**[Cite as *Young v. Avon Lake*, 2010-Ohio-2943.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF LORAIN | ) | |

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| DR. ROBERT YOUNG | C. A. No. 09CA009665 |
| Appellant | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| AVON LAKE, OHIO (CITY OF) | COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO |
| Appellee | CASE No. 08CV158746 |

DECISION AND JOURNAL ENTRY

Dated: June 28, 2010

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Per Curiam.

**{¶1}** Appellants Dr. Robert Young and Kimberly Young appeal from the decision of the Lorain County Court of Common Pleas affirming the decision of the Avon Lake Zoning Board of Appeals ("Zoning Board") which denied the Youngs' request for a variance. For reasons set forth below, we affirm.

I.

**{¶2}** The Youngs desired to erect a fence in their front yard that was forty-eight inches at its highest points; however, the applicable City Planning and Zoning Code ("Zoning Code") section only permitted fences up to thirty-six inches high. The Avon Lake Zoning Administrator denied the Youngs' request for a zoning permit as it did not meet the standards of the Zoning Code. The Youngs appealed to the Zoning Board and sought an area variance. All five of the Zoning Board members heard the Youngs' request at a meeting on August 26, 2008. The Zoning Board denied the request for a variance by a vote of three to two. The Zoning Board

issued written conclusions of fact which detailed the Zoning Board's findings relative to the ten factors it considered in determining that an area variance was not warranted.

**{¶3}** The Youngs appealed the Zoning Board's decision to the Lorain County Court of Common Pleas pursuant to Chapter 2506 of the Ohio Revised Code on the basis that the Zoning Code was strictly enforced upon them when it was not enforced on others. The Youngs did not challenge whether the Zoning Board correctly applied the factors set forth in Section 1217.07(b)(1) of the Avon Lake Codified Ordinances. In support of their position, the Youngs asserted the following as assignments of error in the lower court: (1) the Zoning Board "violated the Equal Protection Clause * * * by denying their application for a zoning vari[a]nce * * * and intending to enforce the law specifically against them[;]" (2) the Zoning Board "abused its discretion by its arbitrary and capr[i]cious application of the [Zoning Code] * * * and in its disregard to the authority granted" to it[;] and (3) "the order of the [Zoning] Board is de facto arbitrary and capricious given that the [Zoning] Board was informed of the many fences existing in Avon Lake [that] do not conform with height zoning requirements and are without [Zoning] Board approval and that the [Zoning] Board has taken no actions to enforce the Zoning Code as it applies to fences, but denied Dr. and Mrs. Young of their variance for an identical use and impact upon the community." The court of common pleas interpreted the latter argument as one of selective enforcement. The trial court addressed the Equal Protection and selective enforcement arguments and ruled that the denial of the variance was not arbitrary, capricious, or unreasonable. On appeal to this Court, the Youngs again argue that the Zoning Code should not be strictly enforced against them when it has not been enforced against others.

II.

ASSIGNMENT OF ERROR I

> "The Court of Common Pleas of Lorain County erred and abused its discretion to the prejudice of the Appellants, by ignoring the overwhelming evidence that the Zoning Board of Appeals of Avon Lake, Ohio permitted the arbitrary, capricious and unreasonable application of the zoning law by denying an application for a fence by the Appellants in the face of numerous properties with similar circumstances with fences erected after the passage of the city height ordinance, where the property owners did not apply for a variance prior to erecting the fence."

**{¶4}** With respect to the review of administrative appeals such as this one, the Supreme Court of Ohio has held that when

> "[c]onstruing the language of R.C. 2506.04, we have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the whole record, including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." (Internal quotations and citations omitted.) *Henley v. City of Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147.

"An appeal to the court of appeals, pursuant to R.C. 2506.04, is more limited in scope and requires that court to 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." *Kisil v. City of 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. 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." (Internal quotations and citations omitted.) *Henley*, 90 Ohio St.3d at 147.

"Accordingly, an appellate court's review examines whether the trial court abused its discretion." *Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 9th Dist. No. 24471, 2009-Ohio-2557, at ¶31.

**{¶5}** In their appellate brief to this Court, the Youngs specifically assert that the trial court abused its discretion in issuing the following paragraph in its judgment entry:

> "With respect to plaintiffs' argument that the zoning ordinance is being enforced selectively, the court finds that while selective enforcement of an ordinance may be asserted as a defense to a criminal prosecution for a violation of the ordinance, it is not a ground to find that the Board's denial of a variance from the ordinance is unreasonable."

The Youngs contend that they were not objecting to the selective enforcement of the Zoning Code, instead they were objecting to the "*non-enforcement* of the zoning code to a large group of people and the strict enforcement of the code upon them." (Emphasis in original.) Thus, the Youngs seem to argue that the Zoning Board should be required to grant them a variance because it has failed to prosecute individuals who are in violation of the code. Despite the Youngs' contentions to the contrary, in essence, the Youngs are making a selective enforcement argument.

> "To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometime referred to as intentional and purposeful discrimination." (Internal quotations and citations omitted.) *Rice v. Slyder* (Apr. 6, 1988), 9th Dist. No. 13324, at *2.

"A mere showing that another person similarly situated was not prosecuted is not enough; a defendant must demonstrate actual discrimination due to invidious motives or bad faith.

Intentional or purposeful discrimination will not be presumed from a showing of different treatment." (Internal quotations and citations omitted.) Id.

**{¶6}** As detailed above, this Court's review of the lower court's decision is even more limited than the lower court's own review. *Kisil*, 12 Ohio St.3d at 34. This Court must affirm the lower court unless we determine that the lower court's decision "is not supported by a preponderance of reliable, probative and substantial evidence." Id. In the instant matter, the lower court properly considered each of the arguments the Youngs raised. The court of common pleas concluded that "while selective enforcement of an ordinance may be asserted as a defense to a criminal prosecution for a violation of the ordinance, it is not a ground to find that the [Zoning] Board's denial of a variance from the ordinance is unreasonable." This statement is an accurate reflection of the law as stated in *Rice*. There was no evidence in the record that the Youngs' were prosecuted for a violation of the Zoning Code. We cannot conclude the trial court abused its discretion in denying a variance to the Youngs.

**{¶7}** The dissent asserts that in order to properly review this matter we must reverse and remand it so that the trial court can consider it in light of the factors outlined in *Duncan v. Village of Middlefield* (1986), 23 Ohio St.3d 83. It is true that in determining whether a practical difficulty exists warranting an area variance, the factors outlined in *Duncan* are to be considered. Id. at syllabus. Here, the Zoning Board did consider the relevant factors along with the additional factors codified in Avon Lake's ordinance. Notably, however, the Youngs did not contend on appeal to the court of common pleas or to this Court that the Zoning Board failed to properly apply the test set forth in *Duncan*. Thus, unlike the dissent, we cannot conclude that it was necessary for the court of common pleas' judgment entry to address the *Duncan* factors in resolving the appeal.

III.

**{¶8}** In light of the foregoing, we affirm the judgment of the Lorain County Court of Common Pleas.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

DONNA J. CARR
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

BELFANCE, P. J.
DISSENTS, SAYING:

**{¶9}** I respectfully dissent. While I acknowledge that the majority's decision correctly analyzes the arguments the Youngs raised before both this Court and the lower court, I nonetheless would conclude that the trial court committed reversible error in failing to evidence that it even *considered* the factors outlined in *Duncan v. Village of Middlefield* (1986), 23 Ohio St.3d 83.

**{¶10}** The Youngs sought an area variance. "The standard for obtaining an area variance is less rigorous than the standard for use variances. An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties." (Internal quotations and citations omitted.) *Smith v. Coventry Twp. Zoning Dept.*, 9th Dist. No. 238711, 2008-Ohio-2532, at ¶13. The Supreme Court of Ohio has held that

> "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." *Duncan*, 23 Ohio St.3d at syllabus.

**{¶11}** This Court has held that a failure by the trial court to analyze the *Duncan* factors constitutes reversible error. *Coventry Twp. Bd. of Zoning Appeals v. Barensfeld* (Aug. 12, 1992), 9th Dist. No. S15191, at *4. This makes sense because the role of this Court is more limited and is confined to reviewing the decision of the court of common pleas to determine if that decision

is supported by "a preponderance of reliable, probative and substantial evidence." *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34. Given that determination of whether an area variance is proper requires consideration of the *Duncan* factors, a failure by the court of common pleas to state a basis for its decision implicating those factors leaves this Court with no ability to appropriately review that decision. See *Barensfeld* at *4 ("Because the common pleas court failed to analyze the *Duncan* factors, we cannot determine whether reversing the board's decision was a proper determination based on any of the reasons enumerated in R.C. 2506.04."); see, also, *Hebeler v. Colerain Twp. Bd. of Zoning Appeals* (1997), 116 Ohio App.3d 182, 187-188.

**{¶12}** In the case sub judice, while the court of common pleas did determine in its judgment entry that it "is not able to find that the decision of the Avon Lake City Zoning Board of Appeal, denying plaintiffs' request for a variance is either arbitrary, capricious or unreasonable[,]" it provided no reasoning for that conclusion. Notably absent from the entry is a consideration of, or mention of, the *Duncan* factors.

**{¶13}** While I understand the majority's reasons for not requiring the lower court to consider factors that were not brought to its attention by the Youngs and were not necessary to resolve the precise arguments they raised on appeal, I would still reverse. This Court cannot determine from the lower court's entry if it appropriately reviewed the matter, rendering a meaningful review of its decision by this Court impossible. In my view, the *Duncan* factors provide a starting point for determining whether an area variance is warranted; and thus, any appeal from a ruling either granting or denying an area variance would necessarily involve consideration of the *Duncan* factors no matter what other issues were raised on appeal. Therefore, because there is no indication in the lower court's judgment entry that it considered

the factors, I would reverse its judgment and remand the matter so that the trial court could evidence that it considered the *Duncan* factors in makings its ruling.

APPEARANCES:

JAMES F. LENTZ, Attorney at Law, for Appellants.

WILLIAM J. KERNER, SR., Law Director, and MICHAEL J. SCHERACH, Assistant Law, Director, for Appellees.