

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

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

**RON SCHMIDT,
Petitioner,**

**Case No.: 15-000040AP-88A
UCN: 522015AP000040XXXXCV**

v.

**CITY OF TREASURE ISLAND,
FLORIDA, PLANNING AND
ZONING BOARD,
Respondent.**

_____ /

Opinion Filed _____

Petition for Writ of Certiorari
from decision of City of Treasure
Island, Florida, Planning and
Zoning Board

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PER CURIAM.

Petitioner, Ron Schmidt, seeks certiorari review of the May 21, 2015, decision of the Planning and Zoning Board for the City of Treasure Island, Florida, conditionally granting the variance request¹ of homeowners, Justin and Rennie Mace. The petition is granted.

¹ City of Treasure Island Variance Requests number PZ-2015-20V-A and B. (App. 62-69)

The Maces are not parties to this appellate action. The Maces' property is located at 715 119th Avenue, Treasure Island, Florida ("the subject property"). Petitioner's property is located at 11775 7th Street, Treasure Island, Florida and is positioned to the west and south of the subject property. The portion of the variance request affecting Petitioner's property is "to reduce the required 5 foot marine structure setback on the west side of lot line to 3 feet." Thomas Dettenwanger and his wife are the owners of the property located at 725 119th Avenue, Treasure Island, Florida that is positioned to the east of the subject property. The portion of the variance request affecting the Dettenwangers' property is "to reduce the required 5 foot marine structure setback on the east side lot line to 2 feet."

The subject property was purchased in July 2014. On April 16, 2015, the application for the variance was filed. The subject property is a corner lot with dimensions of 70 feet by 120 feet. However, due to the fact that it is a corner lot on a canal, the actual waterfront access on the subject property is only 10.67 feet. At the hearing on the variance request, Mr. Dettenwanger testified that prior to the closing on the subject property he had a discussion with Mr. Mace concerning the fact that the waterfront encompassed only 10.67 feet, that there had never been a marine structure on the property, and that under the City Codes it was not possible to construct a marine structure. (App. 33-35).

Standard of Review

This Court in its appellate capacity 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. Sarasota County v. Kemper, 746 So. 2d 539, 541 (Fla. 2d DCA 1999). The appellate court is not permitted to re-weigh the evidence. See Dade County v. Gayer, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980).

Analysis

The City has filed a Motion to Dismiss and Response in which it argues that Petitioner does not have standing to bring this petition on his own behalf or on behalf of the Dettenwangers, who are not parties to this action. Petitioner clearly has standing to challenge the variance that affects his property rights. In the present case, the Maces'

request for a variance was made in a single application with two subparts. This Court concludes that part A and part B of the application are inextricably intertwined, the Board considered the request for the variance as a whole, and the application was granted as a single variance. Therefore, Petitioner has standing to contest all portions of the order granting the single variance. The Motion to Dismiss based on standing is denied.

Treasure Island Code Chapter 69 specifically governs Marine Structures in the City of Treasure Island, Florida. The provisions of City Code section 69-91 set forth the procedure to be used to obtain a variance for a Marine Structure. (App. 70-G). These requirements are more restrictive than those set forth under Treasure Island Code Chapter 70 governing a variance in relation to a building, structure, or land.²

Treasure Island Code section 69-91 states in part:

(a) Requests for variances from the requirements of this chapter shall be heard by the planning and zoning board. No variance may be granted unless the applicant establishes, by substantial competent evidence, that:

(1) A literal enforcement of the provisions of this article would result in extreme hardship due to the unique nature of the project and the applicant's property;

(2) The variance being sought to be granted is the minimum variance that will make possible the reasonable use of the applicant's property; and

(3) The granting of the requested variance will be in harmony with the general intent and purpose of the chapter and will not be injurious to the area involved or otherwise detrimental or of adverse effect to the public interest and welfare.

(Emphasis added). The burden of proof is on the applicant, the Maces, to demonstrate by competent, substantial evidence that enforcement of City Code Chapter 69 would

² In seeking a variance in relation to a building, structure, or land in Treasure Island, the Board is governed by Code section 70-221(4) which provides that the Board is to consider certain "criteria and find that they have been substantially satisfied and a hardship exists." One criterion is: "Owing to special conditions, a literal enforcement would result in unnecessary hardship." Treasure Island Code § 70-221(4)(f) (emphasis added).

The term "unnecessary hardship" has been defined as "a non-self created characteristic of the property in question which renders it virtually impossible to use the land for the purpose or in the manner for which it is zoned." *Fine v. City of Coral Gables*, 958 So. 2d 433, 434-35 (Fla. 3d DCA 2007); *Thompson v. Planning Comm'n of City of Jacksonville*, 464 So. 2d 1231, 1237-38 (Fla. 1st DCA 1985) ("The requisite hardship may not be found unless there is a showing that under present zoning, no reasonable use can be made of the property. . . . [A] self-created hardship cannot constitute the basis for a variance.")

result in "extreme hardship" in order to support their request for a variance to construct a dock on their property within the 10.67 feet of waterfront access.

This Court on certiorari review must consider the testimony and evidence presented at the May 21, 2015, hearing before the Treasure Island Planning and Zoning Board. The Petition does not raise any argument that due process rights were violated. Therefore, this Court must determine if in granting the variance request the Board observed the essential requirements of law and if the decision to grant the variance is supported by competent, substantial evidence.

Mr. Mace presented testimony concerning his desire to have a fishing dock for his young sons and recounted verbal statements that allegedly were made to him by his neighbors concerning installation of a dock. Mr. Mace did not present any evidence or testimony to establish that he and his family would suffer an extreme hardship if the City Code was enforced and the variance request was denied.

The Treasure Island "Staff Report" discusses the merits of issuance of a variance for a marine structure on the subject property and acknowledges the strict criteria that must be demonstrated in part is: "(1) A literal enforcement of the provisions of this article would result in extreme hardship due to the unique nature of the project and the applicant's property." (App. 102-03).

In analyzing this requirement, the Staff Report discusses the limited waterfront access on the subject property and the requirements of Treasure Island Code section 69-71(A)(1) and (6) concerning restrictions on the dimensions and location of docks, davits, boat lifts, and boats. The Staff Report notes:

The more restrictive provision in the Article takes precedence and as such there must be 5 feet on each side of the dock. This more restrictive provision permits the applicants to have a dock 1 foot wide on the subject site. One foot is not wide enough to be a catwalk and does not provide a useful marine structure to the applicants.

In recommending approval of the variance request, the Staff Report states:

Staff finds this situation to be a hardship. Single family residential waterfront properties in the City commonly enjoy marine structures. When the strictest provisions of the code are applied, no dock can be installed behind this home. (One must have at least 2 feet of width for a catwalk.)

(App. 104). The Staff Report does not find and does not indicate how literal enforcement of the provisions of the City Code would result in extreme hardship to the Maces. It should be noted that the Staff Report also states:

If the Planning and Zoning Board members wish **TO DENY** marine variance requests A and B, the findings would be:

- The property owner purchased this lot with 11 feet of waterfront width.
- This is a self-imposed hardship. No marine structure was on the site when they purchased the lot and so no dockage should be sought or anticipated for this location in the future.

(App. 104).

The Board's Order approving the variances does not state that a literal enforcement of the provisions of Treasure Island Code Chapter 69 would result in extreme hardship due to the unique nature of the project and the applicant's property. The only finding by the Board in the Order granting the variance concerning hardship is: "The design of the subdivision plat caused the hardship."

Conclusion

This Court finds that the Board departed from the essential requirements of law by granting variance request PZ-2015-20 without a determination that the Maces had established, by substantial competent evidence that a literal enforcement of the provisions of Treasure Island Code Chapter 69 would result in extreme hardship due to the unique nature of the project and the applicant's property.

Further, competent, substantial evidence does not support the order granting variance request PZ-2015-20 as no evidence was presented to establish that a literal enforcement of the provisions of Treasure Island Code Chapter 69 would result in extreme hardship to the Maces.

This Court also notes that testimony at the hearing demonstrated that Mr. Mace was aware of the limited waterfront access on the subject property before he closed on the subject property. The courts have held: "A self-imposed or self-acquired hardship (such as by purchasing property under existing zoning and then applying for a variance) is not the kind of hardship for which variance should be granted." Elwyn v. City of Miami, 113 So. 2d 849, 852 (Fla. 3d DCA 1959).

The Petition for Writ of Certiorari is granted and the Board's order granting the variance request PZ-2015-20V is quashed.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 13th day of October, 2015.

Original Order entered on October 13, 2015, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia A. Muscarella.

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