[Cite as *Premier Dev., Ltd. v. Poland Twp. Bd. of Zoning Appeals*, 2015-Ohio-2025.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PREMIER DEVELOPMENT, LTD.,	)	CASE NO. 14 MA 91
	)	
APPELLANT,	)	
	)	
VS.	)	OPINION
	)	
POLAND TOWNSHIP BOARD OF ZONING APPEALS,	)	
	)	
APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13CV1650

JUDGMENT: Affirmed.

APPEARANCES:

For-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Donald Duda, Jr.
Assistant Prosecuting Attorney
Mahoning County Sanitary Engineers
761 Industrial Road
Youngstown, Ohio 44509

For-Appellant:

Atty. James Roberts
Atty. Louis P. Alexander, Jr.
Roth, Blair, Roberts, Strasfeld & Lodge
100 East Federal Street, Suite 600
Youngstown, Ohio 44503

JUDGES:

Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: May 19, 2015

[Cite as *Premier Dev., Ltd. v. Poland Twp. Bd. of Zoning Appeals*, 2015-Ohio-2025.]
ROBB, J.

{¶1} Premier Development, Ltd. ("Appellant") appeals the decision of the Mahoning County Common Pleas Court which upheld the decision of the Poland Township Zoning Board of Appeals ("the Board"). The Board denied Appellant's request for an area variance for twenty-seven lots within a subdivision.

{¶2} Procedurally, Appellant argues that the trial court was required to hold a hearing for the presentation of additional evidence under R.C. 2506.03(A) because the testimony at the Board's hearing was not given under oath and the Board allegedly failed to file conclusions of fact with the hearing transcript. However, the statute does not require a court to sua sponte hold an evidentiary hearing merely because grounds for taking additional evidence may exist.

{¶3} The trial court's scheduling order provided the date for any pre-trial motions, set a later date for briefs, scheduled a hearing date, and specified that the hearing would be non-oral unless the court directed otherwise upon motion of a party. Instead of filing a pretrial motion on the matter, Appellant waited until after the motion deadline had passed and asked for an evidentiary hearing within the brief.

{¶4} We conclude that the trial court acted within its discretion to enforce its scheduling order on these matters and did not err in failing to schedule a hearing for the submission of additional evidence. We also note that Appellant did not object to the Board's taking of statements without the administration of an oath. Furthermore, the transcript contains the Board's conclusions of fact.

{¶5} Substantively, Appellant argues that the factors used in applying the "practical difficulties" test weighed in favor of granting the area variance. We apply a more limited review than that of the trial court; we do not substitute our judgment for that of either body. Upon a review of the various factors for granting an area variance, the trial court's decision upholding the Board's decision is affirmed.

STATEMENT OF THE CASE

{¶6} Appellant is the developer of a subdivision known as Park Place Development Plat No. 3 located in Poland Township. Appellant planned the subdivision in 1999 and filed a replat in 2005. The subdivision includes Park Place

Drive and three cul-de-sac streets. Eight of the perimeter lots were sold. Those property owners constructed residences in accordance with the setback requirements in the Poland Township Zoning regulations (and the covenants and restrictions for the subdivision). Poland Township has construction setback requirements of 50 feet in the front and 40 feet in the rear.[1] This was true when the property was originally considered an agricultural district and remained true when the property was recategorized as a residential district.

{¶7} In 2013, Appellant filed an application with the Poland Township Zoning Department for an area variance which includes 27 undeveloped lots. Appellant asked to reduce the setback requirements for these lots from 50 to 40 feet in the front and from 40 to 30 feet in the rear. On May 10, 2013, the zoning inspector denied the variance application. That same day, Appellant filed an appeal with the Board. The Board held a public hearing on June 6, 2013.

{¶8} A consultant submitted a letter on Appellant's behalf, which contained Appellant's arguments as to how the "practical difficulties" test was satisfied. A letter was also submitted by a surveyor on behalf of Appellant, stating that the setbacks along the curved frontages and corresponding rear setbacks severely limited the buildable area of the lots. The letter stated that Appellant cannot fit structures on the interior lots of comparable square footage to the existing houses along the perimeter roads. These letters were read into the record at the hearing.

{¶9} The surveyor, the consultant, and Appellant's general manager all spoke at the hearing. There was some discussion of deed restrictions.[2] It was disclosed that 2,000 square feet was the minimum size of any residence. (Tr. 14). Appellant's general manager stated that the existing residences in the subdivision

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[1] According to the covenants and restrictions for the subdivision, "The minimum rear yard requirements shall be forty (40) feet" and "The front line (set back) of any building inclusive of * * * projections shall not be nearer the front Lot line of any Lot than minimum building setback lines shown on the recorded plat."

[2] In discussing the setback language in the restrictions, residents of the subdivision voiced that it would be unfair and pointless to grant a variance where the restrictions prohibited the altered setback. The Board advised that it could not consider deed restrictions. Appellant's representative revealed that an attorney advised they could change the restrictions after obtaining the variance.

were on larger lots. (Tr. 31). Appellant had four recent inquiries from buyers wishing to build houses ranging from 3,200 to 3,800 square feet, but the foundation of such houses would not fit on the lot depth-wise due to the setback requirements. (Tr. 8, 16, 31). Appellant's surveyor contemplated combining two lots and concluded that this would not address the depth issue. (Tr. 43).

{¶10} Appellant focused on the fact that the platting was done prior to the national housing recession in 2008 and 2009. It was opined that in this rebounding housing market, buyers want larger houses. (Tr. 32). Appellant asserted that the variance would result in higher-value homes and increase the property values of the existing homes. It was then explained that cul-de-sac lots are generally "difficult creatures" due to the curved property lines resulting in non-lineal setbacks. (Tr. 8). The issue was also blamed on engineering flaws during platting. (Tr. 31).

{¶11} Five residents spoke against granting the variance. They expressed that it would be unfair as they had to abide by the setbacks; some built smaller houses than they wished due to the setbacks; and some contemplated buying a cul-de-sac lot but instead bought a perimeter lot due to the size restrictions imposed by the pre-existing setbacks. It was also said to be undesirable to have homes closer to the property lines or the street.

{¶12} At the conclusion of the hearing, the five-member Board unanimously voted to deny the variance. A written decision denying the request was issued on June 13, 2013. Appellant appealed the Board's decision to the Mahoning County Common Pleas Court on June 18, 2013. After the Board filed the record of proceedings with the trial court, the court issued a scheduling order providing dates for any pretrial motions and for briefing.

{¶13} Appellant's brief argued to the trial court that the Board's decision was arbitrary and unreasonable. Appellant urged that the practical difficulties test applicable to an area variance was satisfied and reviewed how the seven factors applied to this case. Appellant stated that the witnesses did not rebut this test but merely offered subjective opinions. Finally, Appellant posited that a full evidentiary hearing was required by R.C. 2506.03 because the testimony before the Board was

not taken under oath and the Board did not file conclusions of fact. Appellant concluded that the court should either order a variance or conduct a full evidentiary hearing.

{¶14} The Board's brief in response pointed to the blanket nature of the request for a variance on all 27 lots. The Board noted that this would diminish the power and effect of the zoning scheme and the goal of controlling density. The Board emphasized that Appellant platted the lots into this formation resulting in a "self-created predicament." The Board emphasized that single-family homes could be constructed on the lots as originally contemplated, just not the large homes recently requested.

{¶15} After Appellant's reply brief was filed, the magistrate rendered an April 24, 2014 decision in favor of the Board. The magistrate set forth the seven factors relevant to the practical difficulties test and concluded that Appellant failed to demonstrate the practical difficulty in utilizing the property without the variance. The magistrate expressed that, at best, Appellant showed mere deprivation of the greatest benefit, not deprivation of a beneficial use. The magistrate found the requested variance to be substantial as a 25% reduction was requested in the rear and a 20% reduction was requested in the front. The magistrate concluded that the preponderance of the reliable, probative, and substantial evidence supported the Board's decision and that Appellant failed to demonstrate the decision was unconscionable, illegal, arbitrary, capricious, or unreasonable.

{¶16} Appellant filed timely objections to the magistrate's decision. Appellant reiterated the arguments that the practical difficulties factors weighed in favor of a variance and that the neighbors' statements were subjective. Appellant again asserted that an evidentiary hearing was required because the Board did not adhere to R.C. 2506.03 as the statements to the Board were not made under oath and the Board did not file conclusions of fact.

{¶17} On June 17, 2014, the trial court overruled the objections and entered judgment in favor of the Board. The court found that Appellant failed to demonstrate practical difficulties in utilizing the property as platted and that a beneficial use of the

property had not been affected. The court concluded that the Board's decision was not unconstitutional, illegal, arbitrary, capricious, or unreasonable.

{¶18} Appellant filed a timely notice of appeal in this court. Appellant's brief contains two assignments of error. As the second assignment of error contends that the matter must be remanded for a hearing before the trial court, we address that contention first.

ASSIGNMENT OF ERROR NUMBER TWO

{¶19} Appellant's second assignment of error provides:

"The Trial Court erred as a matter of law by failing to conduct a hearing for additional evidence on the appeal from the Board of Zoning Appeals as required by R.C. 2506.03."

{¶20} Appellant states the trial court was mandated to hold an evidentiary hearing under R.C. 2506.03(A)(3), (A)(5), and (B). The Board claims Appellant failed to timely ask for such a hearing and Appellant never proffered what additional evidence would have been presented in order to show prejudice. *Citing Franklin Twp. V. Village of Marble Cliff*, 4 Ohio App.3d 213, 447 N.E.2d 765 (10th Dist.1982).

R.C. 2506.03 provides in pertinent part:

> (A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies: * * *
>
> (3) The testimony adduced was not given under oath. * * *
>
> (5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.
>
> (B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing,

> any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.

{¶21} As to Appellant's concern that "[t]he testimony adduced was not given under oath," five neighbors spoke to express concerns of unfairness and the closeness of the proposed new houses to the road. Appellant submitted various documents to the Board. Three witnesses appeared and spoke on Appellant's behalf: Appellant's general manager, a surveyor, and a consultant. The transcript does not show the witnesses were sworn in. Appellant did not ask for its witnesses to be sworn or object to the neighbors speaking without the administration of an oath.

{¶22} For thoroughness, we discuss infra the law related to whether unsworn Board testimony can be waived at the board level. We also discuss the Board's conclusions of fact contained in the transcript. But first, we explain how an overriding principle disposes of the arguments within this assignment of error: a trial court has discretion to enforce its scheduling orders, and Appellant did not properly seek to introduce additional evidence.

{¶23} The statute provides that if the testimony was not given under oath before the Board, "the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party." R.C. 2506.03(B). This provision does not require sworn testimony in order to uphold the Board's decision. A party may introduce additional evidence or may not. In some appeals from unsworn Board hearings, the parties may not choose to introduce additional evidence.

{¶24} Consequently, a right to present additional evidence at a court hearing under R.C. 2506.03(A) can be waived. *See, e.g., City of Independence v. Office of the Cuyahoga Cty. Executive*, 8th Dist. No. 97167, 2013-Ohio-1336, ¶ 35 (court granted motion to submit additional evidence, but then parties proceeded under alternative option; also noting that the complaining party did not argue to the appellate court that it had more evidence to present); *Global Country of World Peace v. Mayfield Heights Planning Comm.*, 8th Dist. No. 924848, 2010-Ohio-2213, ¶ 30 (cannot raise in appellate court trial court's failure to take additional evidence due to board's failure to file conclusions of fact where party never asked trial court to do so).

{¶25} The trial court issued a scheduling order after the Board filed the transcript with the court. That scheduling order required the filing of Appellant's brief by November 25, 2013, the Board's brief by December 30, 2013, and Appellant's reply by January 21, 2014. As Appellee points out, the court's order specified that all pretrial motions must be filed by October 14, 2013. The court further stated, "Unless otherwise directed by the undersigned upon motion of a party, this cause is set for non-oral hearing on JANUARY 28, 2014 AT 8:00 A.M."

{¶26} Thereafter, Appellant submitted no filing until the brief on the due date of November 25 and then a reply to the Board's response brief. In other words, Appellant filed no pretrial motion by October 14. The scheduling order established that only a non-oral hearing would be held in the absence of a pretrial motion to be filed by October 14, 2013. Instead of setting forth its arguments regarding a hearing for additional evidence in a timely pretrial motion as instructed by court order, Appellant missed that deadline. Six weeks later, Appellant set forth the argument at end of the merit brief, without seeking leave to file an untimely motion under the scheduling order.

{¶27} Due to the procedural violation of the scheduling order and the failure to timely request an evidentiary hearing, the trial court properly followed its prior order submitting the matter to a non-oral hearing. In accordance, Appellant's argument, that a hearing was required under R.C. 2506.03(A)(3), due to the Board's failure to swear in witnesses, is without merit.

{¶28} We also point out that, in *Stores Realty*, the Supreme Court was presented with the issue of whether unsworn testimony presented to a local board of building appeals was competent evidence where the landowner's attorney did not request that the witness be sworn or object to the testimony. *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 42, 322 N.E.2d 629 (1975). First, the Court distinguished its prior *Arcaro* case. In *Arcaro*, the trial court affirmed the decision of the zoning board without taking additional evidence under Chapter 2506, and the Supreme Court remanded for a new hearing after concluding that there was no evidence to support the board's decision due to the lack of oath. *Arcaro Bros.*

Builders, Inc. v. Zoning Bd. of Appeals, City of North College Hill, 7 Ohio St.2d 32, 32-34, 18 N.E.2d 179 (1966). That decision was found to be distinguishable from the situation in *Stores Realty* because the zoning board in *Arcaro* had expressly *refused permission* to have any witnesses sworn. *Stores Realty*, 41 Ohio St.2d at 42-43.

{¶29} The *Stores Realty* Court applied the "well-established" waiver rule: "a party may not, upon appeal, raise a claim that the oath of a witness was omitted or defective, unless objection thereto was raised at trial. If no objection was raised, the error is considered to be waived." *Id.* at 43. The Court concluded that "[b]y failing to bring the matter to the attention of the board, appellee effectively waived the right to appeal upon that ground." *Id.* at 43. *See also Dudokovich v. Lorain Metropolitan Hsg. Auth.*, 58 Ohio St.2d 202, 206, 389 N.E.2d 1193 (1979) (trial court can consider unobjected to evidence presented to the board).

{¶30} We recognize that the Supreme Court was reviewing an argument on whether the evidence supported the board's decision rather than specific arguments that the trial court erred in failing to take additional evidence. Yet, *Stores Realty* and *Dudokovich* represented an exception to *Arcaro,* which case did mention the trial court's failure to take additional evidence.

{¶31} In applying the *Stores Realty* holding to a claim that the trial court was required to hear additional evidence due to the failure to administer an oath to witnesses before a local board of zoning appeals, the Eighth District held:

> "In the event that there is no objection to the admission of unsworn testimony at an administrative hearing, the error of allowing this evidence is waived and no additional evidence should be taken by the trial court in an appeal pursuant to R.C. Chapter 2506. *Stores Realty Co. v. Cleveland, supra.* The trial court should then consider the unsworn testimony as though it were given under oath."

Zurow v. City of Cleveland, 61 Ohio App.2d 14, 24, 399 N.E.2d 92 (8th Dist.1978). *See also Ardire v. City of Westlake Planning Comm.*, 8th Dist. No. 61636 (Feb. 4, 1993).

{¶32} The Second District disagrees that a failure to object to the lack of an oath before the Board means that the trial court need not take additional evidence under R.C. 2506.03. *See, e.g., BD Dev. v. City of Vandalia*, 2d Dist. No. 25930, 2014-Ohio-2996, ¶ 32-35 (finding the Eighth District's extension of *Stores Realty* to be misplaced), citing *Raischel, Inc. v. City of Eastlake*, 11th Dist. No. 97-L-280 (Dec. 31, 1998). *But see Raischel* (Christley, J., concurring in judgment only) (disagreeing with this portion of the decision and pointing out that a prior Eleventh District decision applied *Stores Realty* and held that the trial court need not take additional evidence where there was a failure to object to the lack of an oath before the board).

{¶33} The Fourth, Ninth, and Tenth Districts have adopted the Eighth District's *Zurow* reasoning. *See, e.g., Concerned Richfield Homeowners v. Richfield Planning & Zoning Comm.*, 9th Dist. No. 25033, 2010-Ohio-4095, ¶ 8 (trial court did not err when it denied a hearing pursuant to R.C. 2506.03(A)(3) as the record did not reveal that the applicant objected to any failure to swear in the witnesses); *Roop v. Ross Cty. Floodplain Regulations Variance Bd.*, 4th Dist. No. 03CA2707, 2003-Ohio-522, ¶ 20-23 (trial court properly denied request for evidentiary hearing where party did not object to the board's failure to administer an oath to witnesses at hearing, regardless of fact that he was unrepresented before the board); *Neague v. Worthington City School Dist.*, 122 Ohio App.3d 433, 441-442, 702 N.E.2d 107 (10th Dist.1997) (party waived claim that he was entitled to present additional evidence on judicial review where he did not object to the failure to swear in any witness before the administrative tribunal).

{¶34} In addition, the Fifth District has used *Zurow* to support the proposition that additional evidence is not required after waiver of the oath below. *See Barton v. Village of Powell*, 5th Dist. Nos. 98CA-E-09-045, 98CA-E-09-046 (Aug. 19, 1999) (where there was a general oath and it could not be ascertained if all who spoke had been sworn in, appellate court held that any failure by the board to administer an oath was waived and the trial court was not required to permit additional evidence).

{¶35} Our district has utilized the *Zurow* holding as well. *Alltel Communications v. Village of Mingo Junction*, 7th Dist. No. 05JE20, 2006-Ohio-1054,

¶ 29-30, citing *Zurow*, 61 Ohio App.2d at 24, citing *Stores Realty*, 41 Ohio St.2d 41. The *Alltel* case was remanded to the trial court for an evidentiary hearing because the record contained no report of the admitted evidence and because no conclusions of fact were filed. *Id.* at ¶ 33-37. As to the applicant's argument on the lack of oath administration, we quoted *Zurow* and held that the failure to raise the informality issue with the board waived it. *Id.* at ¶ 29-30 (informal board meeting where neither the applicant's representative nor the members of the public who spoke in opposition to the variance request were placed under oath).

{¶36} Regardless of any disagreement as to whether waiver of the oath before the Board allows the trial court to refuse to hear additional evidence, as we held above: the statute allows, but does not require, additional evidence; the trial court has discretion to enforce its scheduling orders; and Appellant did not properly seek to introduce additional evidence. Due to the procedural violation of the scheduling order and failure to timely request an evidentiary hearing to present additional evidence, the trial court properly followed its prior order submitting the matter to a non-oral hearing.

{¶37} Said holding not only disposes of Appellant's argument under R.C. 2506.03(A)(3), regarding the lack of an oath, but also disposes of Appellant's claim under R.C. 2506.03(A)(5) that the trial court was required to hear additional evidence because the Board "failed to file with the transcript conclusions of fact" supporting the decision. In any event, we proceed to explain how the Board members' statements made on the record at the hearing constituted conclusions of fact.

{¶38} It has been observed that R.C. 2506.03(A)(5) does not require the conclusions of fact to be in any specific form when it speaks of whether the Board "failed to file with the transcript conclusions of fact." *Concerned Richfield Homeowners*, 9th Dist. No. 25033 at ¶ 10 (and noting that the statute instructs the court to look at the "face of that transcript" to see if conclusions of fact were filed with the transcript). That court concluded that the statute does not require the zoning commission to file a separate document entitled, "Conclusions of Fact." *Id.* Therefore, where the reasons for the decision were orally placed on the record, the

Ninth District concluded that the trial court was not required to hear additional evidence. *Id.* at ¶ 11-12. Specifically, meeting minutes containing a detailed expression of each commission member's reasoning were held to constitute conclusions of fact. *Id.* at ¶ 12.

{¶39} The Eighth District has also concluded that meeting minutes can provide the conclusions of fact expressed by the Board, thus satisfying the mandate of R.C. 2506.03(A)(5). *Ziss Bros. Constr. Co., Inc. v. Independence Planning Comm.*, 8th Dist. No. 90993, 2008-Ohio-6850, ¶ 27. In *Ziss*, the meeting minutes disclosed the reasons expressed by each of the three commission members who denied the application. *Id.* at ¶ 24-25 (two members abstained from voting). The court distinguished its prior case where the meeting minutes merely stated that after a presentation, a discussion was had and a vote was taken. *Id.* at ¶ 26, distinguishing *Felder v. City Planning Comm. of Pepper Pike*, 8th Dist. No. 38663 (Apr. 26, 1979).

{¶40} Here, the transcript contains various factual findings on the record verbatim. At the beginning of the hearing, the chairperson recited how the minimum setback is 50 feet in the front and 40 feet in the rear pursuant to an August of 2006 amendment changing the property from agricultural to residential. It was noted that the prior agricultural district had the same front and rear setbacks. (Tr. 2-3). At the conclusion of the hearing, the Board recessed to discuss the matter.

{¶41} When they came back on the record, a member of the Board made a motion to deny Appellant's variance request. The chairperson asked the Board members to make comments on the record. One Board member stated:

> we were talking about dealing with 27 variances here. I don't think the practicality - - or practical difficulties applies to all 27 of these lots. I think it makes a major impact to the original intent of the lot. The zoning requirements have not changed since these lots were designed and laid out. (Inaudible) practical difficulties applies. However, there probably is some unique situations get created by these cul-de-sacs, and I think maybe some of these unique situations could be addressed

> individually; but to grant the blanket variance for all 27 lots I think is, you know, excessive overreaching and not the intent of what this board should be acting upon. (Tr. 48-49).

Another member of the Board added:

> I would also add that the lots are buildable as they were intended to be buildable, so there really - - in that regard, there isn't the practical difficulty; and also the fact, again - - this may be reiterating what you said - - is that we are dealing with 27 lots here; and while they may not look substantial individual, it is substantial when you're dealing with 27 lots together asking for this variance request. (Tr.49).

After the five-person Board unanimously voted to deny the variance, the chairperson concluded:

> The request has been denied. I think the board kind of feels that it is overreaching and too much (inaudible) [naming first Board member who made comments] said in specific cases (inaudible) but in specific cases where cul-de-sacs, it seems as though - - if there's a specific structure, footprint that we could consider, I think the board would be - - consider that. (Tr. 50).

{¶42} Appellant does not address these findings or state that they were insufficient. Rather, Appellant briefly and generally argues that no conclusions of fact were filed (seemingly arguing that they must be in a separate document). We, however, agree with the Eighth and Ninth Districts that the conclusions of fact need not be in a separate document written by the Board. Rather, statements on the record can constitute conclusions of fact.

{¶43} This court concludes that the reasoning set forth by three members of the Board at the hearing and transcribed verbatim into the filed record constituted conclusions of fact for purposes of R.C. 2506.03(A)(5). Although we do not have comments by the other two members, three members constitute a majority. *See Cimino v. Cleveland Heights Bd. of Zoning Appeals,* 8th Dist. No. 95350, 2011-Ohio-1803, ¶ 11 (brief comments by three members placed on record at hearing

constituted the conclusions of fact so that trial court was not required to hold evidentiary hearing); *Ziss*, 8th Dist. No. 90993 at ¶ 24-25 (comments by three who denied application; two abstained).

{¶44} In fact, the Eighth District found sufficient conclusions of fact where only the planning director provided findings at the hearing. Specifically, the planning director stated that there were two accessory structures on property, one exceeds the height allowed by the ordinance, and the denial was "based on the fact that there was no practical difficulty to justify two accessory structures and a height variance." *Buckley v. Solon*, 8th Dist. No. 95805, 2011-Ohio-3468, ¶ 17-18. Based upon all of the foregoing reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER ONE

{¶45} Appellant's first assignment of error provides:

"The Trial Court erred as a matter of law by affirming the Decision of the Board of Zoning Appeals."

{¶46} Appellant argues that the Board's decision was arbitrary and unreasonable and was not based on the preponderance of substantial, reliable, and probative evidence. It is urged that the seven factors of the practical difficulties test applicable to area variances weigh in favor of granting the variance. Appellant states that nothing presented at the hearing rebutted Appellant's showing of practical difficulty. Appellant describes the neighbors' comments as subjective and speculative.

{¶47} Pursuant to R.C. 2506.04, the trial court's standard of review of the Board's order is whether the decision "is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." The judgment of the trial court may then be appealed by any party "on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code." R.C. 2506.04.

{¶48} Accordingly, in reviewing the factual decision of the board of zoning appeals, a common pleas court is to defer to the board's judgment and cannot

substitute its judgment for that of the board unless the court finds that the decision is not supported by a preponderance of reliable, probative, and substantial evidence. *Kisil v. City of Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). The appellate court then has an even more "limited function" in ascertaining whether the trial court correctly applied that standard of review. *Id.*

{¶49} The appellate court must affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence. *Id.* "Within the ambit of 'questions of law' for appellate court review would be abuse of discretion by the common pleas court." *Id.* at fn.4.

{¶50} The standard for granting an area variance is a lesser standard than that applied to a use variance. *Id.* at 35. An applicant for an area variance need not establish "unnecessary hardship" as is required for a use variance; it is sufficient that the applicant for an area variance show "practical difficulties." *Id. See also Kennedy v. Milton Twp. Bd. of Trustees*, 7th Dist. No. 08MA263, 2010-Ohio-1405, ¶ 43-46 (the practical difficulties test applies to township zoning decisions on area variances and is not solely applicable to municipalities). A Poland Township Zoning Resolution also provides that the standard applicable to an area variance is practical difficulty.

{¶51} A property owner encounters practical difficulties when an area zoning requirement such as a setback "unreasonably deprives him of a permitted use of his property." *Duncan v. City of Middlefield*, 23 Ohio St.3d 83, 86, 491 N.E.2d 692 (1986). "The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable." *Id.* The landowner must show the zoning rule is inequitable when applied to his property. *Id.*

{¶52} The factors to be weighed in considering whether a landowner seeking an area variance has encountered practical difficulties in the use of the property include, but are not limited to: (1) whether the property 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 adjoining properties would suffer a

substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of government services such as water, sewer, or garbage; (5) whether the owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament can be feasibly obviated through another method; (7) whether the spirit and intent behind the zoning rule would be observed and substantial justice done by granting the variance. *Id.* (emphasizing that no single factor controls). We review the factors.

{¶53} First, Appellant states that the lots will not be put to their "full" beneficial use. Appellant also asserts that, without a variance to the setback lines, the lots will not yield a reasonable return as they are unbuildable in today's market. This relates to Appellant's theory that they platted the lots prior to the national housing recession and that, during this time of economic rebound, prospective buyers are looking for larger houses than those envisioned prior to the recession. Appellant's evidence at the hearing was that they received four inquiries in the months just prior to the hearing, but those people desired homes ranging from 3,200 to 3,800 square feet, which would not fit on the lot without setback changes.

{¶54} However, these inquiries by those seeking to build homes too large for the lots is not evidence that requires a fact-finder to conclude that the lots are "undevelopable in today's market." Nor does it require a court to conclude that buyers only want homes over 3,000 square feet (in the aftermath of a housing recession). There were no figures provided on the prices of the lots or any expected return. As a member of the Board voiced, the lots are buildable as they were intended to be built. It was suggested that it is the developer's intended client that has changed. The magistrate aptly voiced that, at most, it was demonstrated that Appellant will not receive the greatest possible benefit. Yet, being deprived of "the greatest possible benefit" is not akin to being deprived of "the beneficial use" of the lot. *Duncan*, 23 Ohio St.3d at 88.

{¶55} Concerning the second factor, Appellant claims that the requested variance is not substantial. Appellant wanted setback reductions in both the front and the back yards. In general, decreasing the front setback from fifty feet to forty feet

constitutes a reduction of 20% and decreasing the rear setback from forty feet to thirty feet constitutes a reduction of 25%. A trier of fact would not be unreasonable in concluding that this request was substantial. *See, e.g., Salotto v. Wickliffe*, 193 Ohio App.3d 525, 2011-Ohio-1715, 952 N.E.2d 1174, ¶ 24 (11th Dist.) (observing that a 25% reduction of lot size "must be deemed substantial in nature"); *Teets v. Ravenna Twp. Bd. of Zoning Appeals*, 11th Dist. No. 96-P-0063 (Apr. 25, 1997) ("Although ten feet may not seem like much if viewed in isolation, this amounts to almost a third of the total setback requirement.").

{¶56} As a member of the Board additionally observed, Appellant was asking for these variances to apply to 27 lots. Not all of those lots were in the interior of the cul-de-sacs, i.e. not all had the expressed problem with inwardly curved frontages. The ten-foot reduction of both the front setback and the rear setback can also reasonably be viewed as substantial considering the dimensions and shapes of some of the lots as portrayed in Appellant's exhibits.

{¶57} Regarding the third factor, Appellant states that a variance would not substantially alter the essential character of the neighborhood and that adjoining properties would not suffer a substantial detriment as a result of the variance. Appellant suggests that an inability to develop the lots could be a threat to the neighborhood. Appellant urges that the ability to build larger, upscale homes would maintain or boost the character of the neighborhood. These arguments may not outweigh the concern that the larger houses with less yard could pose a density issue affecting the neighborhood as a whole, especially if it could be perceived there is more house than yard on a lot. Houses would be closer to the street and to the rear property lines and thus closer to each other.

{¶58} As to the fourth factor, there is no indication that the variance would adversely affect the delivery of government services such as water, sewer, or garbage. Appellant adds that the larger houses would augment the tax base.

{¶59} The fifth factor asks whether the owner purchased the property with knowledge of the zoning restriction. Notably, Appellant platted this development. Appellant chose to utilize a cul-de-sac plan, three cul-de-sacs to be specific, and to

place 27 lots into this formation with intent to ensure that a certain size house (that would fit) would be built on the lots. Appellant's brief states that Appellant had constructive knowledge of the setback requirements when the lots were platted. In the evidence Appellant presented to the Board, it was acknowledged: "At the time that Park Place Plat No. 3 was approved in 2005, the property owner was aware of the zoning restrictions, and the minimum setback requirements * * *."

{¶60} Concerning the sixth factor, Appellant posits that the predicament cannot be feasibly obviated through another method. Appellant states that without the variance, smaller homes must be built on the lots and insists that such homes will be unmarketable. They did not build a home on any of the 27 lots to test this theory. They did sell eight lots in the outlying phase of the development, and residents live in houses on those lots. There was evidence that one of those houses was 2,490 square feet and another was a one and one-half story house. (Tr. 37). As to another proposed method to obviate their problem, there was a statement by Appellant's surveyor that combining two lots would result in a wider lot but would not solve the depth issue. There was no explanation as to the dilemma with increasing the length and decreasing the depth of a house.

{¶61} Lastly, Appellant urges that the spirit and intent behind the zoning rule would be observed and substantial justice done by granting the variance. Again, Appellant emphasizes increased property values from larger homes as a benefit to the neighborhood and to the township via taxes. A competing intent could be to aesthetically ensure houses are not too close to the street or those behind them. Another competing intent could be to encourage some yard/landscape/natural/non-house area on each lot.

{¶62} Furthermore, as the Board pointed out, the proposed across-the-board changes are to the front and back yards of all 27 lots across the board, even though the lots do not all have the same challenges. It was suggested that a blanket variance was not appropriate. It would be more appropriate to present the Board with evidence of a specific foundational footprint desired on a particular lot. *Compare Town Inv., Inc. v. City of Mentor Bd. of Zoning Appeals*, 11th Dist. No. 89-L-14-145

(Mar. 29, 1991) (seeking variance across the board as to entire subdivision was akin to asking board to rezone the area, which is a legislative rather than an administrative function).

{¶63} In conclusion, the Board occupied the best position from which to weigh the factors and come to a decision as to whether a variance should be granted reducing both the front and rear setbacks on 27 lots. The trial court exercised its function on review and determined that the Board's decision was not arbitrary or unreasonable and was supported by the *preponderance* of the reliable, probative, and substantial evidence. *See Dudukovich*, 58 Ohio St.2d at 207 (emphasizing that "preponderance" is the "key term"). The trial court concluded that the Board reasonably found that the practical difficulty test was not satisfied.

{¶64} We do not have the same power to weigh the evidence as these bodies. *Id.* at 207-208. In carrying out our limited reviewing role, this court does not agree with Appellant's proposition that, as a matter of law, the denial of the variance was arbitrary, unreasonable, or unsupported by the preponderance of the reliable, probative, and substantial evidence. In accordance, the trial court's decision upholding the Board's decision to deny the variance is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.