**[Cite as *Drackett v. Danbury Twp. Zoning Bd. of Appeals*, 2010-Ohio-6506.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Gerry F. Drackett, et al.

Appellants

Court of Appeals No. OT-09-022
OT-10-014

Trial Court No. 07CV508H
07CV509H

v.

Danbury Township Zoning Board of Appeals

Appellee

**DECISION AND JUDGMENT**

Decided: December 30, 2010

* * * * *

George C. Wilber, for appellants.

Jeffrey M. Stopar, for appellee, Danbury Township Zoning Board of Appeals.

Rudolph A. Peckinpaugh, Sr., pro se.

* * * * *

HANDWORK, J.

**{¶ 1}** This consolidated appeal is from the August 3, 2009 and March 5, 2010 judgments of the Ottawa County Court of Common Pleas, which affirmed the decisions of the Ottawa County Board of Zoning Appeals denying zoning variances. Upon

consideration of the assignments of error, we affirm in part and reverse in part the decisions of the lower court. Appellants, Gerry F. Drackett, Barbara Fordyce, William H. Drackett, and Mary R. Drackett, assert the following assignments of error on appeal in case No. OT-09-022:

**{¶ 2}** "I. The Trial Court Erred As A Matter of Law In Holding That the [sic] Danbury Township Board of [sic] Zoning Appeals Had The Authority To Order The Renewal [sic] Of Appellants [sic] Basement Stairwell.

**{¶ 3}** "II. The Trial Court Erred As A Matter of Law In Interpreting That Appellants' Stairwell Violated The Side Yard Setback Requirements Set Forth In The Danbury Township Zoning Resolution.

**{¶ 4}** "III. The Trial Court Erred In Affirming The BZA'S [sic] Denial Of A Variance For Appellants [sic] Roof Extension As The Evidence Submitted By The Appellants Met The Standards For An Area Variance."

**{¶ 5}** Appellants assert the following assignments of error on appeal in case No. OT-10-014:

**{¶ 6}** "I. The Trial Court Erred As A Matter of Law In Holding That The BZA Had Authority To Determine Appellants' Variance Request.

**{¶ 7}** "II. The Trial Court Erred As A Matter Of Law In Holding That Appellants Had Waived Their Right To Argue Non-conforming Use Rights And Inapplicability Of The Zoning Resolution's Off-Street Parking Requirements.

**{¶ 8}** "III. The Trial Court Erred And Abused Its Discretion In Upholding The BZA's Denial Of Appellants' Area Variance.

**{¶ 9}** "IV. The Trial Court Erred And Abused Its Discretion In Finding That The Danbury Township Off-Street Parking Requirements Are Reasonable And Substantially Related To The Public Health, Safety and Welfare As Applied To Appellants' Property."

**{¶ 10}** On September 7, 2007, Gerry F. Drackett, Barbara Fordyce, William H. Drackett, and Mary R. Drackett, the owners of 432 Lakefront, Lakeside, Ohio, appealed to the Ottawa County Court of Common Pleas the August 15, 2007 decisions of the Danbury Township Board of Zoning Appeals denying Gerry F. Drackett's applications numbered 036-07 (an area variance for off-street parking) and 037-07 (an area variance for their roof extension).

**{¶ 11}** On September 14, 2005 a zoning permit had been issued to appellants for an addition to and improvement of appellants' dwelling and outside patio area. The home is located in the "L District," a historical district of Lakeside Community and was in need of upgrade and remodeling. The original plans erroneously provided for only a seven-step stairway covered by a Bilko hatch leading to an 8-foot deep basement. The plan did not provide for the length of run and rise necessary to have head room when entering the basement. This entrance was placed next to an original bay window section of the house

that extended into the setback area to within 1/2 of a foot of the lot line. None of the parties can explain how the error in the drawings occurred.

**{¶ 12}** Furthermore, before the plans were approved by the zoning inspector, she required that the plans be altered to provide for two parking spaces on the property as required by the Danbury Zoning Resolution. Gerry Drackett resubmitted a site plan which provided for two parking places. During the construction, however, the stairway was altered and moved, the roof was extended to cover the stairway. The two required parking spaces on the property were altered so that there would be one full parking space and a second partial space on the property with the remainder of the parking space extending three feet into the right of way.

**{¶ 13}** During a zoning inspection in May 2006, the inspector found two zoning violations. First, she sent Gerry Drackett notice on May 10, 2006, that the property at issue violated the Danbury Township Zoning Resolution that requires that lot owners to have two off-street parking places per dwelling unit, which must be 9' x 18' in size. The zoning inspector testified that upon inspection she discovered that the Dracketts had actually followed the original plans, which only provided for one parking space. Drackett did not respond nor correct the violation, so the inspector filed a criminal complaint in the municipal court in August 2006, which was later dismissed at the request of the prosecutor. In her March 29, 2007 application number 037-07, Gerry Drackett sought a variance from the off-street parking requirement.

**{¶ 14}** Second, the zoning inspector found that the stairway direction had been changed (which would not have caused a problem by itself) but that its covered roof encroached into the required three-foot side-yard setback and thus violated Art. 5, Sec. 504, ¶ 7 of the Danbury Township Zoning Resolution. Appellants were notified of the violation on June 20, 2006, but neither responded to nor corrected the violation. The inspector filed a criminal complaint in the municipal court in August 2006, which was later dismissed at the request of the prosecutor. In her March 29, 2007 application number 036-07, Gerry Drackett requested a variance for a side yard setback to accommodate the roof overhanging the basement stairway.

**{¶ 15}** Public hearings were held regarding the applications for variances. At the April 18, 2007 hearing the following evidence relating to the off-street parking variance was presented. Appellants presented evidence that during the reconstruction of the home, fence and landscaping alterations were required and they obstructed access to one of the two planned required off-street parking spaces. Originally, the property had an electrical meter at the property line (which ran the lights for Lakeside along the waterfront) and a utility pole. The utilities were placed underground and a juncture box was placed at the area where the driveway should have been. Furthermore, a neighboring fence and grade made turning off Vine Street into the driveway and then into the planned parking space very difficult. The resulting changes caused the second parking space to extend three feet into the unimproved area of the roadway.

**{¶ 16}** A neighbor at 142 Vine Street did not oppose the granting of the variance. Kevin Sibbring, President of the Lakeside Association, testified that he granted the use of an easement for parking at 432 Lakefront in July 2006 because there is another on-street parking easement in the area and the neighbor at 142 Vine Street did not object. Barbara Fordyce testified that she owns a vehicle and that the only other vehicle that ever comes to the property is that of her parents when they visit.

**{¶ 17}** The board determined that the variance was not substantial; the essential character of the neighborhood would not be substantially altered nor would adjoining residential properties suffer a substantial detriment as a result of granting the variance; granting the variance would not affect the delivery of any government services; the applicant knew the zoning resolutions when the property was acquired; a zoning permit was obtained for reconstruction of the property, but the owners made modifications and now require a variance; the need for the variance could be avoided by relocation or by following the approved drawings; and the spirit and intent of zoning would not be observed by granting the variance because the practical difficulty was created by the applicant. However, the board voted to allow one 9' x 18' and one 9' x 15' parking space in tandem on the lot.

**{¶ 18}** At a May 16, 2007 hearing, the zoning board received a request from Rudy Peckinpaugh, an adjacent landowner, to reopen the variance application regarding the parking lot. The matter was continued to June 20, 2007. On that date, additional

testimony was taken. Mr. Peckinpaugh's attorney testified that there has been an on-going problem with parking on Vine Street for the last ten years, which was brought about mainly by the encroachment into the street by adjoining property owners with trees and other plantings. The attorney further testified that there was no reason why the appellants could not park two cars on their property and that the prior owners parked two and often three cars on their property. Appellants opposed reopening the variance hearing after the variance had been granted. They argued that the board lacked jurisdiction to reconsider the granting of the variance. The parties then discussed whether the variance had been granted at the last meeting or not. The board noted that the April 18, 2007 minutes of the meeting were approved with the exception of application number 037-07, as evidenced by an unidentified handwritten note at the end of the minutes. The matter was continued until the next meeting, which was July 18, 2007. At the subsequent meeting, the board immediately voted on the application for a variance without taking additional evidence, and the variance was denied.

**{¶ 19}** With respect to the second variance application, the following evidence was presented at the April 18, 2007 hearing. During the reconstruction of the home, practical difficulties also arose with the construction of the stairway. Dennis Rospert of Zimmerman Construction Company that made the improvements testified that when the error in the original site plan regarding the basement stairs was discovered, the parties worked with the county building department to resolve the issue by turning the stairs to

run 13 feet alongside the home starting at the bay window. Gary Wolfe from the Building Department orally approved the change. Appellants' attorney testified that they did not know that they had to return to the building department for official approval of the changes and submit new drawings. Later, it was discovered that there would be problems with the Bilko door leaking, so the builder and Gerry Drackett decided that a roof should be placed over the stairway. The existing roof line from the bay window that extended into the setback area was extended further along the main structure to cover the stairwell. Rospert believed that this was a better plan because the original plan required someone to walk onto the neighbor's property to enter the hatch while the revised plan did not. Furthermore, granting the variance would allow a roof that was actually further away from the property line than the existing roof. Because there was a question of whether the building department had officially approved the changes, the hearing was continued to May 16, 2007.

**{¶ 20}** At the subsequent hearing on May 16, 2007, appellants submitted a certified copy of a May 9, 2007 letter from the Ottawa County Building Department to Zimmerman Remodeling stating that on September 30, 2005, the issue with the stairway was discussed between the building inspectors and contractors. A change of direction of the stairway was discussed and approved. The letter also indicated that no new or revised drawings were required. Appellants also submitted the certificate of occupancy issued by the building department. The zoning inspector informed the board of zoning appeals that

she requires stairs leading up into a house to comply with the setback requirement, but needed guidance from the board as to whether she should apply the requirement to stairs leading to an underground basement. She had always allowed window wells for basements to be located in the setback area, and she had originally thought that this was the plan for the appellants' home. Appellants' attorney argued that the zoning inspector's letter never addressed the stairway, which is why the variance application was filed for only the areas that were addressed by the inspector.

**{¶ 21}** Rudy Peckinpaugh, the son of an adjacent landowner, questioned on his father's behalf why the discussion was limited to the roof covering when the stairway violates the setback rule. He also stated that his father had not been notified of the prior approval of the stairway. He asserted that the roof extended over the property line and onto his property and submitted a recent survey to support his allegation.

**{¶ 22}** Following additional discussion of the extent of the encroachment, the question of whether the stairway was subject to the setback requirement, and whether the board could address the issue of the staircase, the matter was continued to July 18, 2007. At that meeting the board immediately voted on the application for a variance without taking additional evidence, and it was denied.

**{¶ 23}** The zoning board of appeals issued two memoranda on August 15, 2007. With respect to the parking space requirement, the board concluded that the property at issue can be used as a single-family dwelling without a variance and without the

encroachment onto the already congested right-of-way as it has been used in the past. Furthermore, the board found that appellants knew of the parking requirement when they purchased the property and other adjoining property owners are required to comply with this requirement. As to the second variance, the zoning board of appeals considered the basement stairway and overhanging roof as one variance. It stated that it considered that the home was located in the historic district of Lakeside, the stairway was not necessary to use the structure, significant changes had been made to the property, the stairway and roof overhang were built almost exactly to the neighboring property line contrary to the setback requirement, the changes were detrimental to the neighboring property, such a variance would not be consistent with past practices, appellants purchased the property knowing the setback requirement, and any hardship created was self-imposed. The zoning board denied the variance for the basement stairway and roof overhang.

**{¶ 24}** In both cases, appellants appealed the board's decision to the Ottawa County Court of Common Pleas. Rudolph A. Peckinpaugh, Sr., an adjoining property owner, was allowed to intervene in both cases.

**{¶ 25}** The trial court concluded in its separate August 3, 2009 judgments that the decisions of the board of zoning appeals in both cases were not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, probative evidence pursuant to its standard of review set forth in R.C. 2506.04. The court found that the zoning board had authority to reconsider the parking variance,

appellants had not proven practical difficulties to justify the variance on the parking requirements, and appellants were entitled to a hearing on the issue of whether the zoning resolution was unconstitutional as applied to them. Furthermore, the court found that the zoning board had authority to determine that the stairway was subject to the three-foot side yard setback requirement, the stairway and roof overhang violated the plain language of the zoning resolution, and appellants had failed to demonstrate that practical difficulties justified a variance with respect to the stairway. On March 5, 2010, the trial court ruled on the unconstitutionality issue and held that appellants' claim was meritless.

**{¶ 26}** On appeal to this court, our standard of review is limited to only questions of law. R.C. 2506.08. This standard limits our review of the facts to only whether, as a matter of law, the court's decision was supported by a preponderance of reliable, probative, and substantial evidence. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, fn. 4. The appellate court may also determine if the common pleas court abused it discretion. *Henley v. City of Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 148, 2000-Ohio-493.

**{¶ 27}** In their first assignment of error, appellants contend that the trial court erred as a matter of law when it held that the zoning board had the authority to order the removal of the stairway.

**{¶ 28}** The application requesting a variance sought a variance to allow the "[s]ide yard setback from three feet to one-half foot for approximately 13 feet on the west side of the property for an extension of the first floor roof line." Gerry Drackett indicated in the application that this variance would allow for a covered stairway leading to a basement entry door. She did not seek a variance for the basement stairs as they had already been approved by the zoning inspector.

**{¶ 29}** Appellants argue on appeal the zoning board did not have authority to address the issue of the staircase, R.C. 519.14(A) and (B) are not applicable on their face, and the trial court's interpretation of these statutes constitutes an abuse of discretion, is unduly expansive, and would have a chilling effect on administrative appeals. Appellants argue that the power of the zoning board of appeals is limited to that specifically conferred by the General Assembly in R.C. 519.14, which gives the board the power to hear and determine appeals from the decision of administrative officials and to authorize variances. Appellants argue that the trial court misapplied the statute by reading R.C. 519.14(A) and (B) conjunctively to determine that the board has enforcement powers.

**{¶ 30}** Appellees argue that the stairway is inherently part of the application for a variance for the roof extension. Furthermore, since the zoning board of appeals has

statutory authority pursuant to the last paragraph of R.C. 519.14 to make any decision that the zoning inspector could have made, the board had the power to order appellants to remove the zoning violations. The last paragraph of R.C. 519.14 provides that: "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."

**{¶ 31}** In this case, appellants changed their construction plans that had been approved by the zoning inspector and constructed a stairway that encroached upon the side yard setback. The issue in this case is whether the board of zoning appeals could address the alleged zoning violation in the midst of determining whether to grant a variance for the roof extension covering the stairwell.

**{¶ 32}** Townships do not have any inherent or constitutional power to enact zoning resolutions. *Natl. Lime & Stone Co. v. Blanchard Twp.*, 3d Dist. No. 6-04-04, 6-04-05, 2005-Ohio-5758, ¶ 14, reconsideration denied (2006), 109 Ohio St.3d 1483. Rather, the township's authority to adopt and enforce zoning resolutions is directly granted to it by the General Assembly through R.C. Chapter 519. Id. Enforcement of the zoning resolutions can be done through a system of zoning certificates to be issued by a zoning inspector. R.C. 519.16 and Danbury Township Zoning Resolution, Article 12, Section

1200.1. Decisions of the zoning inspector may be challenged by appeal to the board of zoning appeals. Id. at Section 1200.2. Alternatively, the board of township trustees, the county prosecuting attorney, the zoning inspector, or an adjacent or neighboring property owner who would be "especially damaged by such violation" can bring a legal action "to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use." R.C. 519.24.

**{¶ 33}** We agree with appellants there is no provision by statute or within the Danbury Township Zoning Resolution which allows the board of zoning appeals to sua sponte review the decisions of the zoning inspector and enforce the zoning resolution. In this case, the zoning inspector approved the original site plans. After the construction was altered and the zoning inspector viewed the premises, she approved the change made to the stairwell. She objected only to the extension of the roof covering the stairway. While Gerry Drackett filed an application for a variance regarding the roof, she did not request a variance for the stairway itself. We find that the trial court erred as a matter of law when it found that the variance application "intractably intertwined" the roof and stairway construction. Therefore, we find that this issue was not properly before the board of zoning appeals and the board exceeded its statutory power by finding that the stairway was not permitted under the zoning resolution and ordering that the stairway be removed.

**{¶ 34}** Appellants' first assignment of error is well-taken.

**{¶ 35}** In their second assignment of error, appellants argue that the trial court erred by finding that the stairway violated the side yard setback requirements of the Danbury Township Zoning Resolution. The trial court relied upon *Akwen, Ltd. v. Ravenna Zoning Bd. of Appeals*, 11th Dist. No. 2001-P-0029, 2002-Ohio-1475, at 3, which held that a parking lot was a structure and therefore subject to the setback requirements of the Ravenna Township Zoning Code. However, under that zoning resolution, "[s]tructure" was defined to mean "anything constructed or erected which requires location on the ground, including signs and billboards, but not including fences or walls used as fences."

**{¶ 36}** In the case before us, the Danbury Township Zoning Resolution defined the pertinent terms in Art. 3, Section 300, as follows: A "building" is "[a]ny structure consisting of foundations, walls, columns, girders, beams, floors, and roofs, or any combination thereof, designed for the support, enclosure, shelter, or protection of persons, animals, chattels, or property." A "setback line" is "[a] line established on a lot, at a specified distance from and parallel to a side or rear lot line, * * * to restrict the encroachment of buildings on the line, except as otherwise provided herein." A "structure" is "[a]nything constructed, placed, or erected, the use of which requires location on the ground or attached to something on the ground." A "yard" is "[a] required open space unoccupied and unobstructed by any portion of a building or structure from the ground upward, except as otherwise provided herein." Furthermore, a "required side

yard" is "[t]he open space between the front side line and the beginning of the building area, established by the setback dimensions of each district. Such required side yard is unoccupied and unobstructed from the ground upward, except for accessory buildings and/or structures, which may be located in this area if they comply with the resolutions established in this resolution for such accessory buildings and/or structures."

**{¶ 37}** The zoning resolution at issue clearly limits only the building of structures above the ground level, whether constructed from the ground or merely placed on the ground. This was the interpretation the zoning inspector testified that she has always applied as she always had allowed window wells to be in the side yard setback. Furthermore, she had applied the same reasoning in this case when she inspected the property and found only that the roof violated the zoning resolutions. We conclude that the trial court erred as a matter of law when it construed zoning resolutions that were clear and unambiguous.

**{¶ 38}** We find appellants' second assignment of error well-taken.

**{¶ 39}** In their third assignment of error, appellants argue that the trial court erred when it affirmed the board of zoning appeal's denial of a variance for the roof extension. Appellants contend that practical difficulties did exist in this case to justify granting the variance.

**{¶ 40}** In *Kisil v. Sandusky*, supra, syllabus, the Supreme Court of Ohio held that "[t]he 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." The court later delineated some of the "practical difficulties" factors that were relevant to weighing the interests of the community and the property owner to determine whether it is reasonable to apply the area zoning requirement to the property: "(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 v. Village of Middlefield* (1986), 23 Ohio St.3d 83, syllabus, certiorari denied (1986), 479 U.S. 986. These factors were incorporated into the Danbury Township Zoning Resolutions Art. 9, Sec. 901.3 as well.

**{¶ 41}** Appellate courts disagree, however, over whether a township may alter the language of R.C. 591.14(B) and eliminate the stricter unnecessary hardship standard in

favor of the practical difficulties standard for area variances as established by the *Duncan*, supra, court with respect to municipal zoning. See *Dsuban v. Union Twp. Bd. of Zoning Appeals* (2000), 140 Ohio App.3d 602, 606-609, *Briggs v. Dinsmore Twp. Bd. of Zoning Appeals*, 161 Ohio App.3d 704, 2005-Ohio-3077, ¶ 11-12; and *In re Appeal of Am. Outdoor Advertising, L.L.C.*, 3d Dist. No. 14-02-27, 2003-Ohio-1820, ¶ 8-9 (A township is limited by the language of R.C. 591.14(B).) Cf. *Hebeler v. Colerain Twp. Bd. of Zoning Appeals* (1997), 116 Ohio App.3d 182, 186-187, and *Zangara v. Chester Twp. Trustees* (1991), 77 Ohio App.3d 56, 58-59 (A township may adopt the standards set forth in *Duncan*, supra.) Upon a review of the issue, we agree with the majority of appellate courts and follow the precedent set down by the Ohio Supreme Court that there is a distinction between area and use variances. Therefore, we consider whether the trial court properly found that there was sufficient evidence regarding the *Duncan*, supra, practical difficulty factors to support the decision of the board.

**{¶ 42}** Appellants have acknowledged that the current roof encroaches upon the neighboring party and concede that it cannot remain. However, they requested a variance to allow the roofline to extend within 1/2 foot of the property line. The following evidence was presented regarding the *Duncan*, supra, factors.

**{¶ 43}** First, the property has beneficial use without the variance. While there was evidence presented that the property was in need of remodeling, the reason for an outside entrance to a newly-added basement was not given. Appellants stated that alternative

designs were not feasible, but did not elaborate. Had an inside entrance been used or the entrance moved to another side of the house, no variance would have been required.

**{¶ 44}** Second, the variance was substantial in one sense because it would allow appellants to extend the roof line almost to the property line for a distance of 13 feet. The common pleas court noted that the setback requirements are already very small and the variance would basically eliminate any setback for the entire side of the house abutting their only neighbor. But, the trial court noted as well that the alterations to the roof line and the addition of a second story had already significantly altered the home. The trial court focused significantly on the fact that the current roof encroaches upon the neighboring property, but failed to consider that appellants have already conceded that the extension of the roof must be shortened.

**{¶ 45}** Third, there was no evidence that the change to the roof line would significantly affect the essential character of Lakeside or that adjoining property owners would suffer a substantial detriment as a result of the variance. The common pleas court noted that Lakeside is a cottage community of small lots and homes that are very close together. Therefore, the court concluded that building in the short setback area would make the closeness of the homes seem worse and affect the entire neighborhood. However, there was no evidence before the court to establish the character of the neighborhood. Many of the cottages, including this one, were built prior to the zoning resolution. The board noted that it historically denied such variances to prevent the lots

from becoming more crowded. The common pleas court found that there was evidence of a detriment to the neighboring property, but all of that evidence related to the stairway and the fact that the roof extended over the property line. Likewise the board had noted that a substantial detriment had been caused by appellants building a roofline that extended beyond the property line.

**{¶ 46}** Fourth, there was no evidence that the variance would adversely affect the delivery of governmental services.

**{¶ 47}** Fifth, it was undisputed that appellants purchased the property knowing of the setback requirements. Appellants argue that the changes were necessitated by the issues that arose during construction of the stairway to the basement and the misunderstanding of their obligations regarding additional approval for the changes approved by the building department.

**{¶ 48}** Sixth, the only evidence presented regarding alternatives to solve the problems with the open stairway was the testimony presented by appellants that the planned Bilko door would not work because of the potential for leaking. The common pleas court and the board both emphasized the fact of appellants' failure to follow the zoning procedures to obtain prior approval and thus rendered this a self-imposed hardship.

**{¶ 49}** Seventh, as to whether the spirit and intent behind the zoning requirement would be affected or substantial justice done by granting the variance, appellees have

presented a slippery slope argument that if appellants are allowed to ignore the setback requirement, others will do so as well. Appellees also argue that had appellants followed the zoning process and submitted the changed plans to the zoning inspector before building the stairs, the problem with extending the roof would have been discovered and resolved prior to building.

**{¶ 50}** The trial court concluded that a preponderance of reliable, probative and substantial evidence supports the denial of the requested variance. We find that the trial court did not err as a matter of law when it concluded that there is evidence to support the decision of the board of zoning appeals. Therefore, we find appellants' third assignment of error is not well-taken.

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**{¶ 51}** Appellants' first and second assignments of error are interrelated and will be addressed simultaneously. In their first assignment of error, appellants argue that the common pleas court erred as a matter of law when it failed to find that the board of zoning appeals did not have authority to determine the variance request. Appellants argue that they only sought a variance for the parking requirement at the insistence of the zoning inspector who only approved the reconstruction of their home after they included two parking places as she requested. However, appellants believe that the zoning inspector and the board of zoning appeals incorrectly interpret the Danbury Township Zoning Resolution and the parking requirements. Appellants argue that their property is

not subject to the two-parking space requirement because the addition to their home was an increase in square footage of less than 50 percent of the existing structure. Alternatively, appellants contend that providing for one parking space on their property was a non-conforming use which they continued after the reconstruction. Therefore, appellants argue that the board lacked subject matter jurisdiction over the variance.

**{¶ 52}** In their second assignment of error, appellants argue that the common pleas court erred in finding that appellants waived their right to challenge that the two-space parking requirement is not applicable to them because they failed to present this issue before the board of zoning appeals. Appellants contend that they did not waive their right to assert this issue because it relates to the jurisdiction of the zoning board to determine the variance and because the board itself raised the issue in its finding that the resolution applied to appellants' property.

**{¶ 53}** Appellants sought a variance from the zoning resolutions. The filing of the application gave the board of zoning appeals subject matter jurisdiction to determine whether or not to grant a variance. R.C. Chapter 519 and Danbury Zoning Resolution Art. 9, Sec. 901.3. In doing so, the board of zoning appeals found that the resolutions require owners who enlarge their home by 50 percent to have two parking spaces (Danbury Zoning Resolution, Art. 5, Section 504, paragraph 11). No argument was ever made by appellants at the hearings before the board of zoning appeals that the

enlargement of their home was less than 50 percent, although the plans show the extent of the enlargement.

**{¶ 54}** On appeal, the Danbury Township Trustees offered additional interpretations of the zoning resolutions to support the denial of the variance in response to appellants' claim that the zoning resolution was unconstitutional as applied to their property. The common pleas court adopted the findings of fact and conclusions of law filed by appellees and found that this issue had been waived because appellants failed to assert it before the board of zoning appeals. But, the court went on to determine the issue and held that other zoning resolutions (Art. 5, Section 504.11(a) and Art. 7, Sec. 700.1) require appellants to have two parking spaces on their property.

**{¶ 55}** Appellants later sought to challenge the application of the zoning resolution to their situation. That issue is unrelated to subject matter jurisdiction. Appellants did not challenge the enforcement of the zoning resolution by the zoning inspector or seek declaratory judgment interpreting the zoning resolution parking requirements. Rather, they sought a variance for the parking requirement. Therefore, appellants cannot challenge within this proceeding that the zoning resolutions, as interpreted by the zoning inspector and board, are not applicable to them. The trial court erred by addressing the issue, but that error does not alter the outcome of this appeal which addresses only the issue of whether the board properly denied the request for a variance. Appellants' first and second assignments of error are not well-taken.

**{¶ 56}** In their third assignment of error, appellants argue that the trial court erred by upholding the decision of the board of zoning appeals. Appellants contend that practical difficulties justified a variance in this case.

**{¶ 57}** The following evidence was submitted in support of the *Duncan*, supra, factors of the practical difficulties standard. First, the property has beneficial use without the variance. The prior owners used the property without encroachment onto the right-of-way and the originally-approved reconstruction plan provided for two parking spaces. Second, the variance was substantial based upon the evidence that Vine Street is already a very congested area and parking is very limited. Third, while there was no evidence that allowing the variance would significantly affect the essential character of Lakeside, there was evidence presented that the variance would adversely impact some adjoining property owners who have to comply with the parking restriction and navigate through the already crowded street. However, some adjoining property owners did not oppose the variance. Fourth, there was no evidence that the variance would adversely affect the delivery of governmental services. Fifth, it was undisputed that appellants purchased the property knowing of the zoning resolutions. Sixth, no evidence was presented regarding alternatives to solve the parking problem. Appellants contended that they had to alter their original plans because of the need to move electrical boxes for Lakeside and other objects. But, appellants never sought advice from the zoning inspector to resolve these problems prior to extending their patio. Seventh, as to whether the spirit and intent

behind the zoning requirement would be affected or substantial justice done by granting the variance, appellees argue that granting appellants a variance from providing the second parking place as they had agreed in their plans could result in others ignoring the parking requirement as well and contribute to the congestion of the area.

**{¶ 58}** The trial court concluded that a preponderance of reliable, probative and substantial evidence supports the board's denial of the requested variance. We find that the trial court did not err as a matter of law when it concluded that there is evidence to support the decision of the board of zoning appeals. Therefore, we find appellants' third assignment of error not well-taken.

**{¶ 59}** In their fourth assignment of error, appellants argue that the common pleas court erred when it found that the Danbury Township Zoning Resolutions requiring two off-street parking spaces are reasonable and substantially related to the public health, safety and welfare as applied to their property.

**{¶ 60}** Appellants contend that requiring them to comply with the parking requirements was unreasonable and not substantially related to the public health, safety and welfare because their property is located at the end of Vine Street and their property only has 38 feet of frontage along Vine Street, of which 14 feet is usable for access due to the location of utilities and a parking space easement granted to a neighbor whose lot does not front on a street or alley. That parking space encroaches 14 feet into the right-of-way and is located immediately north of appellants' driveway extension. Furthermore,

a neighbor's garden/landscaped area on the southern side of appellant's driveway encroaches six feet into the right-of-way. Finally, the right-of-way is 50 feet but only 20 feet of that right-of-way is paved.

**{¶ 61}** While parking in the unimproved right-of-way clearly impacts the public health, safety, and welfare generally, in this case appellants' argue that strict application of the parking requirement to them does not further that end. Their three-foot encroachment is not detrimental given the 14-foot encroachment on one side of their driveway, a six-foot encroachment on the other side, and the fact that appellants' home is at the dead end of Vine Street. Furthermore, no one can park directly at the end of appellants' driveway anyway. But denying the variance causes an undue and significant detriment to appellants because their back yard would be used for parking rather than other purposes and the back yard is their only private outdoor area on their lot.

**{¶ 62}** Appellees argue that the long-standing parking issues in Lakeside and along Vine Street justify the parking regulation. Furthermore, the prior owners have historically parked two cars on their property without issue.

**{¶ 63}** Zoning regulations are presumed constitutional. *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207, 209, 1998-Ohio-207, reconsideration denied (1998), 81 Ohio St.3d 1517. When a party challenges the constitutionality of a zoning ordinance as applied to an individual property, the issue becomes whether the zoning ordinance is "'clearly arbitrary and unreasonable, having no substantial relation to

the public health, safety, morals, or general welfare' as applied to the owner's property." *Jaylin Investments, Inc. v. Village of Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, ¶ 19, reconsideration denied (2006), 108 Ohio St.3d 1490, 2006-Ohio-962, citing *Goldberg*, supra, at the syllabus. The burden of proof falls on the property owner challenging the constitutionality of a zoning ordinance. *Goldberg*, supra, at 214. And the standard of proof is "beyond fair debate," which equates to the standard of beyond a reasonable doubt. Id., *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12, 19, fn. 7.

**{¶ 64}** In this case, the board and the trial court determined that the congestion on Vine Street was significant enough that a three-foot encroachment was an unneeded addition to the problem. We find that this was a reasonable reason for denying the variance and supports the public safety and welfare. Appellant's fourth assignment of error is not well-taken.

**{¶ 65}** Having found that the trial court did commit error prejudicial to appellants in part and that substantial justice has not been done, the judgment of the Ottawa County Court of Common Pleas is reversed in part. We find that the trial court erred by upholding the decision of the board of zoning appeals insofar as it included the basement stairway in the variance for the roof extension. In all other respects, the trial court's judgment is affirmed. Appellants and appellee are hereby ordered to equally pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____

_____
JUDGE

Thomas J. Osowik, P.J. _____

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JUDGE

Keila D. Cosme, J. _____
CONCUR.

_____
JUDGE