

**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, STATE OF FLORIDA
APPELLATE DIVISION**

**IMH 4 LLC,
Petitioner,**

**REF: 21-000015AP-88A
UCN: 522021AP000015XXXXCI**

-vs-

**CITY OF ST. PETERSBURG,
Respondent.**

_____ /

Opinion filed: _____

Petition for Writ of Certiorari from
Denial of Variance Request by St.
Petersburg Development Review
Commission

Giancomo Boss, Esq.
Attorney for Petitioner

Michael J. Dema, Esq.
Attorney for Respondent

PER CURIAM

Petitioner, IMH 4 LLC, seeks review of the St. Petersburg Development Review Commission's denial of Petitioner's application for a variance. For the reasons set forth below, Petition for Writ of Certiorari is denied.

Facts and Procedural History

Petitioner is the owner of a property located at 1711 Scranton Street South, St. Petersburg, FL. The property consists of an 8720 square foot parcel which currently contains a principal dwelling and an approximately 735 square foot accessory shed. The construction date of both the house and the shed appear as 1925 in the County Property Appraiser's records. There is no construction date on the City's property card. The City property card does indicate that the location of the shed was granted a variance in 1985. This approval, however, only authorized the structure for use as a shed and not as an Accessory Dwelling Unit ("ADU").

At some point between 1985 and September of 2019, the shed was converted into an accessory dwelling unit without the requisite approvals and building permits from the City. Petitioner purchased the property in September of 2019. In November of 2019, Petitioner applied for a variance for a rear yard setback from 10 feet to 1.78 feet for an existing storage structure planned for conversion into an accessory dwelling unit in the NT-1 Zoning District. Petitioner has also submitted for an after-the-fact building permit to make the shed, now an accessory dwelling unit, a legal conforming use. At the time of the application for the variance, the shed was being used as a dwelling and was inhabited.

A public hearing was held May 5, 2021 before the Development Review Commission on the variance. At the public hearing, the Petitioner incorrectly testified that a variance to a setback is unrelated to the use of the structure. Petitioner opined that there is no need to regrant a variance to the setback as there was already a variance granted for the structure. The variance previously granted was for an uninhabited shed, not an accessory dwelling unit. Petitioner argues that they did not modify the structure or the location of the structure and are only applying for a change of use. Cheryl Bergailo with Development Review Services presented a Staff Report that recommended a denial of the variance based on a review of the stringent evaluation criteria contained within the City Code. The seven member commission voted to deny the variance to a rear-yard setback from 10 feet to 1.78 feet for an existing storage structure plan for conversion and to an accessory dwelling unit in the NT-1 Zoning District. The order of the Development Review Commission was rendered May 6, 2021, however Petitioner received it via email on May 28, 2021. Petitioner filed a timely petition for writ of certiorari arguing the City departed from the essential requirement of law.

Standard of Review

Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine (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. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *See Falk v. Scott*, 19 So.3d 1103, 1104 (Fla. 2d DCA 2009). The reviewing court “above all cannot reweigh the “pros and cons” of conflicting evidence.” *Id.* at 1104. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended. *Dusseau v. Metro. Dade County Bd. of County Com'rs*, 794 So.2d 1270, 1276 (Fla. 2001).

Discussion

Petitioner does not argue that due process was not accorded. The Petitioner had notice and the opportunity to be heard. Petitioner does note that the decision of the Development Review Committee was rendered May 6, 2021 and not received until May 28, 2021, thereby not allowing Petitioner the opportunity to request a rehearing. However, as noted by the Respondent, §16.70.010.5 states in pertinent part: a “Commission shall not

rehear an application unless. . . new evidence is discovered by the applicant after the hearing which would likely change the result if a new hearing is granted and which could not have been discovered before the hearing by due diligence.” Petitioner concedes “While admitted (*sic*) not present in the record below, Petitioner believes that even the one unit that encroaches on the setback with a “garage” is in fact encroaching with a living unit because the garage is being used as a living unit. Petitioner would have introduced the evidence as to this point at a rehearing, but Petition (*sic*) did not receive notice of the right to a re-hearing until after the date listed in the Order for rehearing was expired.” Footnote 4 of Initial Brief. That information could have been discovered before the hearing by due diligence of Petitioner and §16.70.010.5 would not authorize a rehearing.

Petitioner argues that the City departed from the essential requirements of law when it denied a variance for using the property as an accessory dwelling unit when a variance was already granted for the same identical structure in the same identical location for use as a shed. Petitioner cites to §16.70.040.1.6 of the St. Petersburg Code which states “[t]he purpose of a variance is to ensure that no property because of the special circumstances applicable to it, shall be deprived of privileges commonly enjoyed by other properties in the same zone and vicinity. Variances shall

be reviewed and may be approved, approved with conditions, or denied by the commission designated in the Decisions and Appeals table.”

§ 16.70.040.106 of the City Code states the need to evaluate the impacts of a variance to “[n]eighborhood character” and whether it will be “injurious to neighboring properties or otherwise detrimental to the public welfare.” The City Code requires a review of a site’s compatibility with its surrounding properties when a change of use is sought.

The Staff Report states “The granting of the variance would not be in harmony with the general purpose and intent of this chapter which at Section 16.10.010.4.J Setback, is to ‘ensure that an effective separation is provided between properties, structures and uses to foster compatibility, identity, privacy, light, air and ventilation. In this case, the rear setback does not allow for sufficient privacy for the unit itself, or an opportunity to provide landscaping along that frontage. The Report also states “The granting of the variance would be injurious to the public welfare because it would be inconsistent with the general purpose and intent of the above-referenced Land Use Regulations Chapter.” Tim Clemmons, the chair of the Development Review Commission stated at the public hearing: “we have a condition where we have a nonconforming, an illegal unit in a building that we’re being asked to approve a variance to reduce the setback from 10 feet

to 1.78 feet, with Staff recommendation of denial, and there does not appear to be good evidence to suggest that there's a hardship or that this is a prevalent condition in the neighborhood".

Petitioner's second argument is the City "departed from the essential requirements of law when it failed to acknowledge that all the neighbors are in the same condition as Petitioner, whether through approval or lack of enforcement, which equates approval." The granting of similar variances to others is not a proper consideration when deciding whether or not to grant a variance. See *City of Jacksonville v. Taylor*, 721 S. 2d 1212, 1213 (Fla. 1st DCA 1998).

Ms. Bergailo testified as to the consistency within the neighborhood of the Petitioner's structure with other setbacks: "there's a shed on the lot to the north and a house to the south, at number 1724 which are located within the rear-yard setback. These structures are similar in age to the subject structure. Farther south on 46th Street South, there's a house at 1744, which also appears to be located in the required rear yard setback. . . The other structures on this block face appear to comply with the required rear-yard setbacks or are non-habitable garage structures in the setback."

Additionally, Ms. Bergailo in response to Petitioner's questioning the existence of other setbacks in the neighborhood, testified: "I do acknowledge

that there, and I did in my testimony, that there are units on that block that are in the setback, and there (*sic*) are of a similar age, probably over 100 years old, um , when zoning didn't exist. So, could that structure be rebuilt without a variance? No."

The evidence before the Commission does not support Petitioner's contention that "all the neighbors are in the same condition as Petitioner."

The Development Review Commission based their findings on the evidence and testimony presented at the public hearing. Therefore, the Development Review Commission's decision is supported by competent substantial evidence and is not a departure of the essential requirements of law. "A departure from the essential requirements of law means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Haines City Community Development v. Heggs*, 658 So.2d 523, 527 (Fla. 1995). Petitioners have failed to show that the decision of the Development Review Committee constituted a departure from the essential requirements of the law such that it amounts to "a violation of a clearly established principle of law resulting in a miscarriage of justice." See *Combs v. State*, 436 So.2d 93, 96 (Fla. 1983).

Conclusion

This Court concludes based on the facts and analysis set forth above, procedural due process was accorded and the Development Review Commission's decision to deny Petitioner's application for a variance to a rear yard setback for the conversion of an existing storage structure into an accessory dwelling unit is supported by competent substantial evidence and the essential requirements of law have been observed. The Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this _____ day of _____, 2022.

TRUE COPY

Original Order entered on April 12, 2022, by Circuit Judges Sherwood Coleman, Patricia A. Muscarella, and George M. Jirotko.

Copies furnished to:

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