IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

JACK R. BEATTIE and ERNESTINE BEATTIE,

Petitioners,

CASE NO.: 2009-CA-08597-O

v.

WRIT NO.: 09-05

CITY OF WINTER PARK, A Florida Municipal Corporation,

Respondent.

On a Petition for a Writ of Certiorari
from the Zoning Board of Adjustment,
City of Winter Park

Darren J. Elkind. Esquire
for Petitioners

James Edward Cheek III, Esquire
For Respondent

Before O'Kane, Thorpe and Grincewicz, JJ.

PER CURIAM

FINAL ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI

This is a zoning case.

Jack R. Beattie and Ernestine Beattie ("Petitioners" or "Beatties") seek certiorari review of the decision of the zoning board ("Board") of the respondent, City of Winter Park ("Respondent" or "City") denying their application for a hardship variance. At the Court's direction, the Beatties filed an Amended Petition ("Petition"). This Court has jurisdiction pursuant to sections 322.2615 and

322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument and deny the Petition.

FACTS

The Beatties purchased a vacant lot (the "Property") in the R-1AAA residential zone in Winter Park. They now seek to build a single family house on it. Setback restrictions enacted after the lot was platted and before the Beatties purchased the property limit the buildable area of the lot to a home with a 400 square foot footprint or 800 feet total area in a permitted two-story. Single family residences are the only use permitted in this zone.

In more detail, the facts are these:

The Beatties seek a hardship variance to erect a home on the vacant lot located across the street from where they currently live. The triangular lot is 12,542 square feet and is located on Lake Maitland ("Lake") in Winter Park. This lot, which the Beatties purchased in 1997, was originally platted in 1926 and was replatted in 1958 as currently configured with the exception of a small strip along the eastern boarder which was sold in the early 1960's.

In seeking a variance, the Beatties made two proposals for a home on the lot. The first ("Proposal 1") was for a residence located at varying setbacks of nine to eighteen feet from the mean water elevation of the Lake and thirty-seven and one-half feet from the bordering roadway, Via Lugano (the "Road"). The Winter Park zoning ordinance (the "Ordinance") requires setbacks of fifty feet from the Lake, and fifty-four feet from the Road. The home in the Beatties' second proposal ("Proposal 2") would be at varying setbacks of eighteen to twenty-six feet from the mean water elevation of the Lake and twenty-seven and one- half feet from the Road. Thus, the house in Proposal 1 would require variances of up to forty-one feet on the fifty foot Lake setback, and up to

sixteen feet on the fifty-four foot Road setback. Proposal 2 would need a Lake variance of thirty-two feet and a variance of twenty-six feet from the street.[1]

At its hearing on the Beatties' application, the Board received evidence that the enforcement of the setbacks in the Code would result in 400 square feet of buildable area on the Property. The footprint for the proposed residence is approximately 3,000 square feet, rather than the 400 square feet permitted by the Ordinance. The Beatties proposed a residence of over 4,496 square feet, or 5,396 square feet including carports and porches.

The Board also heard the Beatties' architect testify that the proposals included the "smallest footprint I could come up with on the home and at the same time maintain the standard [floor area ratio] and so we looked to do the smallest from the site." (Am. Pet. Cert. Ex. 2; T17:-7-10.)

Owners of some of the neighboring properties, as well as a representative of the Isle of Sicily Neighborhood Homeowners Association, objected in person or in writing to this variance request. These neighboring property owners asserted, among other things, that the proposed residence was oversized for the lot and would not be compatible with most of the other residences on the Road within the neighborhood. The neighbors also said that the Beatties had knowledge of the restrictive setbacks when they purchased the Property, as well as knowledge of intent of the Winter Park zoning ordinance that the Property be maintained as vacant land as it would require significant variances to build a single family residence on it. One property owner submitted an e-mail expressing support for the application. At the hearing, an attorney and an architect also spoke in opposition to the application. Mr. Beattie and his architect spoke in support.

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[1] The fifty foot Lake setback were adopted, according to the Winter Park Director of Building "around 1980." (Am. Pet. Cert. Ex. 2; T27:3-4). Immediately prior, that setback was ten feet (Am. Pet. Cert. Ex. 2; T26:23-25) and the front setback was twenty feet. (Am. Pet. Cert. Ex. 2; T8:15-20).

In the end, the Board denied the Beatties' application. One member of the Board opined that the application was "something I don't think should be in front of this board." (Am. Pet. Cert. Ex. 2; T53:1-2.) A second member voiced the opinion that it was not the purpose of the Board "to take an essentially un-buildable property and make it buildable and I'm opposed to it." (Am. Pet. Cert. Ex. 2; T53:6-8.) A third Board member said that he "often [tries] to propose some kind of compromise but I didn't hear a request for any compromise here." (Am. Pet. Cert. Ex. 2; T53:23-25.) He went on to say that he "would not attempt that at this particular time." (Am. Pet. Cert. Ex. 2; T54:3-4.) A final member stated that he "would be in favor of proposal two, closer to the street, to try to mitigate as much from the lake violation setback as possible." (Am. Pet. Cert. Ex. 2; T53:19-21.) The remaining member of the Board, the Chairperson, expressed no opinion. The Board voted on the second of the Beatties' proposals and denied relief by a vote of 4-1.[2] Its Findings, in their entirety, say: "The Board could not establish a hardship for a variance." (Am. Pet. Writ Cert. Ex. 1, p. 6).

STANDARD OF REVIEW

A party may seek circuit court review of a quasi-judicial decision of an administrative board by way of certiorari as a matter of right. *Dusseau v. Metro. Miami-Dade County Bd. Of Comm'rs*, 794 So. 2d 1270, 1273-74 (Fla. 2001). This "first-tier" certiorari review is governed by a three-part standard: 1) whether procedural due process is accorded; 2) whether the essential requirements of law have been observed; and 3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Comm. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *City of Center Hill v. McBryde*, 952 So. 2d 599, 601 (Fla. 5th DCA 2007). "On first-tier certiorari review, the circuit court's task is to review the record for evidence that supports

[2] Proposal 1 was not voted on.

the agency's decision, not that rebuts it-for the court cannot reweigh the evidence." *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 846 (Fla. 2001).

PARTIES' ARGUMENTS

The Beatties contend that this case presents "the quintessential example of a hardship" (Am. Pet. Cert. 8) entitling them to relief from the requirements of the Winter Park zoning ordinance. All factors set out in the Ordinance for obtaining a variance have been met, the Petitioners assert. As a result, they contend that the Board's decision is not supported by competent substantial evidence. They further argue that the Board's decision fails to properly apply governing case law particularly on the issue of whether their hardship was a self-created one. They make no claim that procedural due process was not observed.

The City replies that there is substantial competent evidence to support the decision to deny the requested variance and that this decision is consonant with applicable law.

ANALYSIS

There is no question here about whether or not Petitioners were afforded due process.

The second prong of our standard of review is whether the essential requirements of the law have been observed. This is the "equivalent" of the consideration by a district court, on so-called second-tier certiorari review, of whether this Court has "applied the correct law." *Dusseau v. Metro Dade County Bd. of County Comm'rs*, 794 So. 2d at 1274. In this context, departure from the essential requirements of the law "is something more than a simple legal error." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 888 (Fla. 2003). It is present only "when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Id.*

VARIANCES

We have already seen that the substantial credible evidence standard under which we review the Board's decision is a very deferential one. The Beatties' petition is made further difficult as we begin with the recognition that "[t]he requirements for obtaining a variance from a zoning code are stringent and will be granted only in unusual circumstances involving hardship." *Craig v. Craig*, 982 So. 2d 724, 728 (Fla. 1st DCA 2008).

The Ordinance

The Beatties recognize that "the City of Winter Park's Land Development Code sets forth the following four criteria that must be met for the granting of a variance."

> a. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other land, structures, or buildings in the same district;
> b. That literal interpretation of the provisions of this article would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this article;
> c. That the special conditions and circumstances do not result from the actions of the applicant;
> d. That granting the variance requested will not confer on the applicant any special privilege that is denied by this article to other lands, structures, or buildings in the same district. No nonconforming use of neighboring lands, structures, or buildings in other districts shall be considered grounds for the issuance of a variance.

(Am. Pert. Cert. 8, *quoting Winter Park Code* §58-88(c)(1)).[3]

The Ordinance also requires a finding by the Board that "the reasons set forth in the application justify the granting of the variance, and the variance is the minimum variance that will make possible the reasonable use of the land, building or structure," *Winter Park Code* §58-88(c)(6),

[3] We utilize the numbering and provisions of the Winter Park Code as set forth by the parties without dispute.

and further that "the granting of the variance will be in harmony with the general purpose and intent of this article, and not be injurious to the neighborhood, or otherwise detrimental to the public welfare." *Winter Park Code* §58-88(c)(7).

HARDSHIP

The Board adopted the Minutes of its February 17, 2009, meeting. With respect to the Beatties' application, the Board found that it "could not establish a hardship for a variance." (Am. Pet. Cert. Ex. 1, p.6). Despite the Board saying that *it* could not establish the necessary hardship, we recognize that it is "the *applicant* [who] has the burden to come before the Board of Adjustment and establish the requirements for a variance." *Gomez v. City of St. Petersburg*, 550 So. 2d 7, 8 (Fla. 2d DCA 1989) (emphasis added).

Special Conditions, Special Circumstances and the Self-created Hardship Rule

In its response to the Amended Petition, the City asserts that the Beatties not only "had particular knowledge of the restrictive setbacks on the Property when they purchased the property in 1997, but that they were also aware of the general intent of the Isle of Sicily neighborhood that the property remain vacant because of the impossibility of constructing a large single family residence on the Property." (Resp. Am. Pet. Cert. 9). Our review of the record demonstrates such a conclusion to be supported by competent substantial evidence.

"When a landowner acquires the land with knowledge of the zoning restrictions, he cannot cry 'hardship.'" *In re Kellogg*, 197 F. 3d 1116, 1121 n. 4 (11th Cir. 1999) (applying Florida law). There was substantial evidence adduced at the hearing to support a conclusion that the Beatties knew or at least should have known of the need for a variance when they bought the property. The Beatties do not question such a finding but urge that "the Petitioners' knowledge of the

setback requirements simply was not an issue which should have been considered by the Board." (Am. Pet. Cert. 9). Such knowledge, they contend, is "irrelevant." (*Id.*). We disagree. We are persuaded, instead, by the Board's reliance upon *Thompson v. Planning Commission of the City of Jacksonville*, 464 So. 2d 1231 (Fla. 1st DCA 1985). Pertinent to this case, *Thompson* held:

> The alleged hardship falls into the category of self-created hardship. Before purchasing the property, the owners were fully aware of its shape and size, but still designed a building which was too large for the lot, leaving insufficient room for code-required parking. The hardship arose solely from their own conduct and expectations.

Thompson v. Planning Comm'n of the City of Jacksonville, 464 So. 2d 1231, 1238 (Fla. 1st DCA 1985).

We conclude, therefore that there is substantial credible evidence to support application of the self-created hardship rule.[4]

Based on our ruling that the Board's decision is supported by application of the self-created hardship rule, we need not address the other arguments advanced by the Beatties. We conclude, however, that there is substantial credible evidence to support a decision that the Beatties have failed to shoulder their burden of proof as to any of the requirements of the Ordinance.

Also, it is of no moment that a neighboring home does not comply with the current restrictions as that house was constructed well before the adoption of the current ordinance. That an older home does not meet zoning requirements adopted subsequent to its construction is no justification for variance relief to permit new construction. Sound zoning is accomplished by ordinance, not by variance.

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[4] We note that the City's Director of Building testified that "[a]lthough the lot is relatively narrow, it is a buildable lot and has been in existence for many years." (Am. Pet. for Cert. Ex. 2; T7:13-15).

On this petition, we are

> entitled to review the weaknesses in [the Beatties'] evidence to determine that the Board's decision was supported by substantial, competent evidence. The rule of law requiring substantial, competent evidence to support the Board's decision did not require the City to present affirmative evidence when the Board simply weighed [the Beatties'] evidence and determined that it was insufficient.

Gomez v. City of St. Petersburg, 550 So. 2d at 8.

Here, the Beatties failed to meet their formidable burden of proof. The Board's denial of the Beatties' application for a hardship variance is supported by competent substantial evidence in all respects. Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Amended Petition for Writ of Certiorari of the Petitioners, Jack R. Beattie and Ernestine Beattie, be and hereby is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this ___22nd____ day of ___August________________, 2012 .

_/S/___________________________
JULIE H. O'KANE
Circuit Judge

_/S/___________________________
JANET C. THORPE
Circuit Judge

_/S/___________________________
DONALD E. GRINCEWICZ
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this __22nd___ day of _August________________________, 2012, to the following:

1) Darren J. Elkind, Esquire, PAUL & ELKIND, P.A., 505 Deltona Boulevard, Suite 105, Deltona, Florida 32725; and

2) Erin J. O'Leary, Esquire, BROWN, GARGANESE, WEIS & D'AGRESTA, P.A., 111 N. Orange Avenue, Orlando, Florida 32802-2873.

_/S/________________________
Judicial Assistant