

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

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

HARBOR VILLAS AT DUNEDIN
CONDOMINIUM ASSOCIATION, INC., et al.,
Petitioners,

v.

CITY OF DUNEDIN,
Respondent.

Ref. No. 19-000044AP-88B
UCN: 522019AP000044XXXXCI

FILED
CIVIL COURT REC. DEPT.
2020 APR 22 AM 9:31
JENNIFER BURKE
CLERK OF CIRCUIT COURT

ORDER AND OPINION

Petitioners challenge the City of Dunedin's Board of Adjustment and Appeal's decision to deny an application for a permit to install a dock. For the reasons set forth below, the Petition for Writ of Certiorari is granted.

Facts and Procedural History

Petitioner Michael Rega owns two condominium units in the Harbor Villas at Dunedin condominium complex. In May 2019, Petitioner Rega submitted an application for a conditional use permit for the construction of a multi-use dock at the condominium.¹ Harbor Villas is located in a district that is zoned for single-family residential homes; however, the condominium was grandfathered in as a nonconforming use. On May 22, a hearing was held before the Dunedin Board of Adjustment and Appeals ("Board"). The Board heard testimony from the City's Director of Planning and Development, Petitioner Rega, and several neighbors. The Director recommended granting the application. The Board, however, voted 4 to 1 to deny the application. Petitioners then filed the instant Petition for Writ of Certiorari.

¹ There was some discussion about whether the condominium association, not the unit owner, should have been the applicant for the permit. According to the transcript, counsel for the City indicated that the matter could proceed with approval from the condominium association, which the City received prior to the hearing. Harbor Villas at Dunedin Condominium Association joined Mr. Rega as a Petitioner in this case.

Standard of Review

The circuit court reviews a quasi-judicial decision of a local government for three elements: (1) whether the local government provided due process, (2) whether the local government followed the essential requirements of law, and (3) whether the local government's decision was supported by competent, substantial evidence. *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1039 (Fla. 2d DCA 2012).

Discussion

Petitioners maintain that the Board departed from the essential requirements of law in its decision to deny the application for a dock, and that the Board's decision is not supported by any competent and substantial evidence. We write only to address the lack of competent, substantial evidence.

Determining if competent, substantial evidence supports the Board's decision "involves a purely legal question: whether the record contains the necessary quantum of evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). Upon certiorari review, a court "is not permitted to go farther and reweigh that evidence . . . or substitute its judgment about what should be done." *Id.* Although this Court must only look for evidence that supports the decision below, that evidence still needs to be competent and substantial. Competent evidence must "be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *See Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). Substantial evidence must be "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *Id.* "[F]indings must be based

on something more than mere probabilities, guesses, whims, or caprices, but rather on evidence in the record that supports a reasonable foundation for the conclusion reached.” *Id*

The order on appeal states that the application does not meet approval criteria numbers 7-10, as required by the City’s Code of Ordinances § 104-21.9. Under “Conclusions of Law,” the order simply lists the four criteria. The only “finding” is in regard to number 8 where it is stated that “it is a grandfathered nonconformity. The use allows much more intense use of the dock and slip facilities than the desired growth and land use pattern the City’s Land Use Plan proposes.” The only Board member to attempt to make findings at the hearing stated:

[I]t doesn't meet the criteria of 7 through 10. I don't believe the use is compatible with the desired growth and land use patterns. It is a grandfathered nonconformity. How can it be -- how can it be compatible -- compatible with what the coun -- the City desires when it's -- it's not -- the use of the property is not compatible with what the City's plan is for that piece of property. It -- if it were not a grandfathered nonconformity, it would be two single-family homes. This use allows much more intense use of the dock and slip facilities than the desired growth and land use patterns that the City land use plan proposes. I don't -- yeah, I think the -- the neighbors have indicated that in their view it would be detrimental to their use of adjacent properties and that it would adversely affect the surrounding area. I'm convinced by that, at least some of those -- those points I think are well taken.

A reviewing court “may uphold the decision even in the absence of supportive factual findings, so long as the court can locate competent substantial evidence consistent with the decision.” *Alachua Land Inv'rs, LLC v. City of Gainesville*, 15 So. 3d 782 (Fla. 1st DCA 2009). Here, however, no competent, substantial evidence exists in the record to support the legal conclusions drawn by the Board. The only “evidence” in opposition to the dock is neighbor testimony. Opinion testimony of residents that is not backed up by facts is not competent, substantial evidence. *City of Apopka v. Orange County*, 299 So. 2d 657, 660 (Fla. 4th DCA 1974) (reversing the City’s decision where “[t]he evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by any competent facts [and] the Board made no

finding of facts [but] simply stated as a conclusion that the exception would adversely affect the public interest”); *see also Conetta v. City of Sarasota*, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981) (“Their decision appears to be based primarily on the sentiments of other residents It amounted to no more than a popularity poll of the neighborhood.”).

The “finding” concerning the grandfathered nonconformity is likewise not competent, substantial evidence. “The [c]ourts of this State have never questioned the right of a municipality or county to impose reasonable restrictions on the expansion of a non-conforming use. However, justice requires substantial proof of the violation of such restrictions.” *Johnston v. Orange County*, 342 So. 2d 1031, 1033 (Fla. 4th DCA 1977). The order states “it is a grandfathered nonconformity. The use allows much more intense use of the dock and slip facilities than the desired growth and land use pattern the City's Land Use Plan proposes.” One Board member declared the use could not be compatible with the desired growth and land use patterns because “how can it be compatible . . . when . . . the use of the property is not compatible with what the City's plan is for that piece of property. . . . [I]f it were not a grandfathered nonconformity, it would be two single-family homes.” The Board is confusing the compatibility (i.e., nonconformity) of the condominium with the compatibility of the dock.² The property is grandfathered in as a 12-unit condominium, while the area is zoned for only single-family residential homes. If that land did not have a condominium on it, the space would allow for two single-family homes. Each home would be allowed one boat dock. If this application was granted, the condominium would have two boat docks. If the condominium was replaced by two single-family homes, the dock would still be allowed.³ In

² While it is true that a nonconforming use cannot be extended or enlarged, nothing in the record or applicable case law indicates that a dock would extend or enlarge the nonconforming use.

³ Nothing in this opinion is intended to suggest that more than two docks would be improper. As it is not an issue in this Petition, the Court declines to address it.

addition, the City's Planning and Development Director submitted a staff report and testified as follows:

The nonconformity is the building. And actually if we get very technical, this -- the land and water out in the canal is not even under the [single-family] zoning. That is -- it has its own zoning district. It's called Marine Park. . . . So in this case the -- the dock -- the area that the dock is going to be on is conforming.

Accordingly, the nonconforming use of the condominium has no bearing on this application for a conditional use permit.

Conclusion

Because the Board's order is not supported by competent, substantial evidence, it is

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

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this

____ day of _____, 2020.

Original Order entered on April 17, 2020, by Circuit Judges Pamela A.M. Campbell, Linda R. Allan, and Amy M. Williams.

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