[Cite as *1011 E. Aurora Rd., L.L.C. v. Bd. of Zoning & Bldg. Code Appeals*, 2024-Ohio-317.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
1011 EAST AURORA ROAD, LLC Appellee v. BOARD OF ZONING AND BUILDING CODE APPEALS, CITY OF MACEDONIA Appellants	C.A. No. 30664 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2022-04-1051

DECISION AND JOURNAL ENTRY

Dated: January 31, 2024

CARR, Judge.

{¶1} Appellants City of Macedonia and Board of Zoning and Building Code Appeals (collectively "Macedonia") appeal the decision of the Summit County Court of Common Pleas reversing the decision of the Macedonia Board of Zoning and Building Code Appeals ("the BZA"), which denied an area variance to Appellee 1011 East Aurora Road, LLC. This Court reverses.

I.

{¶2} In 2017, East Aurora purchased property at 1011 East Aurora Road in Macedonia. The property was formerly a bank and contained a four-lane drive through on the west side of the building; however, the property could no longer be used as bank due to a restriction in the deed. Subsequent to East Aurora's purchase, two-thirds of the existing building was leased out to a dental practice.

{¶3} East Aurora sought to remove the drive through lanes, enclose that area, and build an addition behind it, adding around 4,000 square feet of space. In order to do that, East Aurora wanted to create parking spaces in front of the building, near the main road. However, that area required a setback distance of 20 feet from the street right of way, which East Aurora would not be able to comply with. *See* Macedonia Codified Ordinances 1171.11(e)(2)(A). Thus, East Aurora applied for an area variance of 9 feet 4 inches.

{¶4} The matter was initially heard before the BZA in August 2021, but the matter was continued after it became clear that East Aurora was unsure who the new tenants would be.

{¶5} The matter was heard again in February 2022. At that meeting, it was noted that a neighboring business received a variance related to a similar parking setback to allow parking in front of that store. East Aurora maintained that it anticipated the expansion would be used for retail or a restaurant and that it was unable to secure tenants without having parking in front of the building. East Aurora acknowledged that the property contained the required minimum number of parking spaces but asserted that those spaces would be too far away from the proposed entrances to the expansion. The BZA ultimately voted to deny the request for a variance. East Aurora sought to have the BZA reconsider its decision, but that request was denied.

{¶6} East Aurora filed an administrative appeal to the Summit County Court of Common Pleas. Ultimately, the lower court issued a decision reversing the decision of the BZA.

{¶7} Macedonia has appealed, raising three assignments of error.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REVERSING THE DECISION OF THE BOARD OF ZONING AND BUILDING CODE APPEALS AND FINDING THAT THE BOARD ABUSED ITS DISCRETION

BY SUBSTITUTING THE TRIAL COURT'S OWN JUDGMENT FOR THAT OF THE BOARD.

ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REVERSING THE DECISION OF THE BOARD OF ZONING AND BUILDING CODE APPEALS BY CONSIDERING EVIDENCE NOT CONTAINED WITHIN THE RECORD.

{¶8} As Macedonia's first two assignments of error consist of related arguments, they will be addressed together. In the first assignment of error, Macedonia contends that the lower court erroneously substituted its judgment for that of the BZA by considering evidence not within the administrative record. In the second assignment of error, Macedonia argues that the common pleas court erred by considering evidence outside the administrative record.

{¶9} "The denial of a variance request is presumed to be valid, and the burden of showing the claimed invalidity rests upon the party contesting the determination." (Internal quotations and citations omitted.) *Redilla v. City of Avon Lake*, 9th Dist. Lorain No. 09CA009731, 09CA009735, 2010-Ohio-4653, ¶ 8.

{¶10} Pursuant to R.C. 2506.04,

> [t]he trial court's standard for reviewing an administrative appeal is whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence in the record. Then, on appeal, an appellate court conducts a more limited review. The appellate court reviews the trial court's decision only on questions of law to determine whether the lower court abused its discretion in finding that the administrative order was [or was not] supported by reliable, probative, and substantial evidence.

(Internal quotations and citations omitted.) *Boice v. Ottawa Hills*, 137 Ohio St.3d 412, 2013-Ohio-4769, ¶ 7.

{¶11} "[T]his does not mean that the court [of common pleas] may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is

'preponderance.' If a preponderance of reliable, probative and substantial evidence exists, the [c]ourt of [c]ommon [p]leas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand." *Redilla*, 2010-Ohio-4653, at ¶ 10, quoting *Dudokovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.3d 202, 207 (1979). In its review, absent certain circumstances, "the court shall be confined to the transcript filed under section 2506.02 of the Revised Code[.]" R.C. 2506.03(A).

{¶12} "An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties. Practical difficulties are encountered whenever an area zoning requirement unreasonably deprives a property owner of a permitted use of the property." (Internal quotations and citations omitted.) *Redilla* at ¶ 12.

> 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.

Id., quoting *Duncan v. Middlefield*, 23 Ohio St.3d 83, 86 (1986).

{¶13} In addition, Macedonia Codified Ordinance 1135.13(d)(1) provides that

> [t]he following factors shall be considered and weighed by the Board to determine practical difficulty:
>
> A. Whether special conditions and circumstances exist which are peculiar to the land or structure involved and which are not applicable generally to other lands or structures in the same zoning district. Examples of such special conditions or circumstances are exceptional irregularity; narrowness, shallowness or steepness

of the lot; or proximity to non-conforming and inharmonious uses, structures or conditions.

B. Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;

C. Whether the variance is substantial and is the minimum necessary to make possible the reasonable use of the land or structures;

D. Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer substantial detriment as a result of the variance;

E. Whether the variance would adversely affect the delivery of governmental services such as water, sewer, trash pickup;

F. Whether the property owner purchased the property with knowledge of the zoning restrictions;

G. Whether special conditions or circumstances exist as a result of actions of the owner;

H. Whether the property owner's predicament feasibly can be achieved through some method other than a variance;

I. Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance;

J. Whether the granting of the variance requested will confer on the applicant any special privilege that is denied by this regulation to other lands, structures, or buildings in the same district; and

K. Whether a literal interpretation of the provisions of this Code would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Code.

{¶14} Here, we agree with Macedonia that the court of common pleas abused its discretion by substituting its judgment for that of the BZA. The lower court's decision evidences that it considered facts that were not part of the administrative record and relied heavily on those facts in independently analyzing the relevant factors. *See Redilla* at ¶ 14, quoting *Dudokovich* at 207 ("[T]he trial court appears to have reviewed the *Duncan* factors independently and substituted

its judgment for that of the [Board]; instead, it should review the Board's decision and determine whether it is supported by a 'preponderance of reliable, probative and substantial evidence[.]'").

{¶15} In its analysis of the first *Duncan* factor, the trial court stated that "East Aurora did not seek a variance before purchasing the property, but, in 2018 did seek and obtain approval to build the same site plan without obtaining a variance. * * * Because East Aurora did not commence the project within one year, the 2018 permit to build expired. When East Aurora submitted its plans again in 2021, East Aurora was required to seek a variance." These facts appear to have come from East Aurora's appellate brief in the lower court, and while East Aurora references pages in the transcript to support its assertions, the pages in the transcript do not contain the details that East Aurora relayed in its brief. The statements in the transcript are somewhat confusing and unclear and it is difficult to say that the statements in the transcript would lead someone to draw the conclusions made in East Aurora's brief to the lower court.

{¶16} However, of more concern to this Court, is the lower court's conclusion that "[t]he aerial view of 1011 East Aurora and nearby properties reveal most of the properties have variances to the 20[-]foot setback requirement. The properties on the same side of the street as 1011 East Aurora all appear to have set back variances." The lower court then listed seven parcel numbers in a footnote it believed received variances. While there is an aerial map in the administrative record it does not indicate which properties received setback variances. Although it might be possible to examine the aerial map and determine which properties appear to not comply with above mentioned section of the zoning code, the record does not disclose whether all those properties would be required to comply with that section. For instance, some of those properties could have been subject to grandfather clauses. *See Workman v. Franklin Cty. Dist. Bd. of Health*, 10th Dist. Franklin No. 00AP-905, 2001 WL 290168, *6 (Mar. 27, 2001) (discussing grandfather

clauses). Only one of the seven parcels is described in the transcript of the BZA hearing as having received a variance. While East Aurora's counsel discussed the possibility that other parcels had received variances or were otherwise in noncompliance, there was no definitive evidence presented establishing the status of all the parcels mentioned by the lower court. Despite this lack of evidence, the court of common pleas relied on this problematic factual conclusion in its analysis of multiple different factors before ultimately concluding that the order of the BZA should be reversed.

{¶17} Given the foregoing, it is clear that the court of common pleas' decision reversing the order of the BZA is based upon facts that are not contained within the administrative record in contravention of R.C. 2506.03(A). Macedonia's first and second assignments of error are sustained, and the matter is remanded to the lower court for it to consider the matter under the appropriate standard using the evidence authorized by R.C. 2506.03(A). *See Redilla*, 2010-Ohio-4653, at ¶ 14.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO FULLY AND PROPERLY CONSIDER THE *DUNCAN* FACTORS AS REQUIRED BY LAW.

{¶18} Macedonia asserts in its third assignment of error that the lower court erred in failing to fully consider the appropriate factors. Given our resolution of the first two assignments of error, this assignment of error has been rendered moot, and we decline to address it. *See* App.R. 12(A)(1)(c).

III.

{¶19} Macedonia's first and second assignments of error are sustained. The third assignment of error is moot. The judgment of the Summit County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

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 Summit, 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(C). 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

HENSAL, P. J.
STEVENSON, J.
CONCUR.

APPEARANCES:

MARK V. GUIDETTI, Director of Law, for Appellants.

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