[Cite as *Baker v. Mad River Twp. Bd. of Zoning Appeals,* 2009-Ohio-3121.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

LAMAR BAKER, et al. :

Plaintiffs-Appellees/ Cross-Appellants : C.A. CASE NO. 2008 CA 16

v. : T.C. NO. 2001CV76/2001CV107

MAD RIVER TOWNSHIP BOARD OF ZONING APPEALS, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellants/ Cross-Appellees :

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O P I N I O N

Rendered on the 26th day of June, 2009.

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FROELICH, J.

{¶ 1} In 2001, Joseph Stanley ("Stanley") obtained an area variance of the minimum road frontage requirement from the Mad River Township Board of Zoning Appeals ("BZA") in

order to divide an approximately 15-acre lot into three flag-lots, each with 20-foot road frontage, which was to be used as a common drive to the otherwise landlocked lots. Several neighbors contested the variance request, and they brought two separate actions – an administrative appeal of the BZA decision (2001 CV 76) and an action for an injunction and mandamus (2001 CV 107) – in the Champaign County Court of Common Pleas.

{¶ 2} In its final judgment, the trial court consolidated the two cases, denied Stanley's motion to dismiss the BZA appeal, affirmed the variance granted to the parcel on which Mark and Sydney Stanley had built their residence ("Lot 1"), and vacated the variances granted to the remaining two parcels. The trial court concluded that the arguments related to Lot 1 were moot, as was Case No. 01 CV 107.

{¶ 3} In summary, the BZA approved variances for three lots, and the trial court overturned the variances for two of the lots and found the question of the third lot to be moot, thereby allowing that variance to remain.

{¶ 4} Joseph Stanley, Marilyn Stanley, Mark Stanley, and Sydney Stanley (collectively, "the Stanleys") appeal from this judgment, claiming that the trial court lacked jurisdiction over the appeal from the BZA decision and that the trial court erred in vacating the variances for two of the properties.

{¶ 5} Lamar Baker, Kay Baker, David Brown, Kim Brown, Brent Perkins, and Lorie Perkins (collectively, "the Neighbors") cross-appeal. Although they state in their notice of appeal that the trial court erred in failing to vacate the variance for all three lots, their sole assignment of error asserts that the trial court employed the wrong legal standard in reviewing whether the variances should have been granted.

{¶ 6} For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 7} On February 9, 1996, Joseph and Marilyn Stanley purchased a tract of land consisting of 20.001 acres along State Route 55 in Mad River Township, Champaign County. After the purchase, Stanley obtained approval to subdivide three lots, just over one acre each, along the road frontage of the property. Stanley split three tracts of land along State Route 55, which were later sold to Samuel and Tammy Roberts, Lori McArthur, and another builder, who conveyed the property to the Spencers. (Andrew and Stacy Wildman subsequently purchased the McArthur property.) Consequently, the original tract was reduced to 16.457 acres with a frontage of 221.22 feet along State Route 55.

{¶ 8} In July 1996, the Stanleys sought to have the remaining approximately 16.5 acres rezoned from U-1 (rural) to R-1 (low density residential). Although the re-zoning request was approved by the Mad River Township Trustees, the decision was reversed by a subsequent referendum vote.

{¶ 9} In August 1997, the Stanleys created a fourth lot of 1.271 acres with 161.08 feet of frontage along State Route 55, which was later conveyed to Daniel Freeman. As a result of this split, the remaining portion of the original lot consisted of 15.186 acres with approximately 60 feet of frontage along State Route 55. Stated differently, the conveyance created a mostly landlocked tract of land with the remaining frontage to serve as an access drive. At this time, the Mad River Township Zoning Resolution required a minimum of 125 feet of frontage for all tracts zoned U-1.

{¶ 10} In February 2001, Joseph and Marilyn Stanley sought to further subdivide their

15.186 acre property into three tracts of 5.697 acres, 4.71 acres, and 4.777 acres, each with 20 feet of road frontage. Joseph Stanley sought an area variance of the road frontage requirement in order to build three homes – one on each lot – with a common driveway.

{¶ 11} On February 12, 2001, the BZA held a hearing on Stanley's request for the area variance. Stanley testified in favor of the variance; several of the Stanleys' neighbors testified in opposition to it. At the conclusion of the hearing, the BZA granted the variance, with several conditions, by a unanimous vote. A few days later, Joseph and Marilyn Stanley conveyed the largest lot ("Lot 1") to Mark and Sydney Stanley, their son and daughter-in-law, who have since constructed a home on the property.

{¶ 12} On March 6, 2001, the BZA met and voted to"retract" the variance, apparently due to a perceived procedural irregularity in the granting of the February 2001 variance. Stanley was notified by letter of the retraction and that the BZA had set a new meeting for March 20, 2001, to rehear the same variance case.[1] Joseph Stanley and several neighbors testified at the March 20th meeting. After a brief discussion, the BZA again voted unanimously to grant the variance with several conditions.

{¶ 13} On April 2, 2001, the Neighbors, along with the Wildmans, filed an administrative appeal of the BZA decision in the common pleas court, pursuant to R.C. Chapter 2506. Marilyn Stanley, Mark Stanley, and Sydney Stanley were later added as interested parties. The Stanleys subsequently moved to dismiss the appeal of the BZA decision as untimely.

{¶ 14} On May 4, 2001, the Browns and the Bakers filed a complaint for injunction and

[1]Mad River Township Zoning Inspector Jene Gaver testified on June 19, 2001, that the letter to Stanley informing him of the retraction was improperly dated March 2, 2001. Gaver indicated that the letter was sent shortly after the March 6, 2001, meeting.

mandamus against the Stanleys; Jene Gaver, Champaign County Zoning Inspector and Building Inspector; Fereidon Shokouhi, Champaign County Engineer; and Bonnie McGowen Warman, Champaign County Auditor. In their complaint, the Browns and the Bakers sought to nullify the approval of the 1997 lot split which created the 15.186 acre tract with 60 feet of frontage, to nullify the subdivision of the 15.186 acre lot into three tracts, and to prevent the construction of residences on the three tracts. In addition to challenging the road frontage variance, the Browns and the Bakers asserted that the creation of the 15.186 acre lot violated the minimum lot width requirement and the front-to-depth ratio requirement.

{¶ 15} On June 13, June 19, and July 3, 2001, the trial court held evidentiary hearings on the merits of the claims. Numerous post-trial and supplementary briefs were subsequently filed. On May 29, 2008, the trial court consolidated Case Nos. 01 CV 76 and 01 CV 107, denied the Stanleys' motion to dismiss, affirmed the variance granted to the parcel on which Mark and Sydney Stanley had built their residence (Lot 1), and vacated the variances granted to the remaining two parcels. The trial court concluded that the arguments related to Mark and Sydney Stanley's lot were moot, as was Case No. 01 CV 107.

{¶ 16} The Stanleys appeal from the trial court's May 2008 judgment, raising four assignments of error. The Neighbors cross-appeal, raising one assignment of error. We will address the assignments of error in an order that facilitates our analysis.

II

{¶ 17} The Stanleys' first assignment of error states:

{¶ 18} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO DISMISS THE UNDERLYING APPEAL FOR LACK OF JURISDICTION."

{¶ 19} In their first assignment of error, the Stanleys claim that the common pleas court erred in denying their motion to dismiss the appeal of the BZA decision as being untimely. In overruling the Stanleys' motion to dismiss, the trial court found that the administrative appeal was timely, because the BZA "had authority to revoke its initial decision in this case." The trial court relied upon *Holiday Homes v. Butler Cty. BZA* (1987), 35 Ohio App.3d 161, and *State ex rel. Borsuk v. Cleveland* (1972), 28 Ohio St.2d 224.

{¶ 20} In their brief, the Stanleys argue that the BZA lacked statutory authority to "retract" its February 12, 2001, variance and, because the Neighbors did not appeal within 30 days of the initial February 12th decision, the appeal was untimely. In response, the Neighbors agree that they had 30 days to appeal the BZA's final decision; however, they argue that the BZA had the power to vacate the February 12, 2001, decision and that they timely appealed from the March 20, 2001, decision. In their reply brief, the Stanleys raise, for the first time, that the time to appeal as set forth in Section 530 of the Zoning Resolution is only ten days. Thus, they argue that the time to appeal had expired and that the BZA thereby lacked jurisdiction to vacate its decision when the BZA purportedly "retracted" the February 12, 2001, variance.

{¶ 21} "A township has no inherent zoning power. [*Yorkavitz v. Columbia Twp. Bd. of Trustees* (1975), 166 Ohio St. 349.] Whatever power a township has to regulate the use of land through zoning regulations is limited to authority expressly delegated and specifically conferred by statute. *Bd. of Twp. Trustees v. Funtime* (1990), 55 Ohio St.3d 106, 563 N.E.2d 717." *Meerland Dairy, LLC v. Ross Twp.*, Greene App. No. 07CA83, 2008-Ohio-2243, at ¶7.

{¶ 22} R.C. 519.13 requires any township that has adopted zoning regulations to appoint a five-member township board of zoning appeals. Pursuant to R.C. 519.14, the BZA may:

{¶ 23} "(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;

{¶ 24} "(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;

{¶ 25} "(C) Grant conditional zoning certificates for the use of land, buildings, or other structures if such certificates for specific uses are provided for in the zoning resolution. ***

{¶ 26} "(D) Revoke an authorized variance or conditional zoning certificate granted for the extraction of minerals, if any condition of the variance or certificate is violated.

{¶ 27} "***

{¶ 28} "In exercising the above-mentioned powers, the board may, in conformity with such sections, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and may make such order, requirement, decision, or determination as ought to be made, and to that end has all powers of the officer from whom the appeal is taken."

{¶ 29} Focusing on R.C. 519.14(D), the Stanleys argue that the BZA may revoke a variance only when the variance is granted for the extraction of minerals. In support of this interpretation, they cite *Carrocce v. Boardman Tp. Bd. of Zoning Appeals* (Aug. 25, 1993), Mahoning App. No. 92 CA 38, in which the Seventh District held:

{¶ 30} "Nothing in R.C. 519.14 (which sets forth the powers of Township Boards of

Zoning Appeals) gives the Board of Zoning Appeals authority to declare a variance terminated by its own terms or to terminate a variance unless such variance involves the extraction of minerals. The statute sets forth powers of Zoning Boards of Appeals and expressly states the limited circumstances under which a variance can be revoked."

{¶ 31} In contrast to *Carrocce*, the Twelfth District has concluded that a county board of zoning appeals, which is governed by R.C. Chapter 303, has a limited power to reverse or reconsider the granting of a variance or conditional zoning certificate, even though the variance or conditional zoning certificate did not concern the extraction of minerals. *Holiday Homes*, supra. The court relied upon *Borsuk*, in which the Supreme Court of Ohio held that "[a]n administrative board or agency *** has jurisdiction to reconsider its decisions until the actual institution of a court appeal therefrom or until expiration of the time for appeal, in the absence of specific statutory limitation to the contrary." *Borsuk*, 28 Ohio St.2d 224, paragraph one of the syllabus.

{¶ 32} The *Holiday Homes* court noted that R.C. 303.14(D), which is identical to R.C. 519.14(D), grants a county board of zoning appeal authority to "[r]evoke an authorized variance or conditional zoning certificate granted for the extraction of minerals, if any condition of the variance or certificate is violated" and that the statute sets forth no time limitation on when such a revocation may take place. Reading R.C. 303.14(D) in conjunction with the Supreme Court's holding in *Borsuk*, the Twelfth District concluded that a board of zoning appeals may reverse and/or reconsider the granting of a variance that is not for the extraction of minerals until the earlier of (1) the time at which an appeal was filed, or (2) the time at which all affected parties' time to appeal expired. *Holiday Homes*, 35 Ohio App.3d at 169.

{¶ 33} *Holiday Homes* presents the correct approach. Since *Borsuk*, the Supreme Court has reiterated that, "prior to the actual institution of an appeal or expiration of the time for appeal, administrative agencies generally 'have inherent authority to reconsider their own decisions since the power to decide in the first instance carries with it the power to reconsider.'" *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 87 Ohio St.3d 363, 368, 2000-Ohio-452, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph three of the syllabus. See, also, *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St.3d 449, 459, 2002-Ohio-1362 ("It is well established that in the absence of express statutory authority to the contrary, once a decision of an administrative board is appealed to court, the board is divested of its inherent jurisdiction to reconsider, vacate, or modify that decision.")

{¶ 34} R.C. 519.14(D) does not act as a limitation of the BZA's inherent authority to reconsider the granting of a variance prior to the institution of an appeal or the expiration of time for appeal. Rather R.C. 519.14(D) grants the BZA statutory authority to reconsider a variance or conditional zoning certificate for the extraction of minerals without any time limitation, i.e., beyond the time that it could reconsider or reverse the variance or conditional zoning certificate under its inherent authority.

{¶ 35} The BZA initially granted the Stanleys' request for a variance on February 12, 2001. Once the BZA issued this final order, the parties had thirty days, "unless otherwise provided by law," to perfect an appeal. R.C. 2505.07. On March 6, 2001 – prior to the institution of an appeal and within the 30-day period set forth in R.C. 2505.07 – the BZA revoked the Stanleys' variance.

{¶ 36} In their reply brief, the Stanleys assert that, despite the 30-day time period set forth in R.C. 2505.07, the Zoning Resolution provides that an appeal from a BZA decision must occur within ten days. Under Section 549 of the Zoning Resolution, "[a]ppeals from Board decision shall be made in the manner specified in Section 530." Section 530 provides that "*** recourse from the decisions of the Board shall be to the courts as provided by law. *** Any such appeal shall be made within ten (10) days of the Board's written decision."[2]

{¶ 37} R.C. 2506.01 gives courts of common pleas the authority to review "[e]very final order, adjudication or decision of any * * * board * * * or other division of any political subdivision of the state * * * as provided in Chapter 2505. of the Revised Code, except as modified by this chapter." As stated above, R.C. 2505.07 allows 30 days to appeal "unless otherwise provided by law." Although Section 530 grants only ten days to appeal a BZA decision and thus purports to reduce the time for appeal provided by statute, Mad River Township has no statutory authority under R.C. Chapter 519 to alter the appeals period set forth in R.C. 2505.07.

{¶ 38} Nor does inclusion of the phrase "unless otherwise provided by law" in R.C. 2505.07 grant Mad River Township the authority to modify the 30-day period set forth in that statute. See *Austin Square, Inc. v. Board of Zoning Appeals of Barberton* (1967), 12 Ohio Misc. 129. The phrase "unless otherwise provided by law" refers to an appeal period as set forth in another state statute. See, e.g., *Iannarelli v. City of Wooster* (1985), 18 Ohio St.3d 319, 320 (holding that R.C. 124.34, rather than R.C. 2505.07, governs appeals of suspensions by

[2]We note that, under the version of R.C. 2505.07 in effect until March 17, 1987, the time period for perfecting an appeal was also ten days.

members of fire departments). To conclude otherwise would allow each administrative board or other division of a political subdivision to determine its own time to appeal, rendering R.C. 2505.07 meaningless. To the extent that Section 530 attempts to reduce the 30-day period set forth in R.C. 2505.07, Section 530 is in conflict with R.C. 2505.07, and the statute takes precedence. See *Dayton v. State*, 157 Ohio App.3d 736, 2004-Ohio-3141, at ¶83 (setting forth the test for when a state statute takes precedence over a local ordinance).

{¶ 39} The BZA was authorized, under its inherent authority, to reconsider its granting of the Stanleys' variance for the lesser of 30 days or until a party appealed its decision to the court of common pleas. Because the BZA "retracted" the variance within 30 days of the February 12, 2001, decision and prior to an appeal of that decision, the BZA's revocation was a proper exercise of the BZA's inherent authority to reconsider its decision.

{¶ 40} After a second hearing, the BZA again granted the Stanleys' requested variance on March 20, 2001. The Neighbors' appealed that decision on April 2, 2001, within 30 days of the March 20, 2001, decision. Accordingly, the Neighbors' appeal was timely.

{¶ 41} The first assignment of error is overruled.

III

{¶ 42} The Stanleys' second assignment of error states:

{¶ 43} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO AFFIRM THE MAD RIVER TOWNSHIP BZA'S DECISION WHICH WAS SUPPORTED BY A PREPONDERANCE OF RELIABLE AND PROBATIVE EVIDENCE AND WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE."

{¶ 44} In their second assignment of error, the Stanleys assert that the trial court failed

to apply the proper standard of review and impermissibly reviewed the BZA's decision de novo.

{¶ 45} Administrative appeals to the court of common pleas are governed by R.C. Chapter 2506. In an appeal of an administrative order or decision under this chapter, the trial court is authorized to reverse, vacate, or modify the administrative order if the court finds the decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." R.C. 2506.04; *Parisi v. City of Dayton*, Montgomery App. No. 20045, 2004-Ohio-2739, ¶11. Because the trial court must determine whether the decision is supported "by the preponderance of substantial, reliable, and probative evidence," R.C. 2506.04 grants the trial court "extensive power" to weigh the evidence. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493; *Smith v. Granville Twp. Board of Trustees*, 81 Ohio St.3d 608, 612, 1998-Ohio-340.

{¶ 46} In general, the trial court's review is confined to the original papers, the testimony, and the evidence that was offered, heard, and taken into consideration by the administrative body in rendering its final order or decision. R.C. 2506.03(A). However, the trial court may consider additional evidence, introduced by any party, if, among other things, "[t]he officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision." R.C. 2506.03(A)(5).

{¶ 47} The standard of review to be applied by an appellate court is "more limited in scope." *Henley*, 90 Ohio St.3d at 147, citing *Kisil*, 12 Ohio St.3d at 34. Under R.C. 2506.04, the court of appeals does not have the same extensive power to weigh the evidence as is granted to the common pleas court. Id. The appellate court's inquiry is limited to questions of law, including whether the trial court abused its discretion. Id. at 147-48. "Appellate courts must not

substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." *Henley*, 90 Ohio St.3d at 147, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261.

{¶ 48} Initially, the Stanleys argue that the trial court failed to give "due deference" to the BZA's decision. The BZA voted to permit the variances for the three flag-lots. The BZA's March 20, 2001, decision reiterated the purpose of the hearing and indicated that the four requirements in the Zoning Resolution that needed to be met to grant the variance had been read. The decision summarized the testimony offered by Joseph Stanley, Dan and Kim Freeman, Stacy Wildman, Gary Laughman, and David Brown, as well as questions and comments by members of the BZA. After the summary of the hearing testimony, the decision merely indicates that a motion was made to grant the variance to split 15 acres to 3 lots with 20 foot road frontage with a common center drive, with four stipulations. BZA member Sue Johnson seconded the motion, and the BZA voted 5-0 (unanimously) in favor of the motion. The decision contained no findings of fact as to whether the four requirements for the granting of an area variance had been satisfied and what evidence supported each of the requirements. The BZA did not make any factual findings to which the trial court could defer. A recitation of the testimony is not equivalent to making "conclusions of fact supporting [its] *** decision." R.C. 2506.03(A)(5).

{¶ 49} The Neighbors appealed to the common pleas court and therefore had the burden of proving to the trial court that the BZA's decision was invalid in that it was not supported by a preponderance of reliable, probative and substantial evidence. Since the BZA had not made any factual findings, but simply heard evidence and then voted to approve the variances, the trial

court took additional evidence and determined based on the new evidence, the record from the BZA, and considering and weighing the factors required by law, that the BZA's decision to grant the variances was not supported by a preponderance of reliable, probative, and substantial evidence.

{¶ 50} On appeal to this Court, it is the burden of the Stanleys to show that the judgment of the trial court was legally wrong and/or that it constituted an abuse of discretion.

{¶ 51} Upon review of the trial court's decision, the trial court did not exceed its authority. As noted by the Supreme Court, although the common pleas court's review is not *de novo*, "it often in fact resembles a *de novo* proceeding" because R.C. 2506.03 specifically provides that an administrative appeal shall proceed as in the trial of a civil action and "makes liberal provision for the introduction of new or additional evidence." *Kisil*, 12 Ohio St.3d at 34. In its review, the trial court was required to weigh the evidence in order to determine whether the BZA decision was supported by a preponderance of substantial, reliable and probative evidence. Although the trial court's decision indicates that the court weighed the conflicting evidence and made findings based on that evidence, such conduct was appropriate under R.C. 2506.03, considering the BZA's lack of factual findings and the court's consideration of additional evidence.

{¶ 52} The Stanley's second assignment of error is overruled.

IV

{¶ 53} The Stanleys' third and fourth assignments of error and the Neighbors' assignment of error in their cross-appeal are interrelated and will be addressed together. The Stanleys' third assignment of error is worded identically to their second assignment of error.

Again, it states:

{¶ 54} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO AFFIRM THE MAD RIVER TOWNSHIP BZA'S DECISION WHICH WAS SUPPORTED BY A PREPONDERANCE OF RELIABLE AND PROBATIVE EVIDENCE AND WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE."

{¶ 55} The Stanleys' fourth assignment of error reads:

{¶ 56} "THE TRIAL COURT'S DECISION IS AN ABUSE OF DISCRETION AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE CONTAINED IN THE RECORD."

{¶ 57} The Neighbors' sole assignment of error states:

{¶ 58} "THE TRIAL COURT WRONGLY APPLIED THE *DUNCAN* STANDARD AND SHOULD HAVE USED AN UNNECESSARY HARDSHIP STANDARD TO MODIFY THIS AREA VARIANCE."

{¶ 59} In their third assignment of error, the Stanleys assert that, although the trial court correctly utilized the "practical difficulties" test for granting area variances, as set forth in *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, and *Duncan v. Village of Middlefield* (1986), 23 Ohio St.3d 83, the trial court erred in its application of that test. In their fourth assignment of error, the Stanleys claim that the trial court's decision was an abuse of discretion and against the manifest weight of the evidence.

{¶ 60} As an initial matter, the Neighbors claim in their cross-appeal that the trial court erred in employing the "practical difficulties" test rather than an "unnecessary hardship" test. We disagree. As the trial court recognized, we have consistently applied the *Duncan* factors to

township zoning regulations. See *Stickelman v. Harrison Twp. Board of Zoning Appeals*, 149 Ohio App.3d 190, 2002-Ohio-2785; *Trent v. German Twp. Bd. of Zoning Appeals* (2001), 144 Ohio App.3d 7, 14; *Go v. Sugarcreek Twp. Bd. of Zoning Appeals* (June 1, 2001), Greene App. No. 2000-CA-66.

{¶ 61} Even if the trial court had erred in applying the practical difficulties test rather than an unnecessary hardship test, that error would be harmless in this case. The practical difficulties standard imposes a lesser burden on landowners than the unnecessary hardship test and, as discussed infra, the trial court did not abuse its discretion in concluding, in essence, that the Neighbors had met their burden of demonstrating that the preponderance of the evidence did not reflect that "practical difficulties" existed. See *Harlamert v. Oakwood* (June 16, 2000), Montgomery App. No., quoting *BP Oil Co. v. Dayton Bd. of Zoning Appeals* (1996), 109 Ohio App.3d 423, 428 (stating that the burden of overcoming the presumption that the BZA determination is valid and of showing invalidity rests upon the party opposing the determination). Thus, regardless of which test is applied, the Stanleys are not entitled to a variance for the two undeveloped lots.

{¶ 62} As to third lot, the trial court concluded, in the alternative, that the Neighbors' arguments were moot, because a variance had been granted, the Neighbors had failed to secure a stay thereof, and construction on Lot 1 had been completed. The Neighbors did not challenge this alternative basis for affirming the variance for Lot 1. Thus, even if the trial court should have employed an unnecessary hardship test, this test is irrelevant as to Lot 1 due to mootness. The Neighbors' sole cross-assignment of error is overruled.

{¶ 63} In *Duncan*, the Supreme Court outlined a list of factors to be applied in deciding

whether landowners had encountered "practical difficulties" in using their property. These factors included, but were 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; [and] (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance." Id. at syllabus. These factors are to be weighed to determine whether the existing area zoning requirement at issue, i,.e., the frontage requirement, as applied to the property owner in question, is reasonable and, thus, whether a variance should be granted. No single factor is determinative. *Duncan*, 23 Ohio St.3d at 86.

{¶ 64} Applying *Duncan*, the trial court first noted that there was conflicting evidence as to whether the property would yield a reasonable return or whether there could be any beneficial use of the property without the variance. The court found that the property could have been used for agricultural purposes without need for a variance and that the property likely would be able to yield a reasonable return if used for such purposes, which include harvesting field crops, maintaining livestock, conservation efforts, and timber production.

{¶ 65} The evidence supports this conclusion. Janet Gentis testified at the March 20, 2001, BZA hearing that "Mr. Stanley has chosen not to have this ground farmed, but that was

his choice. It could be farmed." Dan Freeman, who testified at the BZA hearing in favor of the variance request, stated that "[t]here could be a lot worse things [than three houses]. *** Anyone could move in, raises hogs or whatever." Although Stanley testified that he is self-employed as a builder and that he purchased the 20-acre tract for the purpose of splitting it and constructing homes on it, he acknowledged that the land could be used for agricultural purposes. Specifically, when asked about beneficial uses for the land, he stated: "I'm not a farmer, but I've been told is not very good for farm ground, maybe could be hay or you could put a hog operation or a chicken house or something like that on it, raise livestock." The fact that Stanley was not interested is using the property for an agricultural purpose does not entitle him to a variance. "[L]andowners are not entitled to variances simply because they cannot obtain the maximum desired economic benefit from their property." *Stickelman*, 148 Ohio App.3d at 193.

{¶ 66} Next, the trial court found that the requested variance was substantial. The court stated: "In this case, evidence presented demonstrates that the BZA has granted many frontage variances in the past, which would indicate that this variance is not substantial. However, the Court is not aware of any variances granted by the BZA where one parcel was purchased with sufficient frontage, divided into five lots wherein the remainder has insufficient frontage for development, and said parcel was then allowed to be divided into three additional parcels, sharing a common drive, all with 20 feet of frontage, for the purpose of residential developments on each of the three newly created lots. The Court finds that this weighs in favor of finding that the variance requested in this case is substantial. See, also, *In re: Appeal fo Averill* (May 28, 1999), 11th Dist. Geauga App. No. 98-G-2140, 1999 Ohio App. LEXIS 2459 (holding a variance that would reduce frontage from the required 200 feet to 43.3 feet is

'substantial,' even though the lot would exceed seven acres.). The Court notes that each new parcel exceeds four acres." (Footnote omitted.)

{¶ 67} The Stanleys argue that the mere size of frontage cannot and should not be used to view the request for a variance as substantial. They assert that a map of Mad River Township reflects "a huge variety of lot size and shapes with varying access widths." They note that the BZA discussed and acknowledged that it had approved similar frontage variances prior to Stanley's request, and that the record contains a list of similar, previously-approved variances. Thus, the Stanleys assert, the record reflects that the variance sought by Joseph Stanley was not substantial.

{¶ 68} As noted by the Stanleys, there was considerable evidence that the BZA had previously granted variances to the road frontage requirement. At the hearing before the trial court, the Stanleys presented the minutes of several BZA proceedings during which the BZA granted variances for road frontage less than the required amount, including variances that allowed no frontage and merely an access drive to otherwise landlocked property. Stanley further testified that, as a builder and homeowner in Champaign County and Mad River Township, it is common to be granted rights-of-way of 60 feet.

{¶ 69} Surveyor Wallace Geuy testified on the Stanleys' behalf that he had no concerns about there being only 60 feet of frontage for the 15-acre "remnant" property that existed after the fourth lot was created. He stated: "It is pretty much common practice or has been for the past several years. The former County Engineer required that there be a 60 foot right-of-way left within a remnant tract when you are splitting lots off with road frontage ***." Geuy testified that the exhibits he reviewed together reflected 45 situations where road frontage variances were

granted. Geuy opined that the variance requested by Stanley was "very similar to many of these that have been approved and the one in particular I mentioned ***."

{¶ 70} Contrary to the Stanleys' evidence, the Neighbors presented evidence that the frontage variances identified by the Stanleys were not analogous to Stanley's requested variance. On cross-examination, Geuy acknowledged that some of the road frontage variances pre-dated the Zoning Resolution. David Brown testified on rebuttal that, upon reviewing the same exhibits, none of the tracts consisted of three contiguous lots with less than the amount of frontage required by the Zoning Resolution. Brown indicated that one tract was not located in Mad River Township, and not all of the tracts had been zoned U-1. Brown testified that some of the tracts were plats. Brown stated that he found no variance for three contiguous lots where a frontage variance had been granted for all three lots.

{¶ 71} Based on all of the evidence in the record, the trial court reasonably concluded that the preponderance of the evidence supported a conclusion that the Stanleys' request for 20 feet of frontage for three newly-created contiguous properties was significantly different from and more substantial than the variances that the BZA had previously granted.

{¶ 72} Moreover, the trial court further found that the variance granted by the BZA implicitly included a variance of the 3:1 depth to width ratio for the three new parcels in addition to the frontage requirement; the parties have not challenged this conclusion. The fact that Stanley implicitly requested an area variance for more than one zoning requirement lends some additional support to the court's conclusion that the variance request was substantial. See *Miller v. Willowick*, Lake App. No. 2006-L-148, 2007-Ohio-465, ¶28 (five variance requests is substantial).

{¶ 73} The trial court found that Joseph and Marilyn Stanley had knowledge of some of the zoning restrictions on the property when they purchased the property and had served in various official positions relating to zoning. In their brief, the Stanleys acknowledge that the record supports these findings, and we agree. However, they note that Stanley also had knowledge of the other 45 frontage variances that had been granted over the years, and they argue that "[t]he record on this point is not dispositive of the ultimate issues and is but one of the 7 factors to be considered by a BZA or trial court on appeal." Although Stanley was aware that numerous frontage variances had been granted, the trial court acted within its discretion by failing to weigh this factor in the Stanleys' favor.

{¶ 74} In short, we find no abuse of discretion in the trial court's determination that the preponderance of substantial, reliable and probative evidence did not support a finding that these three *Duncan* factors weighed in the Stanleys' favor. The Stanleys' third assignment of error is overruled.

{¶ 75} Finally, the Stanleys claim that the trial court's decision was an abuse of discretion and against the manifest weight of the evidence. They claim: "The trial court's own analysis indicated that Joseph Stanley met 4 of 7 factors (again, assuming even the trial court's own analysis was correct.) Overturning the BZA, when the factors are not even a majority was is [sic] an impermissible substitution of judgment and abuse of discretion by the trial court."

{¶ 76} An abuse of discretion is "'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 77} Initially, the Stanleys assert that they have demonstrated that the trial court erred

in its application of three of the *Duncan* factors. We rejected this argument in our discussion of the Stanleys' third assignment of error.

{¶ 78} As to the remaining *Duncan* factors, the trial court found that the Stanleys had caused their own predicament through their course of development and subdivision of the original 20 acre parcel, although it was not aware of any means other than a variance (or using the property for agricultural purposes) through which the Stanleys could obviate their predicament. Because Stanley himself created the 60-foot frontage, this finding does not weigh strongly in the Stanleys' favor. The trial court acted within its discretion in weighing this factor accordingly.

{¶ 79} The trial court also concluded that the essential character of the neighborhood would not be substantially altered and would not sustain a substantial detriment; that governmental services would not be adversely affected; and that the addition of one to three homes on parcels of at least four acres would not violate the spirit and intent of the zoning resolution as it applies to a rural district. Each of these findings is favorable to the Stanleys. Although the Neighbors claim that the Stanleys failed to prove each of these factors, upon review of the record, we find the trial court's findings to be reasonable and not an abuse of discretion.

{¶ 80} Upon finding the BZA decision "unreasonable and unsupported by a preponderance of substantial, reliable, and probative evidence," the trial court modified the BZA decision to grant a variance for both the frontage and 3:1 depth to width ratio requirement as to the parcel transferred to Mark and Sydney Stanley. The trial court retained the same conditions

imposed on the variance by the BZA.[3] The trial court vacated the variances as to the remaining two lots. As a result, the Stanleys were able to obtain an access drive for each of the three lots and to construct a residence on a portion of the former 15-acre parcel, i.e., Lot 1.

{¶ 81} The trial court's decision is neither an abuse of discretion nor against the manifest weight of the evidence. The trial court reasonably gave weight to the fact that the property would yield a reasonable return without the variance or that there could be a beneficial use of the property without the variance. Indeed, the trial court further found that, "as a result of this decision, Defendants Mark [sic] and Marilyn Stanley have been able to subdivide, develop and sell five residential lots out of the original 20 acre parcel, and this constitutes a 'reasonable return' thereon." As discussed above, the record supported the conclusions that the variance was substantial, that the Stanleys were aware of at least some of the zoning restrictions when they purchased the original 20-acre property, and that they caused their own predicament by creating four lots along State Route 55 and leaving only 60 feet of frontage for the remaining 15-acre lot. Although the court apparently gave less weight to the factors resolved in the Stanleys' favor, we find no basis to conclude that the trial court acted unreasonably or abused its discretion by failing to affirm the BZA's ruling solely on those factors.

{¶ 82} The fourth assignment of error is overruled.

V

[3]The conditions imposed by the trial court included maintenance of a driveway composed of a hard surface for at least 50 feet from the State Route 55 right of way; that said driveway be in the center of the sixty feet total frontage of the three flag lots; that said driveway also serve to provide access to the remaining two lots pursuant to easement that shall be established of record; and that drainage is to be maintained pursuant to direction of Health Department and Engineer.

{¶ 83} The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and GRADY, J., concur.

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