IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

MICHAEL LARSON and SUSAN LARSON,

Case No.: 21-AP-9-P

Petitioners,

vs.

THE MONROE COUNTY PLANNING COMMISSION and GREY PROPERTIES, LLC,

Respondents.

_____/

ORDER ON PETITION FOR WRIT OF CERTIORARI

THIS CAUSE is before the Court on a Petition for Writ of Certiorari (the "Petition"), challenging Monroe County, Florida Planning Commission Resolutions No. P22-21 and P23-21 approving variances for two separate lots to allow construction of a house on each lot. After fully briefing the matter, the parties, through counsel, appeared before the Court for oral argument on December 1, 2022.

I. Factual and Procedural Background

Respondent Grey Properties (the "applicant") owns two properties, Lot 12 and Lot 13 ("subject property"), located in Key Largo, Florida. Each subject property consists of a single platted lot that is approximately 2,500

square feet. (Petitioners' Exhibits F and G- Staff Report at P. 4). For each property the applicant requested a setback variance from Monroe County to build a separate house on each lot. On September 29, 2021, the Monroe County Planning Commission conducted a hearing on both applications. Petitioners, the Larsons, live at a house adjacent to the subject properties and appeared at the hearing to voice their objection to the requested variances. At the conclusion of the hearing, the Planning Commission approved both variance requests.

On October 1, 2021, the Monroe County Planning Commission adopted Resolution No. P22-21 granting a variance to Lot 13, and Resolution No. P23-21 granting a variance to Lot 12. On January 18, 2022, Petitioners filed their Petition for Writ of Certiorari seeking to have the court quash Planning Commission Resolutions No. P22-21 and P23-21.

II. Standard of Review

First-tier certiorari review is limited to reviewing whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

III. Discussion

As set forth in the Monroe County Land Development Code ("LDC") Section 131-1, in the subdivision where the subject property is located, the required primary front yard setback is 25 feet and the required rear yard

setback is 20 feet. The applicant requested approval for a variance of 9 feet from the required 25-foot primary front yard setback and a variance of 10 feet from the required 20-foot rear yard setback. LDC Section 102-187(d) provides the following eight (8) standards that must be met for variance approval by the Monroe County Planning Commission:

> **Standards.** The Planning Commission has the authority to grant a variance to the standards described in (b)(1) through (6), with or without conditions, if and only if the applicant demonstrates that all of the following standards are met:
> (1) The applicant shall demonstrate a showing of good and sufficient cause;
> (2) Failure to grant the variance would result in exceptional hardship to the applicant;
> (3) Granting the variance will not result in increased public expenses, create a threat to public health and safety, create a public nuisance, or cause fraud or victimization of the public;
> (4) Property has unique or peculiar circumstances;
> (5) Granting the variance will not give the applicant any special privilege denied to another property owner in the immediate vicinity;
> (6) Granting the variance is not based on disabilities, handicaps or health of the applicant or members of his or her family;
> (7) Granting the variance is not based on the domestic difficulties of the applicant or his or her family; and
> (8) The variance is the minimum necessary to provide relief to the applicant.

In this case, the Planning Department staff report found the variance application to be "in compliance" with all eight of these standards. (Petitioners' Exhibits F and G-Staff Report). After reviewing the staff reports, the variance applications, and hearing from the applicant and members of the public, the Planning Commission concluded the applicant demonstrated that all the required standards set forth in the LDC had been met. (Petitioners' Exhibits A and B-Resolutions P22-21 and P23-21).

Petitioners argue that Resolutions P22-21 and P23-21 are not supported by competent substantial evidence and that the Planning Commission misapplied LDC Section 102-187(d) which is a departure from the essential requirements of law. Petitioners also argue that the "Objectors" (the witnesses that testified in opposition to the application) were denied due process at the Planning Commission hearing.

A. <u>Competent Substantial Evidence</u>

Competent substantial evidence has been defined as "evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred, or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Fla. Pub. Serv. Comm'n,* 380 So. 2d 1028, 1031 (Fla. 1980). Here, Petitioners contend that the record does not contain legally sufficient evidence to support a finding that the applicant satisfied each of the eight standards required by LDC Section 102-187(d), and thus, Resolutions P22-21 and P23-21 are not supported by competent substantial evidence. The Court agrees. There is insufficient evidence to support the following standards: standard (2) failure to grant the variance would result in exceptional hardship to the applicant; standard (4) property has unique or peculiar circumstances; and standard (8) the variance is the minimum necessary to provide relief to the applicant.

The applicant has the burden of proof to introduce competent substantial evidence to prove all of the variance standards. *City of Satellite*

Beach v. Goersch, 217 So. 3d 1143, 1145 (Fla. 5th DCA 2017) (citing *Bd. of Cty. Cmm'rs of Dade Cty. v. First Free Will Baptist Church*, 374 So. 2d 1055 (Fla. 3d DCA 1979)). In this case, the applicant attached a site plan to the application depicting an 840 square foot "footprint" of a proposed structure for each lot. When the applicant was asked in the application to describe how the variance standards in LDC Section 102-187 will be met, the applicant answered for the first standard: "without this variance lot will not have space for a SFR." (Petitioners' Exhibits C and D-application). For the remaining standards, the applicant simply wrote, "correct." *Id.*

At the September 29, 2021 hearing on the application, the Planning Commission was presented with evidence including the variance application, the site plan, boundary surveys, the planning department's staff reports, the oral presentations, and public comments.

i. Exceptional hardship/unique circumstances

In order to grant a variance, the applicant must demonstrate that failure to grant the variance would result in exceptional hardship to the applicant. LDC section 102-187(d)(2). The Monroe County Code defines "exceptional hardship" as a "burden on a property owner that substantially differs in kind or magnitude from the burden imposed on other similarly situated property owners. Financial difficulty does not qualify as exceptional hardship." LDC section 101-1. In this case, the applicant did not establish that its "burden" "substantially differs in kind or magnitude"

from the other ninety owners of 50x50 ft. lots in the Lazy Lagoon Subdivision.

When asked in the application to describe how the failure to grant the variance would result in exceptional hardship to the applicant, the applicant simply stated, "correct." In the report submitted to the Monroe County Planning Commission ("Staff Report"), Devin Tolpin, Principal Planner, through Emily Schemper, Senior Director of Planning & Environmental Resources states that "[s]taff agrees that failure to grant the variance would result in an exceptional hardship to the applicant." (Petitioners' Exhibits F and G-Staff Report at P. 4.) Specifically, they note, "compliance with the required primary front yard setback would result in an available building depth of 5 feet." *Id.* This is not the test for determining exceptional hardship nor is it evidence of exceptional hardship.

However, section (1) of the Staff Report also notes the following:

> "The subject property consists of a single platted lot that is approximately 2,500 square feet. Many of the platted lots within the Lazy Lagoon Subdivision are similar in size. A large portion of single family residences constructed on only a single lot within this subdivision are situated within the setbacks as required pursuant to LDC Section 131-1…"
> (Petitioners' Exhibits F and G-Staff Report at P. 4)

This statement does inform the test for exceptional hardship and it directly contradicts the staff's finding of an exceptional hardship because it establishes the burden of constructing a home on a small lot is shared by many other property owners in the subdivision. Thus, the applicant's burden

does not “substantially differ in kind or magnitude” from the other nearby lot owners as required to find a hardship under LDC Section 102-187(d)(2).

For the same reasons the hardship finding is not supported by competent substantial evidence, the Court finds that the Planning Commission’s finding that the property has unique or peculiar circumstances, is not supported by competent substantial evidence. For LDC section 102-187(d), standard (4), the planning staff determined that “the subject property has a unique or peculiar circumstance that applies to this property but does not apply *to all other properties* within the IS zoning district.” (Petitioners’ Exhibits F and G-Staff Report at P. 5). However, the test is not whether the unique or peculiar circumstances apply to *all other properties* within the zoning district. Here, the size of the subject property is the same as or similar to other properties in the zoning district. The Staff Report admits that many other platted lots in the subdivision are similar in size but have accommodated single family residences on a single lot within the required setbacks thus disproving the contention that the subject property has unique or peculiar circumstances. There is no evidence in the record of unique or peculiar circumstances upon which a variance could be granted.

ii. Minimum necessary to provide relief

LDC section 102-187(d), standard (8) requires the variance to be the minimum necessary to provide relief to the applicant. In the application, when asked if the variance is the minimum necessary to provide relief to the

applicant, the applicant states, “correct.” (Petitioners’ Exhibits C and D-application). As noted, the applicant also attached a site plan depicting an 840 square foot footprint of a proposed structure for each lot. However, the site plan did not identify the size/placement of the house, including the number of levels or the square footage of the structure the applicant actually intends to build on each lot.

In reference to criteria (8), the Staff Report states, “staff confirms that the variance is the minimum necessary to provide relief to the applicant.” (Petitioners’ Exhibits F and G-Staff Report at P. 6). The Staff Report also notes that the variance “is necessary in order for the property owner to construct a single-family residence of the proposed footprint and size.” (Petitioners’ Exhibits F and G-Staff Report at P. 4).

At the hearing, Commissioner Wiatt asked Ms. Schemper if staff could “provide justification of approving 840 square feet of buildable area” stating, “I mean, was there any thought given to whether or not that was more than necessary, less than necessary?” (Tr. 41-42). Ms. Schemper responds that the proposed setback is based on the requested variance submitted by the applicant, and “considering the footprint of the area” it is a “reasonable setback.” (Tr. 42). She states, “minimum necessary, it is a little subjective. We look and we try to see if it seems like a reasonable approach by the person who’s proposing it.” (Tr. 43). Ms. Schemper goes on to state, “[t]his seems to be pretty in line, typical with what people are

trying to build as a modest-size house, you know, a typical-size house." (Tr. 43-44).

Concerned neighbors submitted a Power Point Presentation showing that a smaller variance would result in a 700 square foot "minimum footprint" and allow the applicant to build a 1-bedroom/1-bath house or a 2-bedroom/2-bath house on grade. (Petitioners' Exhibit H).

At the conclusion of the hearing, Commissioner Wiatt states the following: "So, again, my way of thinking, and trying to cut to the quick here a little bit would be, you know, we approve the variance based on the fact that it's a buildable lot and cannot be built on without a variance, but the question then becomes how much of a variance. And without anything else to hang my hat on with respect to the size of the variance, I would yield to the staff and whether that's a reasonable number." (Tr. 51).

It is precisely the point that there is nothing on which to "hang a hat" which leads the Court to conclude there is no competent substantial evidence that the variance is the minimum necessary to provide relief to the applicant. There is no evidence in the record to establish that the variance is the minimum necessary to provide relief to the applicant, and there is evidence that it is not the minimum necessary.

B. <u>Essential requirements of the law</u>

"A ruling constitutes a departure from the essential requirements of law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice." *Miami-Dade County v. Omnipoint*

Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003) (internal quotation and citation omitted). Thus, a circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with "observing the essential requirements of law." *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).

Petitioners argue that the Planning Commission departed from the essential requirements of law by failing to apply the correct legal standard of "minimum relief" contained in LDC section102-187(d)(8). As described *supra*, the planning staff and the Planning Commission focused on what they believed was "typical" "modest" and "reasonable" as opposed to the "minimum necessary to provide relief." The Planning Commission departed from the essential requirements of law when it relied on these standards without a factual foundation to support the finding that the variance proposed was the minimum necessary. It appears that the Planning Commission simply adopted the Staff Report recommendation which was based on the applicant's proposal without giving any consideration to the Objector's presentation that provided evidence that the variance was not the minimum necessary to provide relief to the applicant. The planning staff and the Planning Commission adopted the variance proposed by the applicant which represents the amount necessary "in order for the property owner to construct a single-family residence for the proposed footprint and size" as opposed to the "minimum necessary to provide relief to the

applicant." This is an incorrect application of the law which constitutes a departure from the essential requirements of the law.

C. Due Process

As adjacent landowners, Petitioners have standing to participate in the quasi-judicial Planning Commission hearing and have a constitutional right to present their case. *See Carillon v. Seminole County*, 45 So. 3d 7, 10 (Fla. 5th DCA 2010). "Generally, due process requirements are met in a quasi-judicial proceeding if the parties are provided notice of the hearing and an opportunity to be heard." *A & S Entertainment, LLC v. Florida Department of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019). "The extent of procedural due process protection varies with the character of the interest and nature of the proceeding involved." *Carillon,* 45 So. 3d at 9. Therefore, there is no single unchanging test which may be applied to determine whether the requirements of procedural due process have been met. *Id.* In this case, since the Court finds there is not substantial competent evidence in the record to support the Planning Commission's Resolutions and that the Planning Commission departed from the essential requirements of the law, the Court need not undertake this analysis to address the Petitioner's contention that they were denied due process in the hearing before the Planning Commission.

IV. Conclusion

Since the Court finds there is not substantial competent evidence in the record to support the Planning Commission's decision to grant the

variances and that the Planning Commission departed from the essential requirements of the law, the Petition for Writ of Certiorari is **GRANTED**, and the Resolutions granting the variances (P22-21 and P23-21) are **QUASHED**.

DONE AND ORDERED at Key West, Monroe County, Florida this Thursday, March 2, 2023

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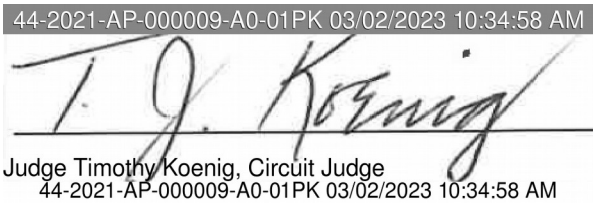

Judge Timothy Koenig, Circuit Judge
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