

**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED,
DETERMINED.**

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

**GEORGE GOMES and JESSE
J. KILLINGSWORTH,
Petitioners,**

**Case No.: 14-000002AP-88A
UCN: 522014AP000002XXXXCV**

v.

**PINELLAS COUNTY, FLORIDA BOARD
OF ADJUSTMENT,
Respondent,**

and

**F & L TOWERS, LLC; and SEMINOLE
CHRISTIAN FELLOWSHIP, INC.,
Intervenor-Respondents.**

Opinion Filed _____

Petition for Writ of Certiorari
from decision of Board of Adjustment,
Pinellas County, Florida

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PER CURIAM.

Petitioners, George Gomes and Jesse J. Killingsworth, seek certiorari review of the decision of Respondent, Pinellas County Board of Adjustment ("Board"). Intervenor-

Respondents, F&L Towers, LLC and Seminole Christian Fellowship, Inc. were granted a special exception for the height of a communications tower to be erected and a variance regarding the setback requirements for the communications tower for adjacent properties. The petition is granted in part and denied in part.

Statement of Facts

On August 20, 2013, Seminole Christian Fellowship, Inc. ("Seminole"), as owner of the property, and F&L Towers, LLC ("F&L"), as the installer of the telecommunications tower, filed an application for a public hearing on a special exception and variance with the Pinellas County Board of Adjustment. Seminole and F&L sought (1) a special exception pursuant to Pinellas County Code of Ordinance sections 138-238 and 138-240(25), authorizing the construction of a 150-foot tall unipole communication tower in a residential area that exceeds the seventy-five foot height limitation imposed by county ordinances and (2) a variance pursuant to Pinellas County Code of Ordinance section 138-113 to allow the 150-foot tower to be constructed fifty feet from the property lines of the residential properties on the northern boundary of the property and 104 feet from the property lines of the residential properties on the western boundary of the property. Under the requested variance, Seminole and F&L proposed that the communication tower be erected in a wooded area in the Northwest corner of the 3.903 acre property.

On October 3, 2013, a public hearing was conducted and objections to the application were heard. The hearing was continued until December 5, 2013.

At the December 5, 2013, hearing the Board unanimously voted to grant the special exception as to the height of the tower. The Board then voted 5-2 to approve the variance as to the setback requirements. (App. 4, p. 32-33).

Contrary to the vote of the Board, the December 5, 2013, "Proposed Order" signed by the Chairman was not edited to reflect the Board's vote, but states that the application for the variance and special exception is denied. (App. 1, p. 1-2). However, correspondence from the Pinellas County Strategic Planning & Initiatives Department indicates that the application was conditionally approved and states that the attached Decision Letter Addendum "explains standard Board conditions, policies and procedures that are a part of the official decision and conditions regarding your Board of

Adjustment case." (App. 2, p. 1-6). The Decision Letter Addendum confirms that the application was granted.

Standard of Review

This Court in its appellate capacity has jurisdiction to review this matter under Florida Rule of Appellate Procedure 9.100. The Court must decide (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent, substantial evidence to support the administrative findings. See Falk v. Scott, 19 So. 3d 1103, 1104 (Fla. 2d DCA 2009). The appellate court is not "permitted to re-weigh conflicting evidence and is primarily relegated to assaying the record to determine whether the applicable law was applied in accordance with established procedure." Dade County v. Gayer, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980).

Analysis

Due Process

A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the board acts. Id. Petitioners do not claim there has been a violation of procedural due process.

Essential Requirements of Law and Competent, Substantial Evidence

Pinellas County Ordinance section 138-1347 governing communication towers and antennas states in pertinent part:

It shall be the intent of this chapter to allow for the reasonable expansion of technology in keeping with the 1996 Federal Telecommunications Act while providing reasonable regulation of communication towers and antennas to ensure that the county landscape is not adversely affected by the proliferation of tall towers. Toward this end the following provisions shall apply:

....

(2) Communication towers which are camouflaged to look like trees or palms which are common to the county may be erected in any zone subject to a height limitation of 75 feet.

....

(7) All towers and supporting equipment including guys shall meet normal setback requirement except that towers shall be set back from residential property lines a distance equal to the height of the tower.

....
(10) Towers shall be set back from residential property lines a distance equal to the height of the tower.

....
Construction of antennas and towers in accordance with the preceding provisions shall be the desired method in the county in order to minimize the visual impacts of towers on the landscape. Proposals to erect towers in another manner (except those specifically exempted from this Code) may be permitted by the board of adjustment as a special exception pursuant to article II, division 7 of this chapter.

Pinellas County Ordinance section 138-114, "Criteria for granting special exceptions" states: "In granting a special exception, the board of adjustment shall consider the requirements of division 7 of this article." Pinellas County Ordinances, Division 7, includes sections 138-236 through 138-240.

Pinellas County Ordinance section 138-238, "General Standards" for special exceptions states in part:

Since the size and nature of the uses identified as special exceptions may vary widely, a detailed plot plan and detailed statement of all uses proposed shall be submitted with each request for a special exception approval. The plan, once approved, shall become a condition upon which the use and structures shown thereon are permitted; and any change or addition shall constitute a violation of the special exception approval unless such change is submitted to and approved by the board of adjustment. Prior to granting special exception approval, the board of adjustment shall ensure that:

(1) All structures shall be adequately separated from adjacent and nearby uses by screening devices and/or open area.

....
(5) The proposed use will be in keeping with the purpose and intent of this Code and not adversely affect properties in the vicinity of the excepted use.

(6) The setback requirements of the district in which the use is to be located shall be complied with, unless varied by the board of adjustment at the hearing. .

..
Pinellas County Ordinance section 138-240, "Uses which may be authorized" for special exceptions states in part:

Unless otherwise permitted by this chapter, the following uses may be allowed as special exceptions in any zoning district unless prohibited by the zoning district or as otherwise indicated within this section:

....

(25) Communication towers may be erected above the height limitations established in this chapter under the following conditions:

a. The applicant must demonstrate a need for the tower's location and increased height.

b. The applicant must demonstrate that the tower cannot be located and constructed pursuant to section 138-1347 of this chapter.

c. The applicant must demonstrate that attempts have been made to locate the proposed communication equipment on another existing tower.

d. The applicant must demonstrate all special exception provisions required by section 138-238 of this chapter have been met.

....

f. Towers shall be set back from residential property lines a distance equal to the height of the tower.

....

j. Construction of towers pursuant to section 138-1347 of this chapter shall be the preferred method in the county in order to reduce the proliferation of such structures on the landscape. Therefore, the burden is on the applicant to provide substantial and competent evidence to the board to demonstrate compliance with the above provisions prior to any approval being granted.

The Board first voted separately on Seminole and F&L's request for a special exception to the height of the tower to be erected. After granting the special exception the Board then considered and granted the request for a variance as to the setback requirements. The Petitioners argue that the Board erred when it considered the requests separately and that both items should have been considered together.

Courts defer to an agency's interpretation of statutes and rules the agency is charged with enforcing unless contrary to law. See Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1273, 1283 (Fla. 2000); Rigo v. City of St. Petersburg, Fla., 13 Fla. L. Weekly Supp. 776a (Fla. 6th Cir. App. Ct. April 25, 2006). There is no law stating that the Board is prohibited from considering the requests for a special exception and for a variance separately.

Special Exception

Petitioners assert that the Board departed from the essential requirements of law when it granted a special exception to allow Seminole and F&L to construct a tower in excess of the seventy-five foot height restriction in section 138-1347(2). Petitioners claim that permitting the 150-foot tower to be constructed was improper because section 138-240(25)(f) and section 138-1347(7) require mandatory setbacks from property lines be a distance equal to the height of the tower.

Seminole and F&L indicate that that they satisfied all the general requirements of section 138-238 for the special exception, including the setbacks from adjacent properties. It is asserted that Seminole and F&L demonstrated that the 3.903 acres was large enough to meet the Code's setback requirements. A designated section in the center of the subject property was more than 150 feet from all property boundaries, without the need for a variance.

Conclusion:

This Court is not to reweigh the evidence, but must determine only if competent, substantial evidence supports the Board's decision. "The preponderance of the evidence standard [is] evidence which as a whole shows that the fact sought to be proved is more probable than not Substantial evidence has been defined as evidence 'which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.' " State v. Edwards, 536 So. 2d 288, 292 (Fla. 1st DCA 1988).

This Court concludes that competent, substantial evidence supports the Board's decision to grant the special exception to permit the 150-foot tower to be constructed. The Board did not depart from the essential requirements of law.

Variance:

Pinellas County Ordinance section 138-113 identifies nine items that shall be considered by the Board in granting a variance. Only one of those nine items is at issue in this petition: Section 138-113(3): "Unnecessary hardship. That literal interpretation of the provisions of this chapter would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this chapter."

Petitioners argue that there is no competent, substantial evidence to demonstrate that without the variance on the setbacks Seminole and F&L would suffer an unnecessary hardship. It is asserted that the only evidence presented was that the most aesthetically pleasing location for the tower would be in the northwest corner of the property in a stand of trees: fifty feet from the northern property line and 104 feet from the western property line.

In response to the Petitioners' argument, Seminole and F&L note that section 138-113 designating the criteria for granting a variance only requires that the Board consider the criterion of "unnecessary hardship." The Board need not find that the criterion was met in order to grant a variance.

The Respondents direct the Court to the Application for the Special Exception and Variance presented to the Board to provide substantial, competent evidence demonstrating that unnecessary hardship was "considered" by the Board. At page 7 of the Application, the following statement was presented in support of granting the variance as to the setbacks under section 138-113(3) based on hardship:

(3) Unnecessary Hardship- The literal interpretation of the provisions of this chapter would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this chapter.

- As noted previously, and as demonstrated by the attached Exhibits B1 and B2, the requested height of 150' is necessary for AT&T's antenna to communicate with its surrounding antenna. If this request were denied, it would deprive the carrier of the ability to provide its customers with the quality of wireless service that is required to meet customer demands. Every tower surrounding the Site, upon which multiple carriers' antenna have been installed, are at heights well in excess of 75'. Consequently, if the height increase were denied, AT&T would be denied the right to develop its wireless network in the same manner that its competitors have been allowed, which would deprive AT&T's customers the quality of service that is expected and demanded by the general public today.
- A denial of the height increase will also prevent the proposed tower from being used for collocation by other carriers. If the height of the unipole were limited to 75', it would impede the expansion of reliable technology and it would encourage a proliferation of towers; consequences that are inconsistent with the intent of the Code.

(App. 3, p. 15). Respondents argue that this portion of the Application demonstrates that the Board considered the issue of whether there would be unnecessary hardship if the setback variance was not granted.

Conclusion:

The Application does not support Respondent's position that the Board considered any unnecessary hardship to Respondents relating to the variance. What purports to be an argument in the Application for the variance under section 138-113(3), in fact, is only an argument that it would be an unnecessary hardship if the request for the special exception as to height was denied. The Application does not supply evidence that the Board considered any unnecessary hardship to Respondents if the variance for the setbacks was denied.

Seminole and F&L do not direct the Court to any evidence presented to the Board that the denial of the variance as to the setbacks would constitute an unnecessary hardship. The Court has reviewed the transcripts of the Minutes for the October 3, 2013, hearing and for the December 5, 2013, hearing before the Board. No testimony or evidence was presented of unnecessary hardship to Seminole and F&L to support a variance for the setbacks.

It has not been demonstrated that the Board considered the section 138-113(3) criterion: "Unnecessary hardship. That literal interpretation of the provisions of this chapter would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this chapter." The Board departed from the essential requirements of law and competent, substantial evidence does not support the Board's decision to grant the variance as to the setbacks. The petition is granted as to the variance.

Conclusion

The Petition for Writ of Certiorari is denied as to the special exception and granted as to the variance. This matter is remanded to the Pinellas County Board of Adjustment for further proceedings.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 5th day of ~~January~~ ^{February} 2015.

Original Order entered on February 5, 2015, by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Patricia Muscarella.

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