[Cite as *Phillips v. Westlake Bd. of Zoning Appeals*, 2009-Ohio-2489.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92051

ROBERT PHILLIPS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF WESTLAKE BOARD OF ZONING APPEALS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-637949

BEFORE: Boyle, J., Gallagher, P.J., and Stewart, J.

RELEASED: May 28, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Plaintiffs-appellants, Robert and Karen Gallagher Phillips, appeal from a judgment of the Cuyahoga County Court of Common Pleas that upheld a decision of the Westlake Board of Zoning Appeals ("BZA") granting a variance to West Ridge Homeowners' Association ("WRHA"). Finding no merit to the appeal, we affirm.

Facts and Procedural History

{¶ 2} On June 8, 2007, WRHA requested a building permit from the city of Westlake to install a fence along both sides of an access way to West Ridge Park, located at 26580 Gershwin Drive, Westlake, Ohio. WRHA's property is shaped like a flag on a pole, encompassing the access way and West Ridge Park. West Ridge Park sits behind the Phillipses' property, located at 26600 Gershwin Drive. The Phillipses' property is one of two properties that abut the access way. WRHA sought the building permit after it voted to replace an old split-rail fence that was previously there. It wanted to replace the old fence because the fence was in disrepair; WRHA had safety concerns because of the access way's close proximity to adjacent driveways and its use to access the park; WRHA wanted to prevent children from cutting through adjacent neighbors' yards to get to the park; and a taller fence would provide more privacy to adjacent owners.

{¶ 3} In their application to the city, WRHA proposed to build "a 50 ft. long three ft. high fence from the street right-of-way at variance with 1211.04(b)(1)," which they stated was a "6 inch variance on the height restriction." They further requested

"relief from the thirty-five foot right-of-way restriction." If this had been a public access way, owned by the city of Westlake and not the WRHA, the setback variance would have been permitted under the zoning regulations.

{¶ 4} The Westlake Building Department denied the request on June 20, 2007 because it found that WRHA needed to obtain BZA approval to build the fence as requested. The Building Department determined that according to current zoning rules, fences should not be "constructed within 35 feet from the public right of way," and "[f]ront yard fences may have a maximum height of 2.5 feet in height."

{¶ 5} On July 3, 2007, WRHA filed an application with the BZA for a variance. In the application, it requested "[t]o install a white vinyl picket fence on both side [sic] of the public walkway to West Ridge Park starting 1.5 feet from the sidewalk at a height of 36 inches for 50 feet then increasing to a scalloped fence varying from 48 to 42 inches in height for the next 118 feet ending at the existing chain link fence around the park."

{¶ 6} The BZA held two hearings on WRHA's variance application, on July 31, and August 28, 2007. The following testimony was presented.

{¶ 7} Gary Jancik, president of WRHA, testified that the fence replacement was part of an overall improvement plan. As part of the improvement plan, the WRHA built a pool, a restroom, and a "pump room utility building" in West Ridge Park. WRHA had already removed the old fence and repaved the access way because the previous asphalt had been deteriorating. And it replaced the gate at the

end of the access way, so that it could lock to prevent people from driving their vehicles down the access way to get to the park. WRHA only opens the gate for emergency vehicles or the pool-supplies delivery truck. There is still an entrance for pedestrians to get to the park.

{¶ 8} Jancik further explained that the WRHA was requesting the setback variance to allow the fence to come within one and a half feet from the sidewalk for safety reasons. He said that the old fence also "went all the way to the sidewalk." After the old fence was removed, he received many complaints from homeowners that children were cutting across their driveways to access the park faster and that one neighboring homeowner had told him that she almost hit a child who cut across her driveway as she was backing out of it. Thus, WRHA's main concern in putting up the new fence was safety.

{¶ 9} Gus Moist, who is on the WRHA board of trustees, explained that the access way was originally created before any houses were built. Its intended use was a walkway to access the park, not a driveway. He stated that the old chain-linked gate was built in the late 60's or early 70's, and they "couldn't get the thing opened and closed, and so we didn't have control over people [driving] back there."

{¶ 10} Moist further testified that the association circulated a petition to the homeowners regarding the variance request. The petition stated, "[t]he undersigned homeowners in the West Ridge Estates Subdivision, Westlake, Ohio, request that the [BZA] grant the variance request *** to permit the erection of a fence along each

side of the access to West Ridge Park as submitted in the permit application." Moist said that, out of 156 homes in the neighborhood, they obtained 146 signatures from 90 households in one weekend. Only one neighbor refused to sign the petition because of a "conflict of interest," but his wife signed. The other neighbors were not at home. He said, "[e]veryone else signed; everyone was totally in favor of it."

{¶ 11} Bill Nest testified that he lives on the other side of the access way. He explained that children were constantly riding their bikes through his yard to get to the park. He kept insisting to the association to replace the old fence. He was worried about his wife backing out of the garage and not seeing a child coming "from the corner of [their] house." He said that he was glad that they built the new fence all the way out to the sidewalk, like the old fence.

{¶ 12} Bill Huffman, Assistant Law Director for the city of Westlake, gave his legal opinion to the BZA regarding the walkway. He said that the access way was not dedicated, so it was not public. It was a flagpole-shaped piece of property that was privately owned. He said that the access way was considered frontage property and, thus, subject to the 35-foot setback regulation and a 30-inch height restriction all the way back to the chain-linked fence. He explained that beginning at 50 feet from the right-of-way (the building line), the adjacent homeowners could build a 6-foot fence because that would be their side yards, not their front yard (side and rear fences were permitted to have a height of six feet).

{¶ 13} The Phillipses' attorney argued that out of the 146 people who signed the petition, none of their properties abutted the access way. He maintained that the access way was a driveway, not a walkway, stating that even the park's pool rules refer to it as a driveway. He said that the Phillipses were "prepared to suffer a slightly taller fence in the back if the front 35 feet back from the right-of-way were to be removed." The Phillipses confirmed this statement.

{¶ 14} After considering testimony from twelve witnesses (not all recited here), documentary evidence, and correspondence from the Phillipses and their attorney, the BZA granted WRHA's request for a variance, calling it a "use variance."[1] In its final order granting the variance, the BZA made the following findings of fact:

{¶ 15} "1. Applicant's property line is located on the juncture of Beethoven and Gershwin Drive;

{¶ 16} "2. Applicant's property line is a flagpole shaped lot that is owned by the homeowner's association;

{¶ 17} "3. Applicant wishes to build a fence along both sides of this narrow lot from the street to the back of the adjacent properties;

{¶ 18} "4. Under the code these lines would be considered front yard to the association property and therefore they are permitted to erect a 30" fence no closer than 35' from the planned right-of-way;

[1]WRHA did not request a "use variance." It merely requested a "variance."

{¶ 19} “5. The width of the lot at the right-of-way is approximately 20' wide and is used for access to the recreation area;

{¶ 20} “6. Driveways of both adjacent property [sic] are within 3' of the walkway;

{¶ 21} “7. The adjacent properties would be permitted to erect a 6' fence from their building line back to the rear of their property;

{¶ 22} “8. Applicant stated that hardship is that the neighbor could erect a 6' fence on the same line whereas they are only permitted to erect a 30" fence;

{¶ 23} “9. Applicant stated that there are safety concerns and that this is a unique situation due to the close proximity of the adjacent driveways and the utilization of the strip for access to the recreation area;

{¶ 24} “10. Applicant stated that a former fence had been in place all the way to the sidewalk right-of-way;

{¶ 25} “11. Applicant stated that this is necessary to protect children and adults from cars backing out of the driveways and children cutting across lawns;

{¶ 26} “12. Board finds that applicant has presented a practical difficulty or unnecessary hardship due to the unique shape of the lot being a flagpole shape lot, that the adjacent neighbors would be able to erect a larger fence along the rear portion of this property line and without a variance the association would not be able to along the same line, that due to the placement of this lot on the bend of the street, there is a safety concern, that the granting of an 18" variance to the height of the

fence from the building line of the adjacent properties to the rear property line of the adjacent properties and the granting of a variance to erect a 30" fence from the building line of the adjacent properties forward within 1½_ of the planned right-of-way is granted and is not a detriment to the neighborhood and is in keeping with the spirit, letter and intent of the codes of the city of Westlake."

{¶ 27} The BZA conditioned its granting the variance on the following:

{¶ 28} "That a fence height of 48" maximum be allowed including posts from the cyclone fence (gate) up to 50' from the right-of-way setback and from the 50' setback a 30" fence is allowed up to 1½_ feet from the planned right-of-way – the 30" height maximum is including fence posts."

{¶ 29} The Phillipses appealed the BZA decision to the Cuyahoga County Court of Common Pleas, which upheld the BZA decision. The trial court found that the BZA decision was not unconstitutional, illegal, arbitrary, capricious, or unreasonable, and further found that it was supported by substantial, reliable, and probative evidence. The trial court also modified the BZA final order "to clarify the variance as an area variance," not a "use variance."

{¶ 30} It is from this judgment that the Phillipses appeal, raising two assignments of error for our review:

{¶ 31} "[1.] The trial court erred in affirming the decision of the BZA when it modified the BZA's decision and reclassified the type of variance granted.

{¶ 32} "[2.] The decision of the trial court was not supported by a preponderance of reliable, probative and substantial evidence."

Standard of Review

{¶ 33} "A zoning board or planning commission which is given the power to grant variances is vested with a wide discretion with which the courts will not interfere unless that discretion is abused." *Schomaeker v. First Natl. Bank of Ottowa* (1981), 66 Ohio St.2d 304, 309. Whether extraordinary circumstances exist to justify the issuance of a variance is a question of fact to be determined by the zoning board or commission. Id.

{¶ 34} In *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 2000-Ohio-493, the Ohio Supreme Court distinguished the standard of review to be applied by common pleas courts and appellate courts in R.C. Chapter 2506 administrative appeals. The Court stated:

{¶ 35} "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. ***

{¶ 36} "The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is 'more limited in scope.' *Kisil v. Sandusky* (1984), 12 Ohio

St.3d 30, 34. '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. '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.' *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261." *Henley* at 147.

Trial Court's Modification of BZA Final Order

{¶ 37} In their first assignment of error, the Phillipses maintain that the trial court erred when it modified the BZA final order to clarify that the WRHA sought, and the BZA granted, an area variance, not a use variance.

{¶ 38} R.C. 2506.04 explicitly permits a trial court to modify a final administrative order. It provides in pertinent part that "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." Id. Therefore, if we

conclude that the trial court had sufficient evidence before it to modify the BZA order (finding that the relief requested was an area variance, not a use variance), then the trial court did not err when it modified the order.

{¶ 39} "A use variance permits land uses for purposes other than those permitted in the district as prescribed in the relevant regulation. An example of a use variance is a commercial use in a residential district. Area variances do not involve uses, but rather structural or lot restrictions. An example of an area variance is relaxation of setback lines or height restrictions. See 82 American Jurisprudence 2d 792-793, Zoning and Planning, Section 256." *Schomaeker*, supra, at 306-307.

{¶ 40} Here, WRHA sought a variance in the setback and height of the fence. Thus, it clearly sought an area variance (it further concedes that it sought an area variance). Therefore, the trial court did not err when it modified the BZA final order to clarify that the BZA actually granted an area variance, not a use variance.

{¶ 41} The Phillipses' first assignment of error is overruled.

Granting a Variance

{¶ 42} In their second assignment of error, the Phillipses maintain that the trial court's decision was not supported by a preponderance of reliable, probative, and substantial evidence. They argue that since the BZA "applied the wrong legal standard in granting the Applicant's [use] variance requests," they claim that "there was little or no evidence presented to the BZA to support the granting of an area

variance." After a thorough review of the applicable law and record on appeal, we disagree.

A. *Duncan v. Middlefield*

{¶ 43} The standard for granting an area variance requires the applicant to demonstrate "practical difficulties," i.e., "the property owner is required to show that the application of an area zoning requirement to his property is inequitable." *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 86, citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, syllabus ("The standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use. An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties").

{¶ 44} The Ohio Supreme Court explained "practical difficulties" in *Duncan*. It stated:

{¶ 45} "While existing definitions of 'practical difficulties' are often nebulous, it can safely be said that 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. The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable. The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of practical difficulties. A property owner is not denied the opportunity

to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions. *Kisil*, supra, at 33; cf. *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238." *Duncan* at 86.

{¶ 46} The high court further explained:

{¶ 47} "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 owners' 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. See, generally, 3 Anderson, American Law of Zoning (2 Ed. 1977), Variances, Section 18.47 et seq.; *Wachsberger v. Michalis* (1959), 19 Misc.2d 909." Id.

B. Westlake Codified Ordinances ("WCO")

{¶ 48} Chapter 1233 sets forth "Powers and Duties" of the BZA. WCO 1233.04(a) provides that the BZA has the power to hear appeals and grant variances. WCO 1233.04(d) states that "[w]here there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter" of the zoning code, the BZA has the power to "vary or modify" such provisions "so that the public health, safety, morals and general welfare may be secured and substantial justice done."

WCO 1203.03(u) defines variance as "a deviation from the requirements of this Zoning Code granted by the Board of Zoning Appeals in cases of practical difficulty or unnecessary hardship under the provisions of and as limited by Chapter 1233." Chapter 1233 then sets forth the standards the BZA must use to determine if a variance amounts to either a practical difficulty or unnecessary hardship.

{¶ 49} The BZA power is limited to granting a variance "to specific cases where the following conditions exist:

{¶ 50} "(1) The practical difficulty or unnecessary hardship is inherent in and is peculiar to the premises sought to be built upon or used because of the size, shape, or other characteristics of such premises or adjoining premises which differentiate such premises sought to be used from other premises in the same district and as to such premises sought to be built upon or used will create a difficulty or hardship caused by a strict application of the provisions of this Zoning Code not generally shared by other lands or structures in the same district;

{¶ 51} "(2) Refusal of the variance or modification appealed for will deprive the owner of the premises sought to be built upon or used of substantial property rights; and

{¶ 52} "(3) Granting the variance or modification appealed for will not be contrary to the purpose and intent of the provisions of this Zoning Code." WCO 1233.04(d).

{¶ 53} The BZA shall make a finding on each of such three conditions as they apply in each specific case as a prerequisite for granting the variance. WCO 1233.04(e).

{¶ 54} After reviewing the Westlake zoning regulations, we find that they "comply with 'the essential spirit' of the *Duncan* factors, even though they are not identical to the criteria outlined in *Duncan*." See *Stickelman v. Bd. of Zoning Appeals*, 148 Ohio App.3d 190, 2002-Ohio-2785, _55 (analyzing a zoning ordinance that was similar to Westlake's).[2] We further find that this criteria expands upon the

[2]In *Stickelman*, the zoning regulation's "standards for granting variances" provided:

"Variances may be granted provided that such uses shall be found to comply with the following standards:

"A. Because of the particular physical surroundings, shape, or topographical conditions of the specific property involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience if the strict letter of this zoning ordinance were to be carried out.

"B. The conditions upon which the application for variance is based are unique to the property for which the variance is sought, and are not applicable generally, to other property in the same zoning district.

"C. The purpose of the variance is not based exclusively upon a desire to increase financial gain.

"D. The alleged difficulty or hardship is caused by strict interpretation of this zoning

Duncan factors, which is also permitted. See *Disanto Ent., Inc. v. Olmsted Twp.*, 8th Dist. No. 90728, 2008-Ohio-6949.

{¶ 55} We agree with the Second Appellate District's reasoning in *Stickelman*:

{¶ 56} "The Ohio Supreme Court did not say in *Duncan* that all factors would be present in every case. In fact, the court did not even discuss whether the variance in *Duncan* would adversely affect the delivery of government services. See, generally, 23 Ohio St.3d 84. Moreover, *Duncan* stressed that 'no single factor controls in a determination of practical difficulties,' and that the factors should be 'considered and weighed.' Id. at 86. Consequently, a variance may be denied even if some factors weigh in favor of a landowner, or are inconclusive." Id. at _32.

Analysis

{¶ 57} The Phillipses maintain that the BZA erred because it did not consider the *Duncan* factors, which they claim "must be considered" when determining if practical difficulties exist regarding an application for area variance request. They set forth arguments regarding each factor.

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resolution and has not been caused by any persons presently having an interest in the property.

"E. The granting of the variance will not be detrimental to the public welfare or injurious to other property and improvements in the neighborhood in which the property is located.

"F. The proposed variance will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood."

{¶ 58} We disagree, however, that the BZA must consider every *Duncan* factor. See *Winfield v. Painesville*, 11th Dist. No. 2004-L-053, 2005-Ohio-3778, _27-28. The *Duncan* factors consist of a list of seven, non-exclusive factors; not mandatory ones. *Carrolls Corp., d.b.a. Burger King Rest. v. Bd. of Zoning Appeals*, 11th Dist. No. 2005-L-110, 2006-Ohio-3411, _12, fn. 2. The Ohio Supreme Court emphasized that "no single factor controls in a determination of practical difficulties." *Duncan* at 86. The "key to this standard" is whether the area zoning required is reasonable. Id.

{¶ 59} As it pertains to *Duncan*, this court has also held that "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." *Dyke v. Shaker Heights*, 8th Dist. No. 83010, 2004-Ohio-514, _30. In the case sub judice, the trial court determined that the BZA decision was supported by substantial, reliable, and probative evidence. Based on our limited review, we cannot find that the trial court abused its discretion in doing so.

{¶ 60} Although the BZA did not discuss every *Duncan* factor, nor did it mention *Duncan* explicitly, it did apply each of the necessary factors set forth in WCO 1233.04(d) which, as we stated, incorporated and expanded upon the *Duncan* factors. In addition, the BZA made findings as to each factor under WCO 1233.04(d), which it was required to do under WCO 1233.04(e).

{¶ 61} Specifically, the BZA found that WRHA demonstrated practical difficulties *and* unnecessary hardship due to its unique flag-shaped property. It determined that the adjacent property owners could build a much higher fence than the WRHA at 50 feet back (the building line) because it would be side yardage for them. The BZA further found that safety concerns (due to children cutting across lawns to use the access way) justified granting the setback variance "due to the close proximity of the adjacent driveways and the utilization of the strip for access to the recreation area." Finally, the BZA determined that the proposed variances were not a detriment to the neighborhood and were within the spirit, letter, and intent of the Westlake zoning codes.

{¶ 62} "A zoning board of appeals or a reviewing court necessarily must weigh the competing interests of the property owner and the community." *Duncan*, supra, at 86. In addition, it is the "'spirit' rather than the 'strict letter' of [a] zoning ordinance [that] should be observed so that 'substantial justice [is] done.'" Id; *Dyke*, supra, at _30.

{¶ 63} Here, the BZA found that the community interests (except for the Phillipses), and the property owner's interests (WRHA's interests and the remaining home owners' interests) were the same. The Phillipses' interests, however, were outweighed by the overwhelming interests of the community. Moreover, the BZA found that the variance fell within the spirt of Westlake's zoning code, which states

that the "purpose and intent" is, in part, "to promote and protect the public health, safety, convenience, comfort and prosperity and the general welfare of the City."

{¶ 64} The Phillipses' second assignment of error is overruled.

{¶ 65} Accordingly, the judgment of the trial court is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR