

**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**

**SEMINOLE GARDEN FLORIST, INC.,  
Petitioner,**

**Case No.: 14-000044AP-88A  
UCN: 522014AP000044XXXXCV**

**v.**

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

\_\_\_\_\_  
Opinion Filed \_\_\_\_\_

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

Gary L. Butler, Esq.  
Attorney for Petitioners

Jason C. Ester, Sr. Asst. Pinellas Cty. Atty  
Attorney for Respondent

**PER CURIAM.**

Petitioner, Seminole Garden Florist, Inc., seeks certiorari review of the decision of Respondent, Pinellas County Board of Adjustment ("Board") granting a variance to Fredrick R. Zinda ("Zinda") to allow Zinda to operate a 135-seat restaurant. The petition is denied.

**Statement of Facts**

Zinda operates a restaurant on property zoned C-1. Pinellas County Ordinance section 138-802(2) defines C-1 as a neighborhood commercial district that permits

"Personal service establishments including . . . small restaurants (50 seats or less, and with no drive-in or drive-through facilities). . . ."

The restaurant is located to the west of the property where Petitioner's florist shop is located. Zinda sought a variance to permit seating capacity in the restaurant to be increased up to 135. A cross-easement exists that permits patrons of the two businesses to use both properties for ingress and egress. After a public hearing, the variance was granted by unanimous vote of the Board.

### **Petition for Writ of Certiorari**

Petitioner raises two arguments:

I. There was no substantial, competent evidence to support the granting of a variance.

A. Zinda did not establish unnecessary hardship.

B. Zinda did not establish that the requested variance would not be injurious to the area or harm the public welfare.

C. Zinda did not offer substantial, competent evidence on other criteria established by § 138-113.

II. The Board did not comply with standards of procedural due process.

### **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**

Pinellas County Ordinance section 138-113 identifies nine items that shall be considered by the Board in granting a variance:

**Sec. 138-113. - Criteria for granting of variance.**

In order to authorize any variance to the terms of this chapter, the board of adjustment shall consider the following criteria:

- (1) *Special conditions.* That special conditions and circumstances exist which are peculiar to the land, structure, or building involved, including the nature of and to what extent these special conditions and circumstances may exist as direct results from actions by the applicant.
- (2) *No special privilege.* That granting the variance requested will not confer on the applicant any special privilege that is denied by this chapter to other similar lands, buildings, or structures in the same zoning district.
- (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.
- (4) *Minimum variance necessary.* That the variance granted is the minimum variance that will make possible the reasonable use of the land, building, or structure.
- (5) *Purpose and intent compliance.* That the grant of the variance will be in harmony with the general intent, purpose, and spirit of this code.
- (6) *Detriment to public welfare.* That such variance will not be injurious to the area involved or otherwise detrimental to the public welfare.
- (7) *Increasing floor area, lot coverage restrictions.* Any variance to the floor area or lot coverage restrictions of this chapter shall be limited to an increase of no more than ten percent of the applicable requirement. (Example: 0.20 floor area ratio may be varied to no more than 0.22.)
- (8) *May not constitute amendment.* The variance, if allowed, shall not constitute an amendment of this chapter, the comprehensive land use plan or the countywide comprehensive plan.
- (9) *Consideration of rezoning.* A rezoning or, where applicable, an amendment to another future land use map category has been considered and determined not to meet the objective of the variance and would not be appropriate.

In the application for the variance, Zinda addressed the nine criteria:

**We are requesting the Board of Adjustment grant this variance application to allow a 100 seat restaurant in our Zone C-1, Neighborhood Commercial District, because:**

- **Special conditions and circumstances exist.** In 1982, we purchased this property inclusive of a fully operational restaurant. At the time of purchase, licensure for that restaurant was approved for seating well in excess of 50+ and licensure has been renewed as the same ever since. A cross use and easement agreement has been in existence since 1985 for utilization of the adjoining neighbor's property (immediately to the east) for traffic flow and parking and a Parking Land Use Agreement is in existence with another adjoining neighbor's property (immediately to the south) for additional parking.

- No special privilege will be conferred. Granting this variance will not bestow any special privilege on us as similar restaurants zoned for C-1, neighborhood community district, operate with greater than 50 seats. The Wastewater Department and Fire Department is knowledgeable of the current seating capacity and has not provided us with any violations or concerns with local code requirements.
- Unnecessary hardship. The restaurant on this site is a family business in existence for over 38 years with expected levels of revenue to cover operating costs and salaries. Numerous family members and employees depend on this same revenue capacity for their livelihood and to prolong the business as it exists in its current form.
- Minimum variance necessary. Request is for the same reasonable use of the land, building, and structure that has been in existence for the last 30 years at this site.
- Purpose and intent compliance. Granting this variance in a "Neighborhood Commercial District" will be in harmony for the general intent, purpose, and spirit of this code. We are the essence of a true neighborhood business as we are family owned and operated for over 30 years in the city of Seminole and over 38 years in Pinellas County. We partner with numerous local churches, schools, and community organizations that, in turn, support and patronize our establishment.
- Detriment to public welfare. Granting this variance will not be injurious to the area involved or public welfare for the reasons mentioned above: A cross use and easement agreement has been in existence since 1985 for utilization of the adjoining neighbor's property (immediately to the east) for traffic flow and parking and a Parking Land Use Agreement is in existence with another adjoining neighbor's property (immediately to the south) for additional parking. The Wastewater Department and Fire Department has not provided any concerns to their system or code for the current seating capacity request.
- Increasing floor area, lot coverage restrictions. Not applicable.
- May not constitute amendment. This variance, if allowed, shall not constitute an amendment of any code or plan.
- Consideration of rezoning. Not applicable.

Section 138-113 designating the criteria for granting a variance in Pinellas County only requires that the Board consider the criteria listed therein. The Code section as drafted does not require the applicant to demonstrate and does not require the Board to find that the criteria has been met in order to grant a variance; only that the criteria have been considered by the Board in making its decision.

## **Discussion**

### **I. Competent, Substantial Evidence**

A. Petitioner asserts that section 138-113(3) requires the applicant to establish it will suffer an unnecessary hardship if the variance is not granted. The hardship must be

an exceptional and unique hardship to the individual landowner and parcel and not shared by other property owners in the area. See Lance v. Town of Indialantic, 419 So. 2d 1041 (Fla. 1982).

Petitioner argues that Zinda's statement in the application set out above to address element 138-113(3) does not demonstrate unnecessary hardship and no testimony was offered by Zinda to support a claim of unnecessary hardship. Allegedly, no proof was offered that if forced to comply with zoning laws as enacted Zinda's property would be "virtually unusable or incapable of yielding a reasonable return." See Maturo v. City of Coral Gables, 619 So. 2d 455, 456 (Fla. 3d DCA 1993).

At the May 3, 2012, hearing on the variance request, Petitioner and his attorney only raised an issue regarding section 138-113(3), the element of undue hardship.

In the presentation to the Board, Zinda represented that in reality the restaurant was not requesting a variance in order to expand the size of the restaurant. However, for state licensing purposes, the Florida Department of Business and Professional Regulation recalculated the seating in the restaurant based on the size of the tabletops on the premises. Zinda represented that the existing four-person booths are now counted by the State as six-person booths because the tabletops are forty inches in length. Under State licensing, a forty-inch tabletop for a booth is seating for six customers. Additionally, high chairs and booster seats are counted by the State to increase the number of existing seating in the restaurant to be calculated by the State at 124 seats, without actually physically making any changes to the restaurant as it exists. It was represented that the restaurant is at its maximum capacity as it now exists and Zinda does not wish to increase the size or actually add additional seating, but must request that the additional seating be authorized in a variance in order to meet the State licensing requirements.

In accordance with the express wording of section 138-113(3), the Board did consider the issue of undue hardship as it related to the State licensing issue in recalculating the customer seating based on the size of the booth tabletops in the restaurant.

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 the Board considered the element of undue hardship and competent, substantial evidence supports the Board's decision.

**B.** Petitioner asserts that section 138-113(6) requires the applicant to establish the requested variance "will not be injurious to the area involved or otherwise detrimental to the public welfare." Allegedly, the only mention of the affected area was a reference to the cross-easement agreement covering the two properties. Petitioner represents no testimony was presented that there would be no injury to neighboring properties. However, Petitioner did present testimony and photographs demonstrating that parking by the restaurant's customers and vendors substantially, negatively impacted Petitioner's business.

**C.** Section 138-113(1) requires a showing that "special conditions and circumstances exist which are peculiar to the land, structure, or building involved, including the nature of and to what extent these special conditions and circumstances may exist as direct results from actions by the applicant." Petitioner asserts that no evidence was offered to support this element.

Section 138-113(2) requires that the granting of the variance "will not confer on the applicant any special privilege that is denied . . . to other similar lands, buildings, or structures in the same zoning district." Petitioner argues that the only evidence offered by Zinda was that there are other restaurants zoned C-1 with more than fifty seats. It is asserted that the fact that variances may have been granted to other businesses is not relevant to whether Zinda's property should be granted a variance.

As noted above, at the hearing Petitioner did not raise an objection to the variance based on any criteria in section 138-113 other than undue hardship. Petition cannot raise an objection to these additional criteria for the first time in a petition for writ of certiorari. The application presented by Zinda and the testimony presented

demonstrates that the Board considered the criteria in section 138-113 in reviewing the application.

## **II. 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.

Upon review of the record the Court concludes that Petitioner was afforded procedural due process.

## **Conclusion**

The Petition for Writ of Certiorari is denied.

**DONE AND ORDERED** in Chambers in Clearwater, Pinellas County, Florida, this  
18 day of February 2015.

Original Order entered on February 18, 2015 by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Patricia Muscarella.

Copies furnished to:

Gary L. Butler, Esq.  
P.O. Box 4575  
Seminole, FL 33775

Jason Ester, Asst. County Atty.  
315 Court St., 6th Floor  
Clearwater, FL 33756