[Cite as *Jones v. Cleveland*, 2007-Ohio-270.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87957

MATTHEW JONES

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND HEIGHTS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-548096

BEFORE: Blackmon, J., Calabrese, P. J., and Kilbane, J.

RELEASED: January 25, 2007

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Matthew Jones appeals the trial court's decision affirming the City of Cleveland Heights Board of Zoning Appeals' denial of his request for a variance. Jones assigns the following error for our review:

> **"I. The trial court erred in affirming the Board of Zoning Appeals' denial of Matthew Jones' variance application."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On September 7, 2004, Jones filed an application with the City of Cleveland Heights Board of Zoning Appeals ("Board") seeking a variance of Zoning Code 1121.12(a)(8). The variance would permit Jones to widen his existing driveway without providing the required three-feet setback from the side lot property line. On October 20, 2004, the Board conducted a public hearing on Jones' application.

{¶ 4} At the hearing, Jones testified the primary reason for requesting the variance was to assist in the care of his ailing and elderly mother-in-law. Jones explained that after he and his wife became primary care-givers of his mother-in-law, they constructed a suite at the back of their house, which opens onto a paved patio. Jones stated that during construction of the suite, he extended the existing driveway to connect it to the patio. Jones stated he wanted to widen the extended portion of the driveway by three feet to enable a vehicle to drive to the back of the house.

{¶ 5} Jones stated that if the Board granted the variance, it would make it easier to load and unload his wheelchair-bound mother-in-law in and out of the van.

Jones stated that without the variance, his mother-in-law would be forced to utilize a walker and walk to the end of the driveway to enter the van.

{¶ 6} In a unanimous decision, the Board denied Jones' application for a variance. Jones then filed an appeal of the Board's ruling to the Cuyahoga County Common Pleas Court pursuant to R.C. 2506. On March 7, 2006, the trial court affirmed the Board's decision denying Jones' request.

Error Assigned

{¶ 7} In his sole assigned error, Jones asserts that the trial court erred in affirming the zoning board's denial of his requested variance. At the core of Jones' argument is his belief that he established that practical difficulties existed that would support the approval of his application for a variance. Although he couches his argument as a question of law, in essence he asks this court to review the facts, weigh the evidence, and rule in his favor.

{¶ 8} We have on many occasions, and most recently, set forth the role of an appellate court in administrative proceedings and our review of the trial court's decisions.[1] In *1476 Davenport Ltd. P'ship v. City of Cleveland, Bd. of Zoning*, this court recognized that the Ohio Supreme Court reaffirmed *Kisil v. Sandusky*[2] in *Henley v. City of Youngstown Bd. of Zoning Appeals*.[3] Both cases defined the

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[1]Cuyahoga App. No. 85872, 2005-Ohio-3731.

[2](1984), 12 Ohio St.3d 301.

[3](2000), 90 Ohio St.3d 142.

respective roles of the trial court and this court when an administrative appeal is taken. We again reiterate that our role is to determine whether the trial court made any errors as a matter of law; in essence, did the trial court fulfill its duty.

{¶ 9} In his brief, Jones points out that this appeal is brought under R.C. 2506, and he cites to these supreme court rulings and recognizes that the trial court's role is to examine the evidence and substitute its judgment when the Board's ruling is not supported by the preponderance of the reliable, probative, substantial evidence.[4]

{¶ 10} Nothing exists in the record to suggest that the trial court did not fulfill its duty. The trial court had before it Jones' explanation of why he needed the variance as well as his expert's testimony that a six inch curb along the property line existed to divert water drainage to the back of the property. The record also contained Board member Zynch's testimony:

> **"The concern I have is going back to drainage, and it would happen under both solutions, either the three foot, two foot, or the one foot solution, is that while I understand that the lip curb will be there, we are sacrificing - I haven't done the calculation - but a fair amount of square footage of what would be ground capable of absorbing water that is going to be lost. Even though the curb may keep the water on the driveway in it, if we do the two feet and the step you could have a potential opening where you could have the water draining there. Its just a concern knowing the state of basements in Cleveland Heights and a house of that age, my concern is that there is precious little ground that will be left to absorb water that is falling***"[5]**

[4]Id.

[5]Tr. at 9.

{¶ 11} Jones does not argue that the zoning setback restriction is unconstitutional. He argues that he has practical difficulties in meeting the requirements of the city's ordinance and needs an area variance.

{¶ 12} The trial court is required by *Duncan v. Middlefield*[6] to assess the facts in light of the following factors to determine whether Jones has encountered practical difficulties in the use of his property:

> **"(1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance."[7]**

{¶ 13} The record indicates that the trial court followed *Duncan*'s mandate. Furthermore, in *Duncan***,** the Ohio Supreme Court recognized that when an area variance is sought, the property owner has a duty to show that the application of an

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[6](1986), 23 Ohio St.3d 83.

[7]*Wolstein v. City of Pepper Pike City Council,* 156 Ohio App.3d 20, 2004-Ohio-361, quoting *Duncan v. Middlefield*, supra.

area zoning requirement to his property is inequitable.[8] Jones failed to meet that burden. In fact, the Board determined that Jones could eliminate his situation in a code-compliant way. The record indicates that the existing driveway including the extension is eight feet wide. The record also indicates that a bay window protrudes approximately a foot and a half from the house, which makes the driveway too narrow for Jones' vehicle to travel back to the suite. The Board determined that replacing the bay window would be a viable alternative to the proposed widening of the driveway extension.

{¶ 14} Consequently, we conclude that the trial court fulfilled its duty and did not abuse its discretion when it failed to find that Jones had practical difficulties that would allow him an area variance. We find no errors as a matter of law.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Common Pleas Court 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.

PATRICIA ANN BLACKMON, JUDGE

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[8] *Duncan* at 86.

ANTHONY O. CALABRESE, JR., P. J., and
MARY EILEEN KILBANE, J., CONCUR