to voting.

{¶14} Fire timely appeals and raises the following assignments of error.

{¶15} "[1.] The trial court erred in finding that appellant Joseph Fire did not demonstrate that an unnecessary hardship existed for the subject property.

{¶16} "[2.] The trial court erred in finding that the unnecessary hardship of appellant Joseph Fire was self created."

{¶17} The BZA also filed a timely notice of appeal. Fire and the BZA's appeals were consolidated for the purposes of briefing, oral argument, and disposition, by this court in a Magistrate's Order dated June 15, 2011. The BZA raises the following assignments of error.

{¶18} "[1.] The trial court erred in finding that the use variance granted by the Hartford Township Board of Zoning Appeals to appellant Joseph Fire violated Ohio Revised Code Section 121.22, The Ohio Sunshine Law, and was therefore illegal and

invalid as a matter of law, because proceedings and deliberations of a board of zoning appeals are quasi judicial in nature and therefore not subject to the provisions of the Ohio Sunshine Law.

{¶19} "[2.] The trial court erred in finding that appellant Joseph Fire did not demonstrate that an unnecessary hardship exists for this property that is unique to the property in question, where the uses permitted by the township zoning resolution are not physically and economically feasible."

{¶20} Judicial review of decisions by the Hartford Township Board of Zoning Appeals is authorized by R.C. 2506.01(A), which states that "every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505 of the Revised Code."

{¶21} When a trial court reviews the decision of a board of zoning appeals, the court "may reverse the board if it finds that the board's decision is not supported by a preponderance of reliable, probative and substantial evidence." *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). In reviewing the decision of a board of zoning appeals, "the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980).

{¶22} "An appeal to the court of appeals, pursuant to R.C. 2506.04, is more limited in scope and 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* at 34. "While the court of common pleas has the power to weigh the evidence, an appellate court is limited to reviewing the judgment of the common pleas court strictly on questions of law." (Citations omitted.) *Carrolls Corp. v. Bd. of Zoning Appeals*, 11th Dist. No. 2005-L-110, 2006-Ohio-3411, ¶ 10.

{¶23} We will first consider Fire's second assignment of error, as it is dispositive of the appeal. In Fire's second assignment of error, he asserts that the trial court erred in reversing the BZA's decision and by finding that any unnecessary hardship that may have occurred, which would allow him to obtain a use variance, was self-created.

{¶24} "[A] use variance is normally awarded 'when a board of zoning appeals allows property to be used in a way that is not expressly or implicitly permitted by the relevant zoning code.'" (Citation omitted.) *Battaglia v. Newbury Twp. Bd. of Zoning Appeals*, 11th Dist. No. 99-G-2256, 2000 Ohio App. LEXIS 5755, *8 (Dec. 8, 2000) (citation omitted). "[T]he governing test for a use variance is whether a particular zoning ordinance creates an 'unnecessary hardship' with respect to the use of the property." *Fisher-Yan v. Mason*, 11th Dist. No. 99-G-2224, 2000 Ohio App. LEXIS 4352, *12-13 (Sept. 22, 2000).

{¶25} "Unnecessary hardship occurs when it is not economically feasible to put the property to a permitted use under its present zoning classification due to characteristics unique to the property. * * * Unnecessary hardship does not exist unless the property is unsuitable for any of the uses permitted by the zoning resolution." *In re Appeal of Dinardo Constr., Inc.*, 11th Dist. No. 98-G-2138, 1999 Ohio App. LEXIS 1430, *5 (Mar. 31, 1999).

{¶26} In order for the unnecessary hardship test to be applicable, it must be determined that any potential hardship was not self-created or self-imposed. A party purchasing a property with knowledge of zoning restrictions cannot claim unnecessary hardship caused by those restrictions for the purposes of a obtaining a use variance. *Kisil*, 12 Ohio St.3d at 33, 465 N.E.2d 848, citing *Consolidated Mgt., Inc. v. Cleveland*, 6 Ohio St.3d 238, 452 N.E.2d 1287 (1983), paragraph one of the syllabus ("the requirement of an unnecessary hardship suffered by a landowner seeking a variance could not be met when the landowner purchased the property with knowledge of the zoning restrictions"); *Norris v. Chester Twp. Bd. of Trustees*, 11th Dist. No. 90-G-1585, 1991 Ohio App. LEXIS 3885, *9 (Aug. 16, 1991) (noting that *Kisil* can be "read as denying a use variance whenever a party acquires property with knowledge of the zoning restrictions").

{¶27} This court has also held that, "[g]enerally, a person who knowingly acquires property *intending to use it in a manner prohibited by the existing zoning ordinance* may not thereafter obtain a use variance based upon unnecessary hardship." (Emphasis sic.) *Craig v. Babcock*, 11th Dist. No. 90-P-2248, 1991 Ohio App. LEXIS 3653, *8 (Aug. 2. 1991); *Kandell v. Kent*, 11th Dist. No. 90-P-2255, 1991 Ohio App. LEXIS 3640, *19 (Aug. 2, 1991). "The self-created hardship rule has been applied most frequently to persons who acquired land for a purpose outlawed by the zoning regulations." *Id.* (citation omitted).

{¶28} In the present case, Fire's statements made at the hearing established that he had knowledge of the zoning restrictions at the time he was deciding whether to purchase the property and at the time he executed the lease in April of 2010. He stated

that, while considering whether to lease the property for the purposes of using it for Truck Night, he was aware "there's zoning in Hartford," but decided to sign the lease anyway. He also explained that when viewing the property, he believed it was zoned improperly. Further, Fire explained that the lease was "open-ended" and should he fail to obtain a use variance, he would not be required to either continue renting or purchase the property, establishing that Fire was aware he would need a use variance at the time he acquired an interest in the property. All of the foregoing facts establish that Fire was aware of the zoning restrictions at the time he signed the lease.

{¶29} In addition, the evidence also establishes that Fire acquired the property intending to use it in a manner prohibited by the existing zoning ordinance, further supporting the trial court's finding that the self-created hardship rule applies. As noted above, Fire stated that, should he be unable to obtain the variance, he would be able to cancel the lease. A review of the lease, signed by Fire on April 5, 2010, shows that Fire was leasing the property "for use as an Off-Road Vehicle Event Site." The statements of Fire himself established also that he had been looking for properties, including the subject property, specifically to use for Truck Night events. Based on the foregoing, Fire did intend to use the property for commercial uses, which was prohibited by the existing zoning regulations on the property.

{¶30} Moreover, we note that courts have applied the self-imposed hardship rule not only in cases where an individual purchased property but also where an individual entered into a lease for the property. *On Point Professional Body Art v. Cleveland*, 8th Dist. No. 87572, 2006-Ohio-5728, ¶ 23 (appellants who leased property could not claim unnecessary hardship when the hardship was self-inflicted).

{¶31} Fire argues that the self-imposed hardship rule does not apply to the present case because the hardship justifying the use variance was not created only by the residential zoning classification but was instead caused by the unique physical condition of the property and that his knowledge of the zoning classification is irrelevant. He cites *Craig*, 1991 Ohio App. LEXIS 3653, for the proposition that there is a distinction between "self created hardships and other hardships."

{¶32} In *Craig*, the court held that "the self-imposed hardship rule militates *only* against those who acquire property intending to use the land for a prohibited purpose, speculating that the use variance would be available or might be obtained through affirmative efforts. By the same token, this approach spares the person who purchased with knowledge of the restrictions and conformed his use, but because of changed conditions on adjacent properties, suffers hardship independent of, and without regard to, any self-inflicted conditions." (Emphasis sic.) *Id.* at *8-9. The court noted that the appellant had acquired property in a residential district intending to use it for commercial purposes after obtaining a use variance, and found that "[h]aving knowingly acquired the land for a use prohibited by the Kent Zoning Ordinance, and having failed to demonstrate that the property suffers a hardship independent of, and without regard to [defendant's plans] for a regional shopping center, we conclude that the hardship here is self-imposed." *Id.* at *9.

{¶33} Fire asserts that, based on the reasoning of *Craig*, he suffered a hardship "independent of" his plans to conduct Truck Night, since the unique condition of the property, due to the dumping of slag, made it unsuitable for any residential use. However, the "independent" hardship cited by Fire is applicable only when the individual

who purchased property with knowledge of the restrictions "conformed his use" but, because of a change in circumstances, suffered an independent hardship that was not self-inflicted. *Id.* at *8-9. Such was not the case here, as Fire signed a lease knowing of the hardship, intending to obtain a use variance to hold Truck Nights, made no effort to conform his use of the property, and no changed conditions occurred after he signed the lease.

{¶34} From the record before this court, it is clear that Fire never intended to use the property for any residential purpose. He always intended to use the property for Truck Night events, which is apparent from the lease agreement being made exclusively for the purpose of having Truck Night, and being conditioned upon Fire obtaining a use variance. Since Fire never intended to conduct any residential activity on the property, he cannot be found to have suffered a hardship from being unable to use the land for any residential purpose.

{¶35} Based on the foregoing, *Craig*, as well as the other cases outlined above, are directly applicable to this case and a self-inflicted hardship did occur. Therefore, we cannot find, as a matter of law, that the judgment of the common pleas court reversing the decision of the BZA, due to the self-imposed nature of the asserted unnecessary hardship, is not supported by a preponderance of reliable, probative and substantial evidence.

{¶36} Fire's second assignment of error is without merit.

{¶37} In Fire's first assignment of error and the BZA's second assignment of error, they similarly contend that the trial court erred by finding that an unnecessary hardship did not exist. Fire argues that the trial court improperly substituted its

judgment for the BZA, that the testimony established that Fire's property could not be used for residential purposes, and that the testimony did not establish the public benefit of denying the use variance.

{¶38} Even assuming that Fire experienced an unnecessary hardship and that such hardship was not outweighed by the public interest, any such hardship was self-imposed, as discussed above. Therefore, since we find that a variance cannot be granted due to the self-imposed nature of the asserted hardship, we need not consider whether such a hardship was proven by a preponderance of reliable, probative and substantial evidence. *See Norris*, 1991 Ohio App. LEXIS 3885, at *9 (where appellant's alleged hardship was self-inflicted and appellant requested a use variance, the court will not examine further into the facts of the hardship, as appellant cannot be granted a use variance).

{¶39} Fire's first assignment of error and the BZA's second assignment of error are moot.

{¶40} Finally, in the BZA's first assignment of error, it asserts that the trial court, sua sponte, improperly held that the BZA violated the Ohio Sunshine Law by failing to conduct deliberations in an open session. The BZA argues that since hearings before a board of zoning appeals are quasi-judicial proceedings, they are not subject to the provisions of R.C. 121.22, the Ohio Sunshine Law.

{¶41} Massasauga Ranch concedes that R.C. 121.22 does not apply to the hearings held before the BZA. However, it asserts that this issue need not be decided since there are separate and independent reasons for affirming the court's decision in this case. We agree.

{¶42} Regardless of whether the BZA's hearing procedures violated R.C. 121.22 or whether the statute applied to the hearing, the trial court had independent and proper grounds to reverse the decision of the BZA, as the BZA improperly failed to find that any unnecessary hardship was self-imposed by Fire. Therefore, we need not address this issue. *See Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944) (even if the trial court has stated an erroneous basis for its judgment, an appellate court must affirm the judgment if it is legally correct on other grounds); *Reynolds v. Budzik*, 134 Ohio App.3d 844, 846, fn. 3, 732 N.E.2d 485 (6th Dist.1999) (upon looking into the record, if the judgment being reviewed on appeal "is right for any reason, it is the duty of the reviewing court to affirm it") (citation omitted).

{¶43} The BZA's first assignment of error is without merit.

{¶44} Based on the foregoing, the judgment of the Trumbull County Court of Common Pleas, reversing the BZA's grant of a use variance in favor of Fire, is affirmed. Costs to be taxed against appellants.

MARY JANE TRAPP, J., concurs,

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion.

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion.

{¶45} While I concur in the majority opinion, I write separately to express an additional reason for affirmation.

{¶46} As the majority states, the trial court has the power to weigh the evidence and reverse a board if it finds that the board's decision is not supported by a preponderance of reliable probative and substantial evidence. Moreover, a use variance is generally granted only if the zoning ordinance creates an unnecessary hardship and an unnecessary hardship does not exist unless the property is unsuitable for any of the uses permitted by the zoning resolution.

{¶47} In addition to applying the "self-imposed hardship" rule, the trial court weighed the evidence, as permitted, and expressly concluded that appellant, Joseph Fire, did not sustain his burden of proof that the property is unsuitable for any of the permitted uses as zoned.

{¶48} For this additional reason, I would affirm the trial court.