[Cite as *Jones v. Hubbard Twp. Bd. of Zoning Appeals*, 2015-Ohio-2300.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

GARY S. JONES, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
		CASE NO. 2014-T-0041
- vs -	:	
BOARD OF ZONING APPEALS OF HUBBARD TOWNSHIP OHIO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2013 CV 02163.

Judgment: Affirmed.

Thomas C. Nader, Nader & Nader, 5000 East Market Street, Suite 33, Warren, OH 44484 (For Plaintiffs-Appellants).

Mark S. Finamore, 258 Seneca Avenue, N.E., Warren, OH 44481-1228; and *James F. Mathews*, Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, OH 44720 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Gary S. and Barbara K. Jones, appeal from a decision of the Trumbull County Court of Common Pleas, affirming the variance granted to Branko Markulin and Brankica Saul for the construction of an accessory building on their property in excess of the size limitations set forth in the Hubbard Township zoning resolution. We find the granting of the variance to be supported by substantial, reliable,

and probative evidence, and that the trial court did not abuse its discretion in affirming this determination. Therefore, we affirm the judgment of the Trumbull County Court of Common Pleas.

{¶2} Appellants' home is directly adjacent to the home of Branko Markulin and Brankica Saul ("applicants") in Hubbard, Ohio; this home is situated on a .5453 acre lot. Applicants requested a variance to construct a 1,600 square foot accessory building/garage on the property. Section 1022 of the Hubbard Township Zoning Resolution outlines the maximum first floor area of a detached structure on property zoned Residential: for a lot size less than 1.5 acres, the square footage is not to exceed 768 square feet.

{¶3} A public hearing was held on the variance application. Mr. Markulin testified that he was requesting a variance for the purpose of putting a boat and trailer in the garage; the trailer and boat currently are stored in his yard, exposed to the elements. Appellants live in a home immediately adjacent to Mr. Markulin and testified in opposition of the variance request, along with appellants' daughter, Stacy Lamangrover of Harborcreek, Pennsylvania. Appellants testified the proposed building would not look aesthetically pleasing in the neighborhood and may negatively impact property values as the neighborhood has small lot sizes. Further, appellants noted the proposed building was almost the same size as the house on the property and nearly double the allotted size permitted by Section 1022.

{¶4} The Board of Zoning Appeals ("the Board") unanimously approved Mr. Markulin's application for a variance noting that it would be a hardship to be unable to

store his boat, along with other items, under one roof, and moreover, there were oversized structures already present in the neighborhood.

{¶5} Appellants filed an appeal to the Trumbull County Court of Common Pleas. The trial court denied appellants' appeal finding, "the granting of the variance was warranted by the practical difficulties Mr. Markulin faced and is supported by a preponderance of substantial, reliable and probative evidence."

{¶6} Appellants now appeal. Before we address the substance of appellants' argument, we consider our standard of review.

{¶7} First, upon review of an administrative appeal, a court of common pleas considers whether the decision to grant or deny a certificate is supported by "the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. This court's review of the judgment of the trial court is more limited than that of the court of common pleas. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000). This court's review is whether, as a matter of law, the decision of the court of common pleas is supported by a preponderance of reliable, probative, and substantial evidence. *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984). "'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.'" *Carrolls Corp. v. Willoughby Bd. of Zoning Appeals*, 11th Dist. Lake No. 2005-L-110, 2006-Ohio-3411, ¶10, quoting *Akwen, Ltd. v. Ravenna Zoning Bd. of Appeals*, 11th Dist. Portage No. 2001-P-0029, 2002-Ohio-1475, ¶17.

{¶8} The Supreme Court of Ohio, in *Kisil*, elaborated:

> This statute [2506.04] 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. Within the ambit of 'questions of law' for appellate court review would be *abuse of discretion* by the common pleas court.

Kisil, supra, at 34, fn.4 (emphasis added).

{¶9} This court recognizes that the Ohio Supreme Court 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*, *supra*, at 32-33; *Duncan v. Middlefield*, 23 Ohio St.3d 83, 85-86 (1986).

{¶10} 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*, *supra*, at 33, quoting *Hoffman v. Harris*, 216 N.E.2d 326, 329 (1966).

{¶11} We note that appellate districts are not consistent as to whether townships must apply the separate standards for use and area variances because *Kisil* and *Duncan* involved municipalities not townships. One view holds "that the General Assembly has limited the power of townships to grant a variance to only those cases in which the zoning resolution causes unnecessary hardship to the landowner." *Dsuban v. Union Twp. Bd. of Zoning Appeals*, 140 Ohio App.3d 602, 607 (12th Dist.2000). *See, e.g., Cole v. Bd. of Zoning Appeals for Marion Twp.*, 39 Ohio App.2d 177 (3d Dist.1973), paragraph two of the syllabus; *Zickefoose v. Green Twp. Bd. of Zoning Appeals*, 5th Dist. Ashland No. 99-COA-01307, 2000 Ohio App. LEXIS 4122 (Sept. 7, 2000). This view draws no distinction between an area and a use variance. *Dsuban*, *supra*, at 607. That is because R.C. 519.14, which outlines the powers of a township board of zoning

appeals, permits variances only where "literal enforcement of the resolution will result in unnecessary hardship." *Id.*

{¶12} The other approach applies the separate standards for use and area variances to townships. *Hebeler v. Colerain Twp. Bd. of Zoning Appeals*, 116 Ohio App.3d 182, 186-87 (1st Dist.1997). Adopting this later approach, this court has reasoned:

> Although both *Kisil* and *Duncan* involved municipalities rather than townships, this court believes that the Supreme Court intended a unified standard of review in area variance cases notwithstanding the language contained in R.C. 519.14. This belief is based upon the fact that the underlying *character type* of an "area" variance or "use" variance *does not change depending upon whether application is made to a municipal or township authority*. Regardless of the distinctions between municipalities and townships, one simple fact remains the same: *area variances do not alter the character of the zoning district and neighborhood considerations are less significant than in use variance cases*. Accordingly, this court will apply the holding of the Fifth District in *Barr v. Monroe Twp. Bd. of Zoning Appeals* (May 23, 1990), Licking App. No. CA-3499, unreported, 1990 WL 70101, adopting the practical difficulties standard in township area variance exercises.

Zangara v. Twp. Trustees of Chester Twp., 77 Ohio App.3d 56, 59 (11th Dist.1991) (emphasis sic.).

{¶13} In *Duncan v. Middlefield*, the Ohio Supreme Court stated:

> 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, supra, at the syllabus.

{¶14} In their first assignment of error, appellants assert:

{¶15} "The trial court abused its discretion in finding that there was competent credible evidence in support of the granting of the variance by the Hubbard Township Board of Zoning Appeals."

{¶16} Appellants first contend there was no evidence presented to show a special condition peculiar to the land as required by the relevant "Application Standards" that is set forth in the township zoning resolution.

{¶17} The order granting the variance, however, demonstrates the Board found the size or condition of the property created a practical difficulty for the proposed use if the variance was not granted. There is evidence in the record of "practical difficulty." The Board was free to consider that there were other large accessory buildings in the neighborhood and other factors in support of the variance. Given the deference accorded a zoning board's decision and the narrow standard of review this court must employ, there is no basis for overturning the opinion and judgment of the trial court.

{¶18} Next, appellants contend no evidence was presented to show there existed a circumstance peculiar to the applicants' land that deprived them of use commonly enjoyed by other properties. Such evidence is not required. The standard appellants point to provides that a literal interpretation of the zoning code would deprive an applicant of rights commonly enjoyed by other properties without the variance. In this matter, the Board emphasized that there existed "several other oversized accessory

buildings/garages in the neighborhood similar to the one proposed that were in compliance with the zoning resolution at the time of construction." Literal interpretation of the zoning code, therefore, would deprive the applicant of rights commonly enjoyed by other properties in the same district. In effect, the Board's finding comports with the standard in question.

{¶19} Moreover, the trial court noted:

> As to the altering the essential character of the neighborhood, the record reflects that Board members specifically withheld issuing a decision on the variance until they could drive by the property to assess how the proposed structure would impact the neighborhood. After having done so, three Board Members observed that there already were other oversized structures in the neighborhood, thus supporting a conclusion that the variance would not alter the character of the neighborhood.

{¶20} The foregoing demonstrates the trial court considered the Board's finding that other similar structures exist in the same district, and as a result, literal application of the zoning code would be unjust under the circumstances. The trial court's determination was neither arbitrary, unreasonable, nor contrary to the record.

{¶21} As their second assignment of error, appellants assert:

{¶22} "As a matter of law, there is no preponderance of reliable, probative and substantial evidence which satisfied the *Duncan v. Middlefield* test."

{¶23} Under their second assigned error, appellants maintain the variance does not satisfy the *Duncan* factors as enumerated above.

{¶24} In its judgment entry, the trial court noted that appellants focused on the following factors: whether the essential character of the neighborhood would be substantially altered or adjoining properties would suffer detriment; whether the property owner purchased the property with knowledge of the zoning restrictions; whether the

problem could be solved by some manner other than granting a variance; whether the variance preserves the spirit and intent of the zoning requirement; and whether substantial justice would be done by granting the variance.

{¶25} In reviewing the Board's decision, the trial court set forth the evidence present in the record and then analyzed it in accordance with the factors set forth in *Duncan*. As this court has recognized, "[a]lthough evidence was submitted to support both sides of the issue, the trial court was obligated to defer to the determination of the [Board of Zoning Appeals], so long as it was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence." *Schultz v. Village of Mantua*, 11th Dist. Portage No. 2011-P-0054, 2012-Ohio-1459, ¶28.

{¶26} As noted above, our standard of review of administrative appeals is limited in scope: we must, therefore, affirm the decision of the trial court unless we find, "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." *Smith v. Granville Twp. Bd. of Trustees*, 81 Ohio St. 3d 608, 613 (1998).

{¶27} Competent and credible evidence supports the finding that applicants would have suffered practical difficulties had the area variance not been granted. We, therefore, cannot say the trial court abused its discretion in finding substantial, reliable, and probative evidence to support the Board's granting of the variance.

{¶28} Appellants' second assignment of error is without merit.

{¶29} Based on the opinion of this court, the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

{¶30} I concur in the majority's decision, affirming the judgment of the trial court, upholding the Board of Zoning Appeals' decision to grant a variance in this matter. I write separately to address the evidentiary issues raised by appellants.

{¶31} In their brief, the appellants argued that, since the trial court struck documents and evidence from the record, "there is no evidence to support the BZA's decision." A review of the trial court's judgment, however, reveals that the only items stricken were an "index of variances" and "certain photographs." Testimony regarding the reasons for building the garage remains in the record, and was properly considered in conjunction with the BZA members' determination regarding the character and size of other structures in the neighborhood. This provided a sufficient basis for granting the variance.

{¶32} Although appellants take issue with the BZA members' decision to personally view the neighborhood to determine whether similarly sized structures existed, they cite no law that such evidence was inadmissible or could not be considered by the BZA. Courts have recognized that the BZA is not required to follow the Rules of Evidence, including admissibility and hearsay rules. Further, BZA members are permitted to use common sense and personal experience in evaluating a

matter, especially given their closeness to, and familiarity with, the area of dispute. *North Coast Payphones, Inc. v. Cleveland*, 8th Dist. Cuyahoga No. 88190, 2007-Ohio-6991, ¶ 11; *Hollinger v. Pike Twp. Bd. of Zoning Appeals*, 5th Dist. Stark No. 2009 CA 00275, 2010-Ohio-5097, ¶ 61. This would logically include viewing a neighborhood to decide whether the proposed structure is similar to those in the area. Courts have accepted BZA determinations which relied upon the members visiting a site to view the character of a neighborhood. *See McCauley v. Plain Twp. Bd. of Zoning Appeals*, 5th Dist. Stark No. CA-7949, 1990 Ohio App. LEXIS 1172, 6-7 (Mar. 26, 1990) (BZA members visited a property and were permitted to determine "that the mobile home would be detrimental to the property in the immediate vicinity and not harmonious with the surrounding area" based on that visit); *Paddock Point, LLC v. Zoning Bd. of Appeals of Cincinnati*, 1st Dist. Hamilton No. C-050222, 2006-Ohio-1847, ¶ 17-18.

{¶33} In light of both the foregoing and the majority's analysis, I concur.