

[Cite as *Dyke v. Shaker Hts.*, 2004-Ohio-514.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83010

SUZANNE DYKE, ET AL.	:	
	:	
Plaintiffs-Appellants	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
CITY OF SHAKER HEIGHTS, OHIO,	:	
ET AL.	:	
	:	
Defendants-Appellees	:	

DATE OF ANNOUNCEMENT
OF DECISION:

February 5, 2004

CHARACTER OF PROCEEDING:

Civil appeal from
Court of Common Pleas
Case No. CV-472573

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiffs-Appellants:
(Suzanne Dyke and
Ernest Siwik)

GERALD W. PHILLIPS
Phillips & Company, L.P.A.
35955 Detroit Road

Avon, Ohio 44011

For Defendants-Appellees:
(City of Shaker Heights)

MARGARET ANNE CANNON, Law Director
City of Shaker Heights
TIMOTHY J. DUFF
Taft, Stettinius & Hollister, L.L.P.
200 Public Square
Cleveland, Ohio 44114-2302

(Southwick Investments, Inc.) SHELDON BERNS
BENJAMIN J. OCKNER
Berns, Ockner & Greenberger, L.L.C.
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122

COLLEEN CONWAY COONEY, J.

{¶1} Appellants Suzanne Dyke and Earnest Siwik ("Appellants") appeal the judgment of the Cuyahoga County Court of Common Pleas affirming the Shaker Heights Planning Commission ("Commission") and Board of Zoning Appeals' ("BZA") approval of a site plan and granting of certain variances. We find no merit to the appeal and affirm.

{¶2} This administrative appeal concerns property consisting of approximately eight acres of vacant land bounded by North Moreland Boulevard, South Park Boulevard, and Warwick Road in the City of Shaker Heights (the "Property"). Appellee Southwick Investments, LLC ("Southwick") first proposed development of the property in February 2001. Initially, Southwick sought to

construct a series of buildings designed to look like typical Shaker mansions divided into separately owned dwelling units suited for people who no longer needed or desired to live in and maintain a traditional single-family home. The City's Strategic Investment Plan identified the Property as a potential development site for this type of housing which the City lacked.

{¶3} In November 2001, the Property was rezoned from SF-2, Single Family Residential, permitting single-family homes on 8,500 square foot lots with frontages of 60 feet, to MF, Multi-Family District Residential, permitting attached and detached single-family dwellings and apartment buildings containing as many as 32 one-bedroom apartments per acre or 29 two-bedroom apartments per acre.

{¶4} The City conditioned the rezoning on deed restrictions that substantially restricted what would have been permissible in a Multi-Family District. Specifically, the rezoning was conditioned upon the filing of a Declaration of Restrictions that limited the density and use of the property "for not more than 16 units consisting of 15 single-family attached dwelling units (of which one is a duplex unit) and one single-family detached unit." The

conditions also required that the Property be developed generally in accordance with the conceptual site development plan and a detailed list of restrictions, which specified, among other things, the style of architecture and building materials to be used.

{¶5} The initial plan also envisioned a larger building along North Moreland Boulevard where apartment buildings already existed.

Smaller buildings were planned on South Park Boulevard where single-family homes existed. A single-family detached unit and a duplex unit were planned on Warwick Road. All of the buildings were to share the same architecture and were designed to resemble typical Shaker mansions. Existing large red oak trees along South Park and North Moreland Boulevards were to be preserved.

{¶6} In March 2002, Southwick's architect, Michael Caito ("Caito") of City Architecture, applied for site plan approval. As part of its application, Southwick requested two variances concerning setbacks, a variance concerning building height, and variances concerning temporary tree-protection fences during construction. In a letter accompanying Southwick's application, Caito explained that the requested variances were intended to

implement the specific requirements mandated by the deed restrictions.

{¶7} The setback variances sought to reduce the setback requirements of the City's zoning code from 100 feet to 30 feet for the building setback along South Park. In its application, Caito explained that placing some buildings closer to South Park allowed deeper setbacks along Warwick and North Moreland. Specifically, Caito stated:

"We feel that as a whole the project benefits from this setback variance. We made a conscious decision to not 'max-out' the setbacks on Warwick Road, which are 35'00". Instead we maintained a very generous setback, which allows the fronts of the new homes on Warwick to blend in with the existing homes. We have created a soft, smooth setback line which ranges from 55'0" at the north end of Warwick to 70'0" at the south end, which abuts 2520 Warwick. By maintaining this Warwick relationship we are encroaching the South Park setback to fit the residences in. The same could be said for North Moreland Blvd. setback. We are aligning units 8 thru 14 with the existing 30'0" setback along North Moreland Blvd. even though the code only requires 20'0".

Without this South Park variance we will need to build up to the allowable setback line of 35'0" on Warwick and 20'0" on North Moreland which we feel will make the project feel bulkier and imposing to the surrounding neighbors."

{¶8} Southwick also sought a setback variance from 66 feet to 25 feet along South Park for two patio walls. Southwick

compensated for the reduced setbacks with additional landscaping as a buffer.

{¶9} Southwick further sought a variance from 36 feet to 46 feet for the height of a building containing six of the 16 units. The requested variance was based on the relative height of the existing apartment buildings along North Moreland, the fact that the roof pitch created most of the extra height, and the fact that the height of the building was reduced as it approached Warwick. In its application, Caito explained:

"We are requesting a variance for units 11 thru 16 on North Moreland Blvd. The building height, as stated in the code is measured from the average finished grade to the peak or ridge of a gable. Our townhouse structure is 46'0" in height. To achieve the density to make the economics work, we have pushed the density to North Moreland allowing Warwick to be less dense. In doing that we have created three story townhomes which save space because they are more land efficient to build than the two story units proposed for the rest of the development. We feel the scale of units 11 thru 16 on North Moreland fit in nicely with the 3-5 story apartment buildings abutting this project and across the street."

{¶10} Minutes from the May 7, 2002 meeting of the Board of Zoning Appeals and City Planning Commission indicate that Caito testified and further explained:

"[T]he gutter line of the taller building on North Moreland matches the gutter line of the existing apartment next door.

The roof is at a much steeper angle due to the different style so it appears much taller. He illustrated an abstract of the building at Fairhill and North Moreland, the 5-story building across the street, and the 36 foot tall building next to this proposal on North Moreland. He illustrated the side and the rear of the North Moreland building. The rear height of the North Moreland Building has been lowered compared to the front height. The rear height is more like 40 feet tall instead of 46 feet tall. The closest existing single-family residential house is the Dyke residence, which is approximately 38 to 40 feet tall."

{¶11} Finally, Southwick requested variances concerning temporary tree-protection fences because the fences are five feet eight inches tall instead of three feet tall and the fences would encroach on the surrounding streets. Southwick sought these variances to comply with the City's requirement that it protect the large red oak trees on the property.

{¶12} Southwick's application was accompanied by: (1) a Natural Resource and Environmental Design Review dated June 27, 2001 prepared by the Davey Resource Group, identifying the vegetation and trees to be preserved on the site, including existing large trees on North Moreland and South Park Boulevards and Warwick Road; (2) a Traffic Analysis dated May 17, 2001 relating to potential

vehicular impacts resulting from the proposed development of the Property; and (3) site development plans for the Property.

{¶13} On April 2, 2002, the Commission and BZA conducted a public hearing on Southwick's proposal. On April 20, 2002, a work session was held at which time revised site plans were reviewed, the public made comments, and members of the Commission offered suggestions to Southwick and its architect for further revisions to Southwick's site development plan.

{¶14} On May 7, 2002, the Commission and BZA held another public hearing to review the site development plan which had been revised to reflect changes requested by members of the Commission.

During the hearing, Southwick, its consultants, and members of the public made comments under oath. Hunter Morrison ("Morrison"), Planning Director for the City of Cleveland, was the only expert planner to testify at the hearing. He opined that the Property met the standards for the requested variances. Specifically, he reviewed the criteria found in Section 1213.04(e) of the City's Zoning Code and testified:

"Hardship/Practical Difficulty. The trapezoidal shape and location of the property presents practical difficulty. It meets the adjacent Warwick setback in order to be compatible with Warwick. This point addresses 2 variances; one to a

100 foot setback on South Park and the second to the height of the buildings facing North Moreland.

Unique Property. This requirement is met by the uniqueness of the deed restrictions of the rezoning of the property. This project is unique by its process, physicality and location. This site is not found elsewhere in the City.

Financial Hardship. The purpose of the variance is not solely financial. There is no question there is an impact for the developer. There is more to it than that. The quality of the product and setback are related. The setback is 30 feet on South Park then allows for the setback on Warwick to be met and also allows for one driveway only on the North Moreland side of the property.

Practical Difficulty/Hardship Not Self-Inflicted. This is a unique site. It is highly visible and constrained by the three roads that surround it. Any respectable developer would seek a similar type project on this property.

Not Detrimental to Public Welfare. The development does not injure the surrounding property values or use of property. Much mitigation has been added to the project so that does not happen. The high price point will raise the property values. In his experience with the City of Cleveland, the high price point of these single-family attached dwelling units will raise the price point of the surrounding single-family dwellings in the neighborhood and raise their value. This is a consideration to help stabilize the existing surrounding neighborhood.

Not Change the Essential Character. The essential character of the neighborhood will be enhanced by the quality of the project and the experience of this Shaker Heights development. This development fully respects the Warwick single-family residential feel in its massing and setback."

{¶15} Morrison concluded that the BZA should approve the requested variances because they met the code standards and enhanced the quality of the neighborhood.

{¶16} At the conclusion of the hearing, David Hartt, a member of the Commission and BZA, summarized the BZA's findings with respect to the variances:

"Mr. Hartt said the approval of this final development with variances has been requested with the conditions of orange ribbon on trees as well as the height study being documented in writing. The findings here of this Board are based on the information provided tonight, the variance requirements of Section 1213.04 E, and the physical surroundings of the site based on unique characteristics. It is not based solely on financial benefit. There has been practical difficulty created by the change in the Zoning Code and the recognition in the Zoning Code of a change in setback for multi-family zoning. There is also recognition that this development is not a detriment to the health and welfare of the other properties on the street. The development will not alter the essential character of the neighborhood.

It was moved by Mr. Hartt and seconded by Mrs. Turner to approve the site plan review conditioned on:

an orange ribbon around trees to be saved;

a written, labeled version of the height study; and

copies of all exhibits shown at this meeting to be submitted to staff; and to approve the front yard setback variance, to approve the building height variance and to approve the tree protection fence location and height variances as submitted."

{¶17} Accordingly, the Commission and BZA approved the site plan and variances. Appellants filed an appeal with the Cuyahoga County Common Pleas Court. The court affirmed the Commission and BZA's approval of the site plan and variances. Appellants now appeal to this court.

Standard of Review

{¶18} Appellants bring the within appeal pursuant to R.C. Chapter 2506. R.C. 2506.04 sets forth the applicable standard of review and provides as follows:

"The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may 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."

{¶19} In *Henley v. Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433, the Ohio Supreme Court construed the above language and explained:

"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. See *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 612, 693 N.E.2d 219, * * *, citing *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 206-207, 389 N.E.2d 1113, * * * .

Our standard of review to be applied in an R.C. 2506.04 appeal is 'more limited in scope.' *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848. '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.' *Id.* at fn. 4. '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 * * * 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.' *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264." *Id.* at 147.

{¶20} It is with this limited scope of review that we address appellants' eleven assignments of error.

Variances v. Rezoning

{¶21} In their first assignment of error, appellants argue the trial court erred in affirming the Planning Commission and BZA's decision to grant the requested variances because the variances are substantial in nature and tantamount to rezoning. In other words, appellants argue the Planning Commission and the BZA improperly rezoned the Property.

{¶22} As noted by the Ohio Supreme Court, variances are intended only to "permit amelioration of strict compliance of the zoning ordinance" and are "not authorized to change zoning schemes." *Consolidated Management, Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 452 N.E.2d 1287, 1289. "The authority to permit a

variance does not include the authority to alter the character and use of a zoning district." Id.

{¶23} In the instant case, the variances for setbacks, building height, and temporary tree-protection fences do not constitute a rezoning of the property and do not alter the character or use of the land. Rather, all the variances are consistent with the character and use of the property in a Multi-Family District.

For example, Shaker Heights Zoning Code allows the BZA to grant a variance for building height "where such additional height would more closely harmonize with adjoining development if, in the opinion of the BZA, such additional height would result in a more appropriate development of the lot and remain consistent with the intent of the Zoning Ordinance." Here, the height variance allows Southwick to construct one taller building adjacent to neighboring pre-existing apartment buildings on North Moreland which allows the scaling down in height from the taller apartment buildings on North Moreland to the smaller single-family residences on Warwick Road.

{¶24} The temporary tree-protection fences also are not substantial and do not change the use of the land. Southwick sought a variance for the temporary tree-protection fences because

the fences were five feet eight inches tall instead of three feet tall and the fences would encroach on the surrounding streets. The purpose of these fences is to protect the trees. Although the variance allows Southwick to use slightly taller fences than those permitted by the zoning code, the fences are needed to better protect the trees and will be removed once the construction project is completed.

{¶25} Finally, the setback variances are not substantial nor do they alter the use of the property. Although the variances reduce the setback requirements from 100 to 35 feet for the building setback along South Park Boulevard, evidence was presented that this variance is consistent with townhouses and is thus more appropriate for the character and use of multi-family dwellings than the original setback requirements. The setback variance also allows a larger setback than required on Warwick Road to prevent the project from feeling bulky and imposing on surrounding neighbors on Warwick Road. Although the setback variance for the two patio walls along South Park reduced the setback from 66 feet to 25 feet, Southwick compensated for the reduced setbacks with additional landscaping as a buffer.

{¶26} Therefore, because the variances do not alter the character or use of the property and do not result in rezoning, we overrule this assignment of error.

Practical Difficulties

{¶27} In their second assignment of error, appellants argue that the variances should not have been granted because the Property does not suffer from practical difficulties or particular hardship. In their fifth assignment of error, appellants argue the BZA improperly granted the variances when the practical difficulties were self-inflicted. In their sixth and seventh assignments of error, they argue that the granting of the variances were injurious to and altered the essential character of the neighborhood. Because all of these arguments relate to whether Southwick encountered "practical difficulties" in the development of the Property, we analyze them together.

{¶28} A property owner applying for an area variance must demonstrate "practical difficulties" in complying with a zoning regulation. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848, at the syllabus. "[A] property owner encounters 'practical difficulties' whenever an area zoning requirement (e.g.

frontage, setback, height) unreasonably deprives him of a permitted use of his property." *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 86, 491 N.E.2d 692, certiorari denied, 479 U.S. 986, 93 L.Ed.2d 579, 107 S.Ct. 576. The Ohio Supreme Court has established seven factors to be considered in determining whether a landowner has encountered practical difficulties in the use of his property:

"The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance."

{¶29} *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 491 N.E.2d 692, syllabus. Thus, whether the property owner purchased the property with knowledge of the zoning restrictions is one

factor to be considered in a practical difficulties determination.
Id.

{¶30} Further, no single factor controls in the determination of practical difficulties; the inquiry should focus on the spirit rather than the strict letter of the zoning ordinance so that substantial justice is done. Id. at 86.

{¶31} During the May 7 hearing, Southwick argued and the BZA found that the Property's unique trapezoidal shape and location imposed practical difficulties on the Property. Appellants argue that the property is not trapezoidal in shape and to the extent that it is trapezoidal in shape, Southwick created the problematic shape by joining three parcels of property. Appellants' argument is not supported by the evidence.

{¶32} Hunter Morrison ("Morrison"), the only expert planner to appear at the May 7 hearing, testified that the Property's shape and location imposed practical difficulties and particular hardship. He further explained that the practical difficulty was not self-inflicted but rather was caused by the unique location of the property, stating:

"This is a unique site. It is highly visible and constrained by three roads that surround it. Any

respectable developer would seek a similar type of project on this property."

{¶33} There is also evidence that the property is located on a corner and is narrow at its northern end, along South Park Boulevard, and broad at its southern end, along North Moreland Boulevard and Warwick Road.

{¶34} Additionally, Morrison explained that the variances do not change the essential character of the neighborhood but actually preserve it. Morrison testified:

"The essential character of the neighborhood will be enhanced by the quality of the project and the experience of this Shaker Heights development * * *"

{¶35} As previously stated, the Property lies in a transition area between traditional higher-density multi-family housing on one side and single-family housing on the other. The evidence demonstrates that the project was designed to blend into the neighborhood by matching characteristics of neighbors on both sides and thereby form a transition from apartment buildings to single-family residences. Therefore, the project does not alter the character of the neighborhood but conforms to characteristics of its neighbors.

{¶36} Moreover, as previously mentioned, the variances are not substantial, but are necessary to preserve the essential character of the neighborhood. Thus the spirit and intent behind the zoning requirements are observed by the variances. Morrison testified that the development will not injure the surrounding property but will actually raise the neighboring property values. There is no evidence to suggest that the variances would adversely affect the delivery of governmental services. These factors combined with Morrison's unrefuted testimony that the trapezoidal shape of the property imposed practical difficulties supports the BZA's finding that the variances are justified.

{¶37} Accordingly, the second, fifth, sixth, and seventh assignments of error are overruled.

Uniqueness of the Property

{¶38} In its third assignment of error, appellants argue the BZA erroneously granted a variance when there are no conditions unique to the property. Appellants argue that because the claimed uniqueness is not the result of a physical condition but rather of the deed restrictions imposed on the Property by the rezoning, a finding of uniqueness was inappropriate. Appellants also claim

there is evidence that the Property is not unique because the City's Fire Chief testified that the Property is not unique.

{¶39} First, it should be noted that the Fire Chief's testimony that the Property is not unique related solely to the Fire Department's ability to access the property in the event of a fire and did not relate to other characteristics of the property. Thus, it is not dispositive of the uniqueness issue.

{¶40} Further, while Morrison admitted that the property is unique because of the deed restrictions, he also testified that the "project is unique by its process, physicality and location." During the course of his testimony, Morrison explained that the awkward shape of the property combined with the transition from traditional higher density, multi-family housing along North Moreland to single-family residences along Warwick Road and South Park Boulevard make the property unique in shape and location. Therefore, the BZA's finding that the Property is unique is supported by a preponderance of substantial, reliable, and probative evidence.

{¶41} Accordingly, the third assignment of error is overruled.

Financial Considerations

{¶42} In their fourth assignment of error, appellants argue that the BZA improperly granted a variance based on the developer's financial difficulties. In support of this argument, appellants refer to Southwick's acknowledgment that financial considerations affected the development of the property.

{¶43} It is undisputed that the profitability of a particular project, in and of itself, is not a proper basis for granting a variance. However, Southwick has not argued that it should receive the variances solely because the project is profitable. To the contrary, Morrison testified that the requested variances are not based on financial hardship alone, stating:

"The purpose of the variance is not solely financial. There is no question that there is an impact for the developer. There's more to it than that. The quality of the product and setback are related. The setback of 30 feet on South Park then allows for the setback on Warwick to be met and also allows for one driveway only on the North Moreland side of the Property."

{¶44} Nothing in the evidence before the BZA suggests that the sole purpose for the requested variances was financial. As previously stated, the evidence demonstrates that the variances were actually necessary to preserve the essential character of the neighborhood. Thus, the evidence before the BZA provides many

reasons for granting the requested variances other than financial gain.

{¶45} Accordingly, the fourth assignment of error is overruled.

Site Plan Approval

{¶46} In their eighth assignment of error, appellants argue that the Planning Commission and BZA's approval of Southwick's site plan was improper because the landscaping plan is inadequate, the density provided for the plan is too great, and the maximum coverage and rear-setback yard requirements were not addressed. Appellants further contend that these deficiencies in the site plan do not comply with the purpose and intent of the Shaker Heights zoning ordinances and will negatively change the essential character of the neighborhood.

{¶47} First, it should be noted that the Planning Commission and the BZA were not required to address the maximum coverage and rear setback yard requirements because Southwick never sought or required variances for these requirements. Therefore, this argument is unfounded.

{¶48} Although appellants contend the landscaping plan is inadequate, the evidence in the record supports a contrary

conclusion. Appellants contend the landscaping plan is inadequate because the six mature oak trees on the property will not survive.

However, several individuals testified at the May 7 hearing that the trees would be unaffected by the construction. Andrew Sparks, a landscape architect, gave an in-depth discussion of the plan for preserving the six oak trees. Southwick also represented that an arborist would be present during construction and agreed to tie an orange ribbon around the trees to be preserved. There is no evidence to support appellants' assertion that the trees will not survive.

{¶49} Appellants also argue that the buffer depicted in the landscaping plan is inadequate. However, the landscaping plan shows a buffer between the townhouses and appellant Dyke's property including plans to preserve existing dense vegetation and to plant nine additional evergreen trees.

{¶50} Finally, contrary to appellants' claim that the density provided in the site plan is excessive, the site plan actually provides for a lower density than allowed under multi-family zoning. Based on the square footage of the Property, the City's zoning code allows for approximately 52 two-bedroom units, a much

higher density than the 16 units proposed by Southwick's plan. Therefore, Southwick's plan complies with the spirit and intent of the Shaker Heights zoning ordinances.

{¶51} Accordingly, the eighth assignment of error is overruled.

Contract Zoning

{¶52} In their ninth assignment of error, appellants argue the Planning Commission and BZA's approval of the requested variances and site plan constituted an unconstitutional delegation of its duties by contract and was tantamount to illegal contract zoning.¹

{¶53} It is well settled that a municipality may impose conditions on its zoning decisions. *Gillespie v. Stow* (1989), 65 Ohio App.3d 601, 609; *Johnson v. Griffiths* (1955), 74 Ohio Law Abs. 482. However, in *Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals* (1974), 40 Ohio App.2d 432, 438, this court held invalid, as contrary to public policy, an ordinance provision that

¹This court recently addressed this issue in *Siwik v. Shaker Heights*, Cuyahoga App. No. 82390, [2003-Ohio-5502](#), which involved Southwick's development of a neighboring parcel of land. In that case, this court concluded that because Southwick's application for variances met the requirements of the applicable Shaker Heights zoning ordinances, there was no evidence of contract zoning.

a person seeking rezoning agree that the land involved would revert to its original classification if not used within twelve months for the purpose for which rezoning was sought. Such a provision, the court concluded, constituted an attempt to condition zoning by contract, and as such was invalid. Thus, while a municipality may impose conditions, it may not bargain away its legislative power. Id.

{¶54} In the instant case, the City never bargained away its legislative power when Southwick agreed to comply with the deed restrictions, which incidentally, were more stringent than the applicable zoning ordinances. The Planning Commission and BZA heard evidence and determined that Southwick had encountered practical difficulties which justified the issuance of variances. The Planning Commission also determined, based on the evidence before it, that Southwick had met all the requirements for site plan approval. Therefore, the Planning Commission and BZA's granting of variances and approval of the site plan was not the product of contract but rather decisions reached on the evidence presented.

{¶55} Accordingly, the ninth assignment of error is overruled.

Intent and Purpose of Zoning Code

{¶56} In their tenth assignment of error, appellants argue the Planning Commission and BZA's granting of the requested variances and approval of the site plan is contrary to the general purpose and intent of the zoning code. Specifically, appellants argue that because the variances are substantial, they will detrimentally affect the public welfare, negatively change the essential character of the neighborhood, and "injure" the neighborhood.

{¶57} Section 1210.03 of the Shaker Heights Codified Ordinances sets forth the purpose and intent of the zoning code. It states, in pertinent part, that the zoning code is adopted:

"A. To promote the orderly and beneficial development of the City of Shaker Heights in accordance with City land use policy;

B. To promote the public peace, health safety, morals, comfort, prosperity and general welfare of the citizens of the City of Shaker Heights;

C. To protect the character and stability of residential, institutional, business and technical areas;

D. To promote and protect the economic viability of citizens and businesses;

E. To minimize congestion in the public streets and to ensure efficient and safe traffic circulation;

F. To provide for orderly growth and development; to afford adequate facilities for the safe, convenient, and efficient means for the traffic circulation of its population; and to safeguard the public against flood damage;

G. To provide adequate open spaces for light, air, and outdoor uses;

H. To preserve and enhance aesthetics and property values throughout the City;

* * *

J. To divide the City of Shaker Heights into districts of such number, shape, area and of such different classes, according to the use of land and buildings and the intensity of such use, as may be best suited to carry out the purposes of this Zoning Ordinance;

K. To encourage compatibility between different land uses and to protect the scale and character of existing development from the encroachment of incompatible uses;

To regulate and restrict the location and intensity of use of buildings, structures and land for trade, industry, residence, and other uses;

* * *"

{¶58} In the instance case, as previously addressed, the variances are not substantial, but are necessary to preserve the essential character of the neighborhood. The height variance, which exceeds the zoning requirement by ten feet, allows Southwick to construct one taller building adjacent to neighboring apartment

buildings on North Moreland, thereby allowing the scaling down in height from the taller apartment buildings on North Moreland to the smaller single-family residences on Warwick Road.

{¶59} Similarly, the temporary tree-protection fences also are not substantial, are only temporary, and are necessary to protect mature oak trees on the Property. Although the setback variances reduce the setback requirements from 100 to 35 feet for the building setback along South Park Boulevard, evidence was presented that this variance is consistent with townhouses and is thus more appropriate for the character and use of multi-family dwellings than the original setback requirements. The setback variance also allows a larger setback than required on Warwick Road to prevent the project from feeling bulky and imposing on surrounding neighbors on Warwick Road. Southwick compensated for the reduced setbacks for the two patio walls on South Park with plans for additional landscaping as a buffer. Thus, the variances not only comply with the purpose and intent of the zoning code but are actually necessary to preserve the character of the neighborhood.

Further, Morrison testified at the May 7 hearing that the development will not injure the surrounding property but will

actually raise the neighboring property values. Although appellants contend the landscaping plan is inadequate because the six mature oak trees on the property will not survive, several individuals testified at the May 7 hearing that the trees would be unaffected by the construction. The landscaping plan also included a buffer between the townhouses and appellant Dyke's property consisting of dense vegetation and nine additional evergreen trees.

Finally, while appellants claim that the density provided in the site plan is excessive, the site plan actually provides for a lower density than allowed under multi-family zoning. Based on the square footage of the Property, the City's zoning code allows for approximately 52 two-bedroom units, a much higher density than the 16 units proposed by Southwick's plan. Therefore, the variances and site plan comply with the purpose and intent of the Shaker Heights zoning ordinances.

{¶60} Accordingly, the tenth assignment of error is overruled.

Individual Assignments of Error

{¶61} In their eleventh assignment of error, appellants argue the trial court committed reversible error when it failed to

separately address each assignment of error in writing as required by App.R. 12(A)(1)(c). We disagree.

{¶62} App.R. 12(A) requires a court of appeals to decide each assignment of error except for those assignments of error made moot by the appellate court's resolution of another. Although appellants correctly state the substance of this rule, they incorrectly argue that App.R. 12 applies to the common pleas courts in administrative appeals under R.C. 2506.04.

{¶63} In *Schira v. Stow* (1990), 69 Ohio App.3d 841, 843-44, 591 N.E.2d 1321, the Ninth District Court of Appeals held that a common pleas court is not required to separately address each assignment of error raised in an administrative appeal brought pursuant to R.C. Chapter 2506:

"Under R.C. 2506.01, the decisions of the commission may be reviewed by the courts of common pleas 'as provided by Chapter 2505 of the Revised Code, except as modified by this chapter * * * .'"

{¶64} (Emphasis added). R.C. Chapter 2505 permits the application of some of the Rules of Appellate Procedure in administrative appeals. However, R.C. Chapter 2505 is modified by R.C. 2506.04, the statute under which the common pleas court

reviewed the BZA's decision. Under R.C. 2506.04, a common pleas court may:

"* * * find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court."

{¶65} This statute requires only that the common pleas court review the commission's decision to determine whether it was supported by the preponderance of substantial, reliable, and probative evidence. The statute does not require that the court address all assignments of error. See, also, *In re Annexation of 1,544.61 Acres* (1984), 14 Ohio App.3d 231, 235, 470 N.E.2d 486; *Barker v. Kattelman* (1993), 92 Ohio App. 3d 56, 68, 634 N.E.2d 241.

Thus, the trial court was not required to address each of the assignments of error in this appeal of an administrative decision.

{¶66} Accordingly, the eleventh assignment of error is overruled.

{¶67} The judgment is affirmed.

Judgment affirmed.

PATRICIA ANN BLACKMON, P.J., and TIMOTHY E. McMONAGLE, J.,
concur.

It is ordered that appellees recover of appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).