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.: 15-000057AP-88A
UCN: 522015AP000057XXXXCV

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 September 14, 2015, decision of Respondent, Pinellas County Board of Adjustment ("Board"). Intervenor-Respondents, F&L Towers, LLC and Seminole Christian Fellowship, Inc., were granted a variance from the Pinellas County Code of Ordinances setback requirements for adjacent properties in relation to the erection of a 150-foot communication tower. The petition is granted and the September 14, 2015, order granting the variance is quashed.

Statement of Facts

In 2013, Seminole Christian Fellowship, Inc. ("Seminole"), as owner of the property, and F&L Towers, LLC ("F&L")(collectively "applicants" or Respondents), as the installer of the telecommunication tower, filed an application for a public hearing on a special exception and variance with the Pinellas County Board of Adjustment.[1] The applicants 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, four inches from the property lines of the residential properties on the western boundary of the property. Under the requested variance, the applicants proposed that the communication tower be erected in a wooded area in the Northwest corner of the 3.903 acre property.

On December 5, 2013, the Board unanimously voted to grant a special exception as to the height of the tower. The Board then voted 5-2 to approve the variance as to the setback requirements finding that all nine criteria in Code section 138-113[2] had been met.

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[1] This Court takes judicial notice of the original Application in the appendix filed in Gomes v. Pinellas County, Board of Adjustment, Case No. 14-000004AP-88A. See § 90.202(6), Fla. Stat. (2016).

[2] Pinellas County Ordinance section 138-113, "Criteria for granting of variance" states:

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.

Petitioners, adjacent landowners, Mr. Gomes and Mr. Killingsworth, filed a petition for writ of certiorari from the Board's December 5, 2013, decision. In Gomes v. Pinellas County, Board of Adjustment, 22 Fla. L. Weekly Supp. 775a (Fla. 6th Cir. App. Feb. 5, 2015)(hereinafter "Gomes I"), with regard to the variance, Petitioners raised an issue concerning only one of the nine criteria for granting a variance: 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."

In Gomes I, Petitioners argued, and this Court agreed, that there was no competent, substantial evidence to demonstrate that without the variance for the commercial tower setbacks the applicants would suffer an "unnecessary hardship." This Court concluded that the Board departed from the essential requirements of law and competent, substantial evidence did not support the Board's decision to grant the variance as to the setbacks. The petition was granted as to the variance and the matter was remanded for further proceedings in accordance with the opinion of the Court.

On remand, the applicants presented the same variance request that was presented in Gomes I with an additional document entitled "Supplemental Information to Variance Application – BA 6-10-13." A hearing was conducted on September 3, 2015, and in an order entered on the same date, the Board approved the variance. This petition followed.

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(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.

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

I. Due Process

Petitioners do not claim there has been a violation of procedural due process.

II. Essential Requirements of Law and Competent, Substantial Evidence

A. Petitioners' Arguments:

1. Constitutionality of Code section 138-113

Code section 138-113 setting forth the "Criteria for granting of variance" states that in order to authorize a variance, the Board "shall consider" the nine listed criteria.

Petitioners argue that an interpretation of the Code section that merely requires consideration of the criteria is insufficient. It is asserted that if in granting a variance the Board is not required to find that competent, substantial evidence supports a finding by the Board that each criterion has been met, the Code section would be rendered "unconstitutionally vague and indefinite, thus rendering it void."

In response to Petitioners' argument, applicants assert that the constitutionality of Code section 138-113 is not properly raised in this petition for writ of certiorari.

Case law concerning challenges to the constitutionality of a code provision have held that, on certiorari review, the Court may properly consider only whether procedural due process was afforded. See Nostimo, Inc. v. City of Clearwater, 594 So. 2d 779, 782 (Fla. 2d DCA 1992). The issue of whether substantive due process has been afforded by a code provision must be determined by the trial court in a declaratory action. Id. A challenge to not only the application of the code section, but also its very

validity or constitutionality is properly brought as a declaratory action. Id.; Bama Investors, Inc. v. Metropolitan Dade County, 349 So. 2d 207 (Fla. 3d DCA 1977). Petitioners' challenge to the constitutional validity of Code section 138-113 is not properly raised in this petition.

This Court cannot and does not make any comment or ruling on the constitutionality of Code section 138-113, as this petition is not the appropriate vehicle for the issue to be resolved.

As currently drafted, section 138-113 does not require the applicant to demonstrate and does not require the Board to find that the nine listed criteria have been met in order to grant a variance; only that the criteria have been "considered" by the Board in making its decision.

However, on certiorari review, this Court reviews the evidence presented in support of the variance in order to make two determinations: (1) whether the Board considered the criteria and (2) whether competent, substantial evidence supports the Board's decision. See Seminole Garden Florist, Inc. v. Pinellas County Board of Adjustment, 22 Fla. L. Weekly Supp. 865a (Fla. 6th Jud. Cir. App. Ct. Jan. 18, 2015). This Court is not to reweigh the evidence, but if, as in Gomes I, competent, substantial evidence does not support the Board's decision, the petition for writ of certiorari must be granted.

2. Did Respondents show all the variance criteria were met?

In the petition, responses, and reply in this action, there is disagreement between Petitioners and Respondents as to whether on remand the Board was to consider all nine criteria required by Code section 138-113, or only criterion number three, unnecessary hardship.

As noted above, in Gomes I, the Petitioners raised an issue only as to criterion three, unnecessary hardship. At the commencement of the September 3, 2015, hearing, the Assistant County Attorney on behalf of the Respondent, Pinellas County, advised the Board and stated:

> So just the effect of the remand basically continues the previous hearing, just a regular continuance. So please note that all testimony that was previously submitted is still valid. You can limit the testimony if you don't wish to hear

everything that was discussed last time or you can ask for more information to refresh your recollection.

(Resp. App. p. 49). Further, after introducing himself, counsel for Intervenor, F&L Towers, stated to the Board: "I will ask that consistent with the earlier discussion, that the record of the prior proceedings be a part of this record as well in the event there is yet another appeal." (Resp. App. p. 51). Counsel explained that three witnesses would be testifying to present evidence about all nine criteria to ensure all issues raised by a Staff Report were addressed. (Resp. App. p. 59).

In Gomes I, this Court granted the petition as to the variance and remanded for further proceedings on the application for the variance. The statement by the Assistant County Attorney concerning the scope of review is correct. This Court did not direct the Board on remand to reconsider all issues related to the variance request. The Board was to conduct a new evidentiary hearing to determine whether the applicants could present competent, substantial evidence of an unnecessary hardship to support granting a variance: the only issue raised by Petitioners in Gomes I.

The Petitioners summarize the evidence presented by Respondents at the September 3, 2015, hearing and argue that with regard to criteria one through four: (a) the community's alleged need for AT&T Wireless services is irrelevant; (b) the evidence regarding the safety of the tower is irrelevant; (c) the Church's future expansion plans are irrelevant and were properly dismissed by the Board as a reason for granting the variance; (d) evidence that the aesthetics of the tower project would be optimized if the variance was granted does not support the Board's decision that the variance criteria are met; and (e) the applicant failed to present any competent, substantial evidence to support the Board's finding that the Church would suffer an unnecessary hardship if the variance was denied.

As noted above, the only criterion that shall be considered by this Court is criterion number three.

3. Criterion Three: Unnecessary Hardship

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.")

a. The Supplemental Information to Variance Application – BA 6-10-13

The Supplemental Information to the Application sets out two arguments that reference the unnecessary hardship issue:

(i) Structural Safety Issues. With regard to this argument, the Supplemental Information concludes:

> Therefore, in this particular instance, the extensive 150 foot setback requirement - initially imposed to prevent damage or danger to adjacent structures or property - no longer serves a necessary purpose since the subject unipole Communication Tower is structurally engineered to collapse internally and does not present a danger to adjacent structures or property. As such, given the current engineering standards for structural soundness and collapsibility of the subject unipole Communication Tower, the 150 foot setback requirement creates an unnecessary hardship on the Applicant because it is unnecessarily excessive and deprives the Applicant of a right commonly enjoyed by others in the same zoning district - i.e., the standard setback requirements for the R-R zoning district (Front -- 25 ft., Side --10 ft., and Rear 20 ft.).
>
> . . . .
>
> Since the 150 foot setback is no longer necessary to provide tower safety, this excessive setback creates an unnecessary hardship on the Applicant by depriving it of a right commonly enjoyed by other properties in the same zoning district – i.e., the standard setback requirements for the R-R zoning district (Front -- 25 ft., Side --10 ft., and Rear 20 ft.).

(Pet. App., p. 80, 83; emphasis in original).

(ii). Aesthetic Concerns. With regard to this argument, the Supplemental Information concludes:

> However- if the Variance is not approved -- the required tower location would force the tower to be placed in a highly visible barren area of the parent tract immediately adjacent to the street and in front of the existing church buildings. Therefore, denial of the Variance and the imposition of the 150 foot setback has a less aesthetically desirable consequence than the proposed location with the Variance. While the setback requirement for communication towers is imposed, in part, for aesthetic purposes, given the site's unique conditions and the fact that

> the proposed tower location is substantially buffered by existing vegetation, trees and the church buildings, the 150 foot setback requirement is unnecessary in this instance. Therefore, the imposition of the 150 foot setback presents an unnecessary hardship and deprives the Applicant of a right commonly enjoyed by others in the same zoning district -- i.e., the standard setback requirements for the R-R zoning district (Front -- 25 ft., Side -- 10 ft., and Rear 20 ft.).
>
> . . . .
>
> Therefore, since the proposed unipole tower is more aesthetically pleasing than the early 1990s towers, and since the site's existing trees and vegetation provide effective visual buffering of the view of the tower, the 150 foot setback constitutes an unnecessary hardship on the Applicant and deprives the Applicant of a right commonly enjoyed by others In the same zoning district -- i.e., the standard setback requirements for the R-R zoning district (Front -- 25 ft., Side -- 10 ft., and Rear 20 ft.).

(Pet. App., p. 81, 83; emphasis in original).

b. Testimony and Argument Presented

(i) At the September 3, 2015, hearing, applicants presented no testimony or argument in support of the Structural Safety Issues or Aesthetic Concerns contained in the Supplemental Information to the Application, as is set forth above.

However, in response to the Supplemental Information, counsel for Mr. Gomes characterizes it is a "creative" argument. Applicants are arguing that an unnecessary hardship is created because property owners are allowed to build their homes within a short distance from the neighboring property lines, but a communication tower (seventy-five feet or more in height) is not permitted to be erected within these same short distances. Counsel for Mr. Gomes summarized:

> When you say it out loud, it's pretty clear that that's not apples to apples. And our code, the variance, the provisions of the code make it clear and they ask us to consider like structures. . . . It is not an unnecessary hardship for one person not to be able to put a tower up against a property line just because Mr. Gomes can put his house that close to the property line. That is an entirely different situation and that is not what unnecessary hardship is intended to do, even as written under this particular County code.

(Resp. App. 95-97).

This Court agrees that this creative argument is flawed. Other property owners in the same zoning district who wish to erect communication towers or antenna are not permitted to install a tower or antenna in a twenty-five foot setback from the front, ten

feet from the side, or twenty feet from the rear of their structure. All the similarly situated property owners who wish to erect communication towers or antenna are restricted by the requirements in Pinellas County Ordinance section 138-1347[3] that require that towers shall be set back from residential property lines a distance equal to the height of the tower. See § 138-1347(7), (10).

(ii) At the hearing, three witnesses testified on behalf of the applicants. (1) Stacy Frank, a principal of F&L testified (Resp. App. 59-63) concerning "why there's a need for this site" for the telecommunication tower. She testified generally in support of the erection of a communication tower. Ms. Frank did not address how the applicants would suffer an unnecessary hardship if the variance request for the setbacks was not granted.

(2) Seth Schmid of Kimley-Horn and Associates, a structural engineer, testified (Resp. App 63-69) concerning the design of the proposed unipole telecommunication tower and about the "fall radius" for the tower. Mr. Schmid did not address how the applicants would suffer an unnecessary hardship if the variance request for the setbacks was not granted.

(3) Cyndi Tarapani, Vice-President of Planning with Florida Design Consultants, testified (Resp. App. 69-84) about the site plan and some "constraints to the site and constraints to that tower location in addition to the church buildings." Ms. Tarapani directed the Board to graphic diagrams of the area and noted that to the west of the "tower site" are church storage buildings and to the southeast is a basketball court. Additionally, photographic simulations of the proposed communication tower from varying angles were presented. (Pet. App. 89-96).

The special exception granted by the Board in 2013 allows the Respondents to exceed the seventy-five foot height limitation on communication towers imposed by Code section 138-1347(2), in order to erect the proposed 150-foot tall communication

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[3] 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:

. . . .

(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.

tower. Ms. Tarapani noted that the center of the subject property is the only location within the perimeter of the property that meets the 150-foot distance requirement imposed by Code section 138-1347(10). (Resp. App. 75). She testified that Seminole "does intend to expand over time to address the needs of its congregation." In discussing the possibility of expanding their facilities, Ms. Tarapani states that she was informed by the pastor that a gymnasium could be built in the area where the communication tower must be erected if the variance is not granted. (Resp. App. 76). It was argued that the required location of the tower without the variance "significantly reduces the church's ability to expand over time." (Resp. App. 77).

In addressing any unnecessary hardship if the variance request for the setbacks was not granted, Ms. Tarapani testified as follows:

> The literal interpretation of the code for the setbacks restricts that location to one specific location in the center of the site, in direct conflict with the church's expansion plans. This restricted location therefore deprives the applicant of his rights to full use of the property both now and in the future, like other RR properties, since the setbacks reduce the amount of available land for expansion.
> . . . .
> Also without the variance, an unnecessary hardship is created for the applicants in this site by prescribing a specific location for the tower which has the effect of preventing the future expansion. Since there is an alternative location with a variance subject to your approval that is consistent with the intent of the code to minimize visual impact, there is no need to create a hardship and prevent future expansion by the church.

(Resp. App. 79, 80)

In response to Ms. Tarapani's testimony, counsel for Mr. Gomes argued:

> We also heard future expansion. Future expansion is a speculative request of somebody who doesn't have to comply with 150-foot setbacks. [Seminole] can build [its] gymnasium where they're proposing the tower to be, near the parking lot. [Seminole] doesn't have to be in the middle with the gymnasium. [Seminole] can build it on the other side of the church or anywhere else on the property. It's only the tower that has the 150-foot setback.

(Resp. App. 87). In his concluding comments to the Board, counsel for Mr. Gomes asserted that Seminole's "future speculative expansion is not a reason for you to grant this variance. It's just inapplicable." (Resp. App. 97).

(iii) In conclusion, counsel for Mr. Gomes directed the Board to the case of Auerbach v. City of Miami, 929 So. 2d 693, 693-95, 695 n.3 (Fla. 3d DCA 2006), in which the appellate court found, in a strongly worded opinion, that the mere fact that the variance may render the project more aesthetically pleasing or more economically rewarding does not support a finding of hardship. This Court notes that in its Response the County candidly concedes that "aesthetics alone does not constitute competent substantial evidence" and it also cites to Auerbach. (County Resp. p. 17).

C. The Board's Observations on the Record

Board Member Alan Bomstein noted that the neighbors had not expressed a fear about safety issues with the communication tower falling on their property. Further, he noted:

> I'm not so sure about the fact that it would prohibit the expansion of the church property in the future. I tend to agree with [counsel for Petitioners] that you can build around it if you had to. But that's okay. I don't think that all -- I don't think that all of the conditions of hardship need to be met. I think enough of them have been addressed that we've considered the issues appropriately.

(Resp. App. 111-112). Board Member Bomstein commented:

> Assuming, assuming that yes, there's going to be a tower on this property and that's definitely going to happen, if that's the assumption, then I would say there is an undue hardship placed upon the property owner if they had to put it in the middle of the property and also upon all the neighbors around it because it would become a much more visible entity, and it would impact the aesthetics of the property and possibly the future use of the property, although that's really not our problem.
>
> But I think it would -- it would clearly create at least a visual hardship, if nothing else, once you take the premise that the tower is going to happen. So that premise, to me, becomes paramount in determining whether or not there's a hardship. You have the opportunity to put the tower amongst the trees off of the center of the property, which would seemingly minimize impact to everybody, to the property owner, to the surrounding greater neighborhood. . . . So, you know, there is the responsibility that this Board has to the greater good of the community and the neighbors, and I think burying the tower in a less visible location is -- serves well the citizens of the county, if not, you know, the few immediate neighbors who object to this. But I think that we would be derelict if we allowed this tower to get built smack in the middle of this property where it could be seen from everybody for literally blocks around.

(Resp. App. 115-117). In a motion on the variance request, Board Member Bomstein concluded:

> Well, based on the evidence that's been presented, based on the criteria for variances in the County land code, looking at specifically all of the conditions that have to be met, I think that on balance we have met those conditions. I think that the community is served well by allowing the variance to occur and I would move for approval.

(Resp. App. 120).

The form order entered September 14, 2015, with regard to criterion three, an "x" was placed next to the statement: "Unnecessary hardship. That literal interpretation of the provisions of this chapter would deprive the applicant of the rights commonly enjoyed by other properties in the same zoning district under the terms of this chapter." (Pet. App. p. 4-5).

Conclusion

The Petitioners request that this Court quash the September 14, 2015, Order with directions to the Board to deny the Application for a variance. This Court does not have the authority to make a ruling on the merits of the request for a variance and will not direct the Board as to the manner in which to proceed. See Clay County v. Kendale Land Dev., Inc., 969 So. 2d 1177, 1180-81 (Fla. 1st DCA 2007).

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, 958 So. 2d at 434-35 (Fla. 3d DCA 2007); Thompson, 464 So. 2d a 1237-38 ("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.")

Upon a review of the documentary evidence and testimony presented to the Board on September 3, 2015, this Court concludes that competent, substantial evidence does not support the Board's decision that the applicants would suffer an unnecessary hardship if the variance is not granted. The Board departed from the essential requirements of law in finding that the literal interpretation of the provisions of County

Code Chapter 138 would deprive the applicants of rights commonly enjoyed by other properties in the same zoning district upon which a communication tower is proposed to be erected.

The Petition for Writ of Certiorari granted as to the variance. The variance is quashed.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 12th day of May, 2016.

Original Order entered on May 12, 2016, by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Patricia Muscarella.

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