

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

GILBERT HAKIM,

Petitioner,

v.

PINELLAS COUNTY, FLOIRDA,

A political subdivision of the

State of Florida, through its Board of Adjustment,

Respondent.

Ref. No.: 11-000054AP-88B

UCN:522011AP000054XXXXCV

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE is before the Court on a Petition for Writ of Certiorari filed by the Petitioner, Gilbert Hakim, on November 2, 2011. The Respondent, the Pinellas County Board of Adjustment ("Board"), filed a response in opposition, to which Petitioner filed a reply. For the reasons set forth below, the Petition is hereby granted.

Petitioner's property is located on the northwest corner of the intersection of McMullen Booth Road and Sunset Point Road in Pinellas County. Petitioner's property is designated zone A-E, Agricultural Estate Residential. The A-E, agricultural estate residential district is comprised of large lot, rural/agricultural type of development. Petitioner applied for a special exception and related variances to use his property as a 160-child day care center, an approved special exception use under Section 138-378 of the Pinellas County Code. The County's planning staff reviewed Petitioner's special exception application and recommended approval. At a hearing held by the Pinellas County Board of Adjustment, the Board heard evidence regarding the special exception including: the planning staff's report and recommendation for approval; Petitioner's traffic engineer who's traffic analysis showed an insignificant impact on traffic; Petitioner's planning and engineering consultant; and statements from neighborhood residents opposing the application. The Board subsequently denied Petitioner's application, stating in a

letter to Petitioner that “the denial of the special exception was based on the Board of Adjustment findings that the request did not meet the intent of section 138-238 General Standards for Special Exceptions 1 thru 7.”

A local government’s decision to grant or deny a special exception is reviewed by this Court to determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment were supported by competent, substantial evidence. *See City of Deerfield Beach v. Vaillant*, 419 so.2d 624, 626 (Fla. 1982). In reviewing local administrative action to determine whether the agency’s determination is supported by competent substantial evidence, a circuit court may not re-weigh the evidence to substitute its judgment for that of the agency. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So.2d 202, 205 (Fla. 3d DCA 2003).

Petitioner argues that the Board’s decision to deny his application for a special exception was not supported by competent, substantial evidence. Petitioner introduced evidence at the hearing showing that the site plan for the day care center complied with the applicable land development and zoning regulations, and that it was consistent with the County’s Comprehensive Plan. The County’s planning staff agreed with Petitioner and recommended approval of the application. Petitioner’s traffic engineer provided evidence that the traffic impact of the project would not be statistically significant, and that excessive vehicular traffic would not be generated on local residential streets. As explained in *Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So.2d 708, 709 (Fla. 3rd DCA 200):

An applicant seeking special exceptions and unusual uses need only demonstrate to the decision-making body that its proposal is consistent with the county’s land use plan; that the uses are specifically authorized as special exceptions and unusual uses in the applicable zoning district; and that the requests meet with the applicable zoning code standards of review...then the application must be granted unless the opposition carries its burden, which is to demonstrate that the applicant’s requests do not meet the standards and are in fact adverse to the public interest.

In response to Petitioner’s evidence showing consistency with the County’s land use plan, the only evidence presented to the Board in opposition of Petitioner’s application was testimony from neighborhood residents concerned that allowing Petitioner to run a child care facility would cause an

unacceptable increase in traffic around and through their neighborhood, and that operation of the facility would generally upset the residential character of their neighborhood. Petitioner argues that these general objections from neighbors do not constitute the competent, substantial evidence required for the Board to carry its burden of demonstrating that an applicant's request does not meet the County's standards for special exceptions.

Courts have held that lay witnesses cannot provide competent substantial evidence on potential traffic effects. *See Pollard v. Palm Beach County*, 560 So.2d 1358 (Fla. 4th DCA 1974); *Jesus Fellowship, Inc. v. Miami-Dade County*; *Katherine's Bay, LLC v. Fagan*, 52 So.3d 19, 30 (Fla. 1st DCA 2010).

Most recently, in *Katherine's Bay*, 52 So.3d at 30, the court reiterated the standards for when lay testimony can be considered competent, substantial evidence:

Lay witnesses may offer their views in land use cases about matters not requiring expert testimony. *Blumenthal*, 675 So.2d at 601. For example, lay witnesses may testify about the natural beauty of an area because this is not an issue requiring expertise. *Id.* Lay witnesses' speculation about potential "traffic problems, light and noise pollution," and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence (emphasis added). *Pollard v. Palm Beach County*, 560 So.2d 1358, 1359-60 (Fla. 4th DCA 1990). Similarly, lay witnesses' opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. *See City of Apopka v. Orange County*, 229 So.2d 657, 659-60 (Fla. 4th DCA 1974) (citation omitted). There must be evidence other than the lay witnesses' opinions to support such claims. *See BML Invs. v. City of Casselberry*, 476 So.2d 713, 715 (Fla. 5th DCA 1985); *City of Apopka*, 299 So.2d at 660.

The appellant in *Katherine's Bay* was challenging a final order by the Administration Commission denying a small-scale development amendment to the county's comprehensive plan. The commission in *Katherine's Bay* relied upon lay testimony that "described the beauty and peacefulness of the area and opined that the introduction of another RV park into the area would lead to increased traffic, litter, noise, and light pollution." *Id.* The court held that:

Based on these standards, it was error for the ALJ to rely on Appellee's testimony concerning potential light pollution, increased traffic, and negative impacts on the value of the homes in the area. There were no facts to support his concerns, and in fact, the County Staff's report indicates that the traffic issue was studied by an expert and determined that increased traffic would not unduly burden the area.

Katherine's Bay, 52 So.3d at 30-31.

The evidence the Board relied upon in the instant case is exactly the type of evidence the court in Katherine's Bay held to not constitute competent, substantial evidence. The only evidence presented to the Board in opposition of Petitioner's application was lay testimony of neighbors speculating about potential traffic impacts and other general, unfavorable impacts of the proposed day care facility. After Petitioner presented evidence that the planning committee had approved his site plan application, and that a traffic engineer had studied the traffic impacts of the problem and found them to be insignificant, the burden shifted to the Board to find by competent, substantial evidence that the Petitioner's request did not meet the standards for granting a special exception. Lay testimony by neighbors in the area concerned about increased traffic does not constitute competent, substantial evidence. *Id.*

Because the Board relied solely on lay opinion testimony concerning potential traffic increases and other general impacts to the neighborhood to make its decision, the Board's denial of Petitioner's application was not based on competent, substantial evidence.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is GRANTED.

DONE AND ORDERED in St. Petersburg, Pinellas County, Florida, on May_____, 2012.

Original order entered on June 27, 2012, by Circuit Judges Amy M. Williams, Jack Day, and Pamela A.M. Campbell.