[Cite as *Johnson's Island Invest. Group, L.L.C. v. Marblehead Bd. of Zoning Appeals*, 2012-Ohio-1667.]

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

Johnson's Island Investment Group, LLC	Court of Appeals No. OT-11-023
Appellant	Trial Court No. 10CV396
v.	
Marblehead Board of Zoning Appeals	**DECISION AND JUDGMENT**
Appellee	Decided: April 13, 2012

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John A. Coppeler, for appellant.

James C. Barney, for appellee.

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YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Ottawa County Court of Common Pleas affirming the decision of appellee Marblehead Board of Zoning Appeals ("the BZA") to deny appellant Johnson's Island Investment Group's ("JIIG") application for a use variance. Because we find the trial court's decision precludes meaningful review of appellant's assignments of error, we reverse.

A. Facts and Procedural Background

{¶ 2} In 2008, JIIG became the owner in fee simple of several properties located in the middle of Johnson's Island in Ottawa County. Included among those is a former quarry ("the quarry property") that is now submerged. The quarry property provides water access to Lake Erie for houses located in the Baycliffs Subdivision in the interior of Johnson's Island. Also included among the properties were several pieces of land contiguous to the Baycliffs Subdivision, but not abutting the quarry property.

{¶ 3} JIIG's plan was to subdivide the several pieces of land into seven lots that would be part of the Baycliffs Subdivision. As part of that plan, JIIG sought to build seven docks on the quarry property. Each dock would be assigned to one of the seven lots, thereby greatly increasing the value of each lot. At the time that JIIG acquired the quarry property, a stringer[1] with 18 docks existed, providing boat dockage for 36 similarly landlocked lots in the Baycliffs Subdivision. The new docks were to be built along a second stringer. The second stringer had been approved separately to provide dockage for an additional 18 existing lots in the Baycliffs Subdivision. Building the new docks along the second stringer would not cause that stringer to be extended.

{¶ 4} Both parties agree that the seven new docks would be in violation of the Marblehead Zoning Ordinance. On Johnson's Island, only residential dwellings and accessory buildings and uses are permitted. Marblehead Municipal Code 154.100. It is undisputed that a dock constitutes an accessory building/use. Under the zoning ordinance, the accessory building/use must be located on the same lot as an existing

[1] A "stringer" is the long pier/deck that extends from the shore out into the water.

principal building, or on a lot that is within 50 feet of the lot on which the principal building is located and the same party owns both lots. Marblehead Municipal Code 154.109. Here, the seven lots are not within 50 feet of the quarry property, and obviously no principal building exists on the quarry property because that land is submerged. Therefore, JIIG applied for a use variance to install the seven docks. Following a public hearing on the application, the members of the BZA voted 2-2 to grant the variance with one member abstaining. Because three votes are necessary to pass, the application was denied.

{¶ 5} JIIG then initiated a R.C. Chapter 2506 appeal to the Ottawa County Court of Common Pleas.[2] An evidentiary hearing was held pursuant to R.C. 2506.03, at which the managing partners of JIIG, Gary Zdolshek and James Redinger, testified. The BZA did not call any witnesses. On June 15, 2011, the trial court issued its judgment entry affirming the decision of the BZA.

B. Assignments of Error

{¶ 6} JIIG now appeals to this court under R.C. 2506.04, asserting two assignments of error:

1. The Court erred as a matter of law in affirming the decision of the Marblehead Board of Zoning Appeals when the BZA's decision denying

[2] R.C. 2506.01(A) provides,

> [E]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505 of the Revised Code.

appellant the right to install docks for an additional seven boats was not supported by a preponderance of reliable, probative, and substantial evidence.

2. The Court abused its discretion in affirming the decision of the Marblehead Board of Zoning Appeals to deny appellant the right to install docks for an additional seven boats.

II. Analysis

{¶ 7} In *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147-148, 735 N.E.2d 433 (2000), the Ohio Supreme Court explained the separate standards of review for administrative appeals, stating:

> Construing the language of R.C. 2506.04, we have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the "whole record," including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.
>
> The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is "*more limited* in scope." (Emphasis sic.) "This statute 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." "It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals, or this court, might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so."
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> * * *
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> This court has held that in administrative appeals under R.C. 2506.04, "[w]ithin the ambit of 'questions of law' for appellate court review would be abuse of discretion by the common pleas court." (Internal citations omitted.)

{¶ 8} Here, in order to obtain a use variance, JIIG must demonstrate an "unnecessary hardship." Marblehead Municipal Code 154.279(B)(2); *Kisil v. Sandusky*, 12 Ohio St.3d 30, 465 N.E.2d 848 (1984), paragraph one of the syllabus. "A zoning regulation imposes an unnecessary hardship which will warrant a variance only where the hardship is unique to a particular owner's property." *Fox v. Johnson*, 28 Ohio App.2d 175, 181, 275 N.E.2d 637 (7th Dist.1971). "An owner does not suffer hardship sufficient to warrant the granting of a variance simply because his land would be more valuable or yield more profits if the variance were granted." *Hulligan v. Columbia Twp. Bd. of Zoning Appeals*, 59 Ohio App.2d 105, 109, 392 N.E.2d 1272 (9th Dist.1978), quoting

Fox v. Johnson. Rather, unnecessary hardship is shown where "the only permitted uses are not economically feasible." *Id.*

{¶ 9} Thus, the issues we must address are (1) whether the facts and evidence in the record do not support, as a matter of law, the BZA's decision to deny the variance application based on JIIG's failure to demonstrate unnecessary hardship, and, relatedly, (2) whether the trial court abused its discretion in finding that the BZA's decision was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.

{¶ 10} Here, however, the lack of clarity regarding the property for which JIIG sought a use variance thwarts our review. JIIG contends that the application was for the quarry property. The BZA contends that the application was for the seven lots. The variance application itself is ambiguous on this issue. For example, the variance application contained the legal description of the quarry property, but stated that the variance

> would grant dock rights and ownership to the 7 lots in Annex at Baycliffs – Phase III Sub-Division. Each lot would have each dock individually assigned to each lot, if approved by planning commission. All other 118 lots in Baycliffs Phase I and Phase II currently have dock rights and this variance would give consistency to the area and grant rights to those who don't front water.

In addition, the required list of adjoining property owners submitted with JIIG's application consisted of the owners surrounding the seven lots, not those surrounding the quarry property.

{¶ 11} Moreover, the May 5, 2010 public hearing on the variance application did not clarify which property was before the BZA for decision. The purpose of the hearing, as described in the minutes, suggests that the variance application was for the quarry property:

> The Public Hearing [is] for a variance to allow 7 docks to be placed in the cluster area of the Docks at Baycliffs, submitted by [JIIG]. * * * If approved, these docks would be assigned to the recently created 7 lot subdivision. Because these docks would not be contiguous to the lots they would be assigned to, a variance would be necessary for approval.

However, during the "extensive discussion" that ensued, the BZA analyzed the requirements for a use variance as they related to the seven lots:

> [One of the BZA members] then asked the Zoning Administrator, Mr. Hruska, to interpret number 3 under the Use variance section. Mr. Hruska explained each in turn. 3(a) asks if other lots in the vicinity have the same circumstances or conditions as the lots requesting the variance. There are many lots on the island that do not have dock rights. The non-waterfront lots in Baycliffs that have dock rights were grandfathered from 2001 from Danbury Township permits. The second part of 3 asks if the

conditions for the variance request were created by the applicant. Mr. Hruska explained that before the creation of the 7 new lots, there was no need for those 7 docks. 3(b) asks if the granting of the variance is necessary to preserve a substantial property right. Mr. Hruska said there should be no expectation of dock or water rights with a non-waterfront lot, and the 7 non-waterfront lots in question all enjoy the same rights as other non-waterfront lots on the island. 3(c) asks if there would be an unreasonable diminishment of property values to the neighbor's properties if the variance was granted. Mr. Hruska explained that since no evidence was submitted either way that proves that property values would decrease, the benefit of the doubt should be given to the developers in this regard.

{¶ 12} Unfortunately, this issue was also not resolved in the trial court, despite being central to the proceedings. The transcript from the R.C. 2506.03 evidentiary hearing contains numerous references to questions regarding whether the variance application was for the quarry property or for the seven lots. Some of the responses state that the application was for the quarry property, while other responses indicate that the variance was sought for the seven lots. One particular exchange during the cross-examination of Zdolshek illustrates the confusion:

Q. So you applied for a variance?

A. Yes.

Q. For those seven lots?

A. That is correct.

Q. You didn't apply for the use of the quarry land, is that correct? You didn't apply for a variance?

A. No. We did two things. We applied for a subdivision approval of the seven lots, and then we applied for a zoning variance for those seven lots to associate a dock.

Q. Correct. But there is no variance for the use of the quarry, correct?

A. I still don't understand your question.

Q. You applied for a variance for the use of the seven lots?

A. No, sir.

[JIIG's Attorney]: I am going to object because I think the legal description is for the quarry.

[The BZA's Attorney]: For the use of the seven lots?

[Zdolshek]: No, it is for the use of the docks in the quarry.

Q. And they are associated with those seven lots?

A. Yes.

{¶ 13} Further, in its post-hearing briefs, JIIG argued that the zoning regulations constituted an "unnecessary hardship" with regards to the quarry property, and therefore the trial court should reverse the decision of the BZA. The BZA, on the other hand, asserted that JIIG created the argument that the variance application was for the quarry property in its appeal to the trial court. The BZA

contended that the application was always for a variance for the seven lots, and that JIIG failed to demonstrate unnecessary hardship because houses could be built on the seven lots, albeit at a lower value. The BZA further argued that even if the application was for the quarry property, JIIG did not meet the standard of unnecessary hardship because the quarry property was currently being used for other docks, and because JIIG purchased the quarry property knowing that a variance would be required to build the new docks.

{¶ 14} Rather than resolving this issue, the trial court's judgment entry remained vague in affirming the BZA. The court set forth the facts as follows:

> In 2005 [sic], [JIIG] purchased land in the center of Johnson's Island, which included the quarry area. Thereafter, [JIIG] decided to subdivide some available acreage into 7 lots which became known as
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> Annex at Baycliffs Subdivision Phase 3. Pursuant to Marblehead Zoning Regulations, docks must be contiguous with the lots to which they are assigned. As a result, on April 11, 2010 [JIIG] submitted a Variance Application to [the BZA]. The variance proposed to grant dock rights and ownership to the 7 lots. A hearing was held on the application on May 5, 2010, wherein the variance was denied.

{¶ 15} After discussing the standard of review and appropriate legal considerations, the trial court concluded, "In the present case, [JIIG] seeks a variance to add 7 docks in the quarry area. However, there are economically feasible uses of the

property as it is. Although adding boat docks would make the land more valuable, but [sic] this alone does not constitute and [sic] "unnecessary hardship." Notably, the record does not contain any evidence indicating that the quarry property would be more valuable with the new docks on it, leading us to infer that the trial court was referring to the value of the seven lots. On the other hand, the court states that the variance is "to add 7 docks *in the quarry area*." (Emphasis added.)

{¶ 16} We are somewhat mystified that the foundational issue of which property is the subject of these proceedings is still unresolved, especially in light of the fact that a use variance, by definition, must be sought *for the land where the proposed use will be located*—here, the quarry property. *See* Marblehead Municipal Code 154.279(B)(2)(a)(1) ("A use variance involves the development or conversion of land for a use not permitted in the specific zoning district.") Without knowing the specific property for which JIIG sought a variance, we cannot review whether, as a matter of law, the evidence did not support the BZA's decision, or whether the trial court's affirmance of the BZA's decision constituted an abuse of discretion. *See Cloyd v. Danbury Twp. Bd. of Zoning Appeals*, 6th Dist. No. 93OT045, 1994 WL 88775 (Mar. 18, 1994) (no meaningful review possible where the board of zoning appeals rejected the unnecessary hardship standard in denying a use variance application without identifying what did serve as the basis for its denial, and where the trial court's judgment provided no indication of the standard applied in determining the reasonableness of the decision).

{¶ 17} As a final matter, we must address the BZA's attempt to argue in the alternative in its appellate brief. It contends that JIIG does not satisfy the unnecessary

hardship standard with regard to either the seven lots or the quarry property. However, we cannot consider such an alternative argument in this case. The BZA insists that JIIG sought a variance for the seven lots, and that it based its decision to deny the variance on an application of the unnecessary hardship standards to those seven lots. It is that decision that was reviewed by the trial court, and that is ultimately being reviewed by this court. Thus, the BZA cannot now argue that even if it applied the unnecessary hardship standard to the wrong property, the result is nonetheless proper. The determination whether JIIG demonstrated an unnecessary hardship regarding the quarry property is a question of fact to be determined by the zoning board, not by the court of common pleas or this court for the first time in the course of an administrative appeal. *See Schomaeker v. First Natl. Bank of Ottawa*, 66 Ohio St.2d 304, 309, 421 N.E.2d 530 (1981). ("Whether a hardship or exceptional or extraordinary circumstances exist to justify the issuance of a variance is a question of fact to be determined by the zoning board or commission.")

{¶ 18} Accordingly, because we cannot determine from the record and the trial court's judgment entry for which property JIIG sought a use variance, we are precluded from providing a meaningful review. Thus, to this limited extent, JIIG's assignments of error are sustained.

III. Conclusion

{¶ 19} We are dismayed by the outcome of this appeal, and by the continued litigation and expenses that will result. Our preference would have been to afford some measure of finality to the parties. However, given the circumstances of this case, we

have no choice but to reverse the judgment of the Ottawa County Court of Common Pleas, and remand this cause to the Marblehead Board of Zoning Appeals for further proceedings to determine which property JIIG seeks a variance for, and ultimately to determine whether a use variance should be granted. Costs of this appeal are to be split equally between the parties pursuant to App.R. 24.

Judgment reversed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE

JUDGE