

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

JOANN NESTOR; and  
JOHN NESTOR,  
Petitioner(s),

REF: 22-000011-AP  
UCN: 522022AP000011XXXXCI

v.

CITY OF ST. PETERSBURG FLORIDA;  
and BAY TO BAY REMODEL AND  
DESIGN LLC,  
Respondent(s).

\_\_\_\_\_ /  
Opinion filed 09/28/2023

Petition for Writ of Certiorari for relief  
from approval of a variance application  
by the City of St. Petersburg, Florida.

Allison C. Doucette, Esq.  
Counsel for Petitioner

Devon E. Haggitt, Esq.  
Counsel for City of St. Petersburg, Florida

Jacob T. Cremer, Esq.  
Counsel for Bay to Bay Remodel and Design LLC

**PER CURIAM**

Petitioners, JOANN NESTOR and JOHN NESTOR (hereafter, “the Nestors”), seek certiorari review of Respondent CITY OF ST.

PETERSBURG, FLORIDA’S (hereafter, “the City”) approval of a variance

application in favor of Respondent BAY TO BAY REMODEL AND DESIGN LLC (hereafter, "Bay to Bay"). This Court has appellate jurisdiction pursuant to Art V § 5(b), Fla. Const. and Fla. R. App. P. 9.030(c)(3). For the reasons enumerated below, we deny Petitioners' writ of certiorari and affirm the decision of the City's Development Review Commission to grant a variance with special conditions for the property located at 3538 Bayshore Boulevard NE, St. Petersburg, Florida 33703 (hereafter, "the Property").

### **STATEMENT OF FACTS**

Respondent Bay to Bay purchased real property located at 3538 Bayshore Boulevard NE, St. Petersburg, Florida 33703, in December 2021. The Property consists of two conjoined lots, Lot 27 and Lot 28 of the Shore Acres neighborhood within the City of St. Petersburg, Florida.

In 2015, the Property contained one single-family home under common ownership and the lots were merged by operation of law before Bay to Bay purchased the Property. At issue in the case *sub judice* is the City's approval of a variance permitting the proposed lots to deviate from the minimum lot requirements of the Property's designated zoning district. The variance allows Bay to Bay to commence development of two single family residential homes upon two individual 60-foot lots in accordance with

development specifications submitted contemporaneously with the variance application.

The Property is subject to the Neighborhood Suburban-1 (NS-1) zoning district. The principal use of the NS-1 zone is single-family homes with front-facing driveways and garages permitted according to specific design criteria. St. Petersburg, Fla., Ordinance §§16.20.020.1-16.20.020.12 (2022). Generally, multi-family uses are prohibited. St. Petersburg, Fla., Ordinance §16.20.020.4 (2022). For purposes of development, “[t]he standards for the NS districts are intended to allow for additions and improvements, while respecting the existing development pattern and the character of the neighborhoods.” St. Petersburg, Fla., Ordinance §16.20.020.5 (2022). In fact, all Neighborhood Suburban districts are subject to specific development and design criteria. Saliently, the minimum lot width for residential lots in the NS-1 zoning district is 75 feet. St. Petersburg, Fla., Ordinance §16.20.020.6 (2022).

The Nestors are homeowners residing at 3547 Bayshore Boulevard NE, St. Petersburg, Florida 33703, and have standing to oppose the variance. The Nestors seek to overturn the City’s decision, arguing that the City’s Development Review Commission failed to adhere to the requirements of the local Land Development Regulations when it granted

the variance allowing Bay to Bay's lots to measure 15 feet less than the minimum required lot width of 75 feet.

## **STANDARD OF REVIEW**

The Supreme Court of Florida, in City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982), held that where full review of administrative action is given in the circuit court as a matter of right, the circuit court must determine: (1) whether procedural due process is accorded, (2) whether the essential requirements of law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. This standard of review has been extended to include review of quasi-judicial decisions of local government agencies. Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

## **ANALYSIS**

First, the requirements of procedural due process pursuant to the United States Constitution, as well as the Florida Constitution, are fair notice and a reasonable opportunity to be heard. Housing Authority of City of Tampa v. Robinson, 464 So. 2d 158, 164 (Fla. 2d DCA 1985). "[T]here is ... no single, unchanging test which may be applied to determine whether the requirements of procedural due process have been met." Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982). These are

flexible concepts to be discerned from the facts of each case. Mathews v. Eldridge, 424 U.S. 319 (1976).

Respondents argue, and we agree, that the Nestors have waived their arguments against having been accorded procedural due process during the development review proceedings. The Nestors do not allege in either of their briefs that they were deprived of procedural due process. See City of Miami v. Steckloff, 111 So. 2d 446, 447 (Fla. 1959) (“An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs”).

Nonetheless, it is apparent from the record that Nestors, as well as members of the surrounding community, were actively involved in opposing the variance throughout the development review proceedings. In its application, Bay to Bay represented that on December 11, 2021, it mailed a Notice of Intent to File to all neighborhood or business associations within 300 feet of the Property. The Nestors, through counsel, mailed two objection letters to the Development Review Commission on March 1, 2022, and on May 3, 2022, stating that the Nestors were “Registered Opponents’ [of the variance and were] prepared to be present at the...hearing[s].” Pet’rs’ App’x at Appx\_064-Appx\_077, Appx\_201-Appx\_202. According to the transcripts of the hearings, the Nestors were,

in fact, present at each hearing. Pet'rs' App'x at Appx\_079-Appx\_166, Appx\_314-Appx\_390. Thus, we must conclude that the Nestors, and all other parties, were accorded procedural due process.

Second, whether the essential requirements of law have been observed hinges upon the lower tribunal's application of the correct law. Heggs, 658 So. 2d at 531 (Fla. 1995). "The correct law may derive from a variety of sources including local government ordinances." Wolk v. Board of County Com'rs of Seminole County, 117 So. 3d 1219, 1223 (Fla. 5th DCA 2013).

According to St. Petersburg, Fla., Ordinance § 16.70.040.1.6(A), "the 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." To obtain a variance for the Property, Bay to Bay was required to submit an application to the City subject to the requirements of St. Petersburg, Fla., Ordinance §16.70.040.1.6(B) (2022), including a demonstration that the applicant is deprived of the reasonable use of the land. Thereafter, the POD, or "person officially designated," reviews the application for completeness and sends a report to the City's development review commission. St. Petersburg, Fla., Ordinance § 16.70.040.1.6(C) (2022). The commission schedules hearings

and issues a decision according to both the standards of review for a zoning and planning decision generally, which are promulgated by St. Petersburg, Fla., Ordinance §16.70.040.1(E) (2022), and the standards of review for a variance, which are promulgated by St. Petersburg, Fla., Ordinance §16.70.040.1.6(D) (2022).

The standards of review for a zoning and planning decisions require that:

the POD, commission, or the City Council shall consider whether the proposed amendment is consistent with and furthers the purpose of the Land Development Regulations and other City ordinances and actions designed to implement the plan.”

St. Petersburg, Fla., Ordinance §16.70.040.1(E) (2022). The standards of review for a variance decision add the following factors to “guide” the development review commission’s decision:

1. Special conditions exist which are peculiar to the land, building, or other structures for which the variance is sought and which do not apply generally to lands, buildings, or other structures in the same district. Special conditions to be considered shall include, but not be limited to, the following circumstances:
  - a. *Redevelopment*. If the site involves the redevelopment or utilization of an existing developed or partially developed site;
  - b. *Substandard lot*. If the site involves the utilization of an existing legal nonconforming lot which is smaller in width, length or area from the minimum lot requirements of the district;
  - c. *Preservation district*. If the site contains a designated preservation district;
  - d. *Historic resources*. If the site contains historical significance;
  - e. *Significant vegetation or natural features*. If the site contains significant vegetation or other natural features;

f. *Neighborhood character*. If the proposed project promotes the established historic or traditional development pattern of a block face, including setbacks, building height, and other dimensional requirements;

g. *Public facilities*. If the proposed project involves the development of public parks, public facilities, schools, public utilities or hospitals;

2. The special conditions existing are not the result of the actions of the applicant;
3. Owing to the special conditions, a literal enforcement of this chapter would result in unnecessary hardship;
4. Strict application of the provisions of this chapter would provide the applicant with no means for reasonable use of the land, buildings, or other structures;
5. The variance requested is the minimum variance that will make possible the reasonable use of the land, building, or other structure;
6. The granting of the variance will be in harmony with the general purpose and intent of this chapter;
7. The granting of the variance will not be injurious to neighboring properties or otherwise detrimental to the public welfare; and
8. The reasons set forth in the application justify the granting of a variance;
9. No nonconforming use of neighboring lands, buildings, or other structures, legal or illegal, in the same district, and no permitted use of lands, buildings, or other structures in adjacent districts shall be considered as grounds for issuance of a variance permitting similar uses.

St. Petersburg, Fla., Ordinance §16.70.040.1.6(D)(1)-(9) (2022).

It is apparent from the record that the development review commission applied the correct law, to wit: St. Petersburg, Fla., Ordinance §16.70.040.1.6(D)(1)-(9) (2022). The Staff Report, upon which all parties including the development review commission, based their arguments and conclusions contains the exact language of St. Petersburg, Fla., Ordinance

§16.70.040.1.6(D)(1)-(9) (2022), complete with explanations and detail. Pet'rs' App'x at Appx\_023-Appx\_027. The City's development review commission discussed these guiding factors during the public hearings in extreme detail, and although a great amount of time was spent speaking on the topic of "neighborhood character," most, if not all relevant guiding factors were addressed at the hearings. See Pet'rs' App'x at Appx\_079-Appx\_166, Appx\_314-Appx\_390.

As a circuit court acting in its appellate capacity, our first-tier certiorari review is *limited*. This is not a plenary appeal of the City's decision. "A decision made according to the form of the law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, is not an illegal or irregular act or proceeding remediable by certiorari." Heggs, 658 So. 2d at 525 (Fla. 1995) (Citing Basnet v. City of Jacksonville, 18 Fla. 523, 526-27 (1882)).

Third, whether the administrative findings and judgment are supported by competent, substantial evidence demands an honest look at the evidence. Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles, 209 So. 3d 1165 (Fla. 2017). The evidence cannot be untruthful or nonexistent. Id. Competent, substantial evidence is "such evidence as will

establish a substantial basis of fact from which the fact at issue can be reasonably inferred.” De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

During the hearings, the City considered the Staff Report, testimony and sworn statements from experts and neighbors in opposition, documents including those submitted to the City by Bay to Bay, plat maps, site plans, and the presentations by counsel. The City received evidence of the dimensions of Lots 27 and 28, as well as those of the surrounding neighborhood, and determined that the variance is in harmony with the general purposes and intent of the land development regulations. See Pet’rs’ App’x at Appx\_079-Appx\_166; see Pet’rs’ App’x at Appx\_314-Appx\_390.

The Nestors are correct in arguing that there is no finding of hardship pursuant to the St. Petersburg, Fla., Ordinance § 16.70.040.1.6(D)(3). The Nestors are also correct in arguing that “strict application” of the ordinance(s) would, in fact, provide Bay to Bay with a reasonable use of the land. St. Petersburg, Fla., Ordinance § 16.70.040.1.6(D)(4). The City admitted several times that Lots 27 and 28, as merged, provide Bay to Bay with a reasonable use of the land. See Pet’rs’ App’x at Appx\_079-Appx\_166, Appx\_314-Appx\_390; see also Pet’rs’ App’x at Appx\_023-

Appx\_027. The application itself is deficient such that Bay to Bay did not demonstrate that:

strict application of the Land Development Regulations would deprive the applicant of reasonable use of the land, building, or structure, equivalent to the use made of lands, buildings, or structures in the same district and permitted under the terms of this chapter...

St. Petersburg, Fla., Ordinance § 16.70.040.1.6(B)(2); see Pet'rs' App'x at Appx\_007-Appx\_022. Even the Staff Report, when applying the law to the facts, states:

8. The reasons set forth in the application justify the granting of a variance;
  - The reasons set forth in the application narrative are not particularly persuasive.

Pet'rs' App'x at Appx\_026. In fact, it appears the only factors that were supported by competent, substantial evidence are the special circumstances of Lots 27 and 28 that are “not the result of the actions of the applicant.” St. Petersburg, Fla., Ordinance §§ 16.70.040.1.6(D)(1), (2); see Pet'rs' App'x at Appx\_079-Appx\_166; see Pet'rs' App'x at Appx\_314-Appx\_390.

However, this Court, in its appellate capacity and under the limited standard of review to be applied, “is not entitled to reweigh the evidence or substitute its judgment for that of the [lower tribunal].” Heggs, 658 So. 2d 523, 530 (Fla. 1995). The factors are intended to “guide” the local

government in determining whether a variance is warranted. See St. Petersburg, Fla., Ordinance § 16.70.404.1.6(D).

The question is not whether, upon review of the evidence in the record, there exists substantial competent evidence to support a position contrary to that reached by the agency. Instead, the circuit court should review the factual determination made by the agency and determine whether there is substantial competent evidence to support the agency's conclusion.

City of West Palm Beach Zoning Bd. of Appeals v. Education Development Center, Inc., 504 So. 2d 1385, 1386 (Fla. 4th DCA 1987). It is clear that substantial, competent evidence supports the City's variance approval.

This Court sympathizes with the Nestors' plight. Changes to one's primary residential neighborhood may be deeply personal and upsetting. However, the City did not depart from the essential requirements of law by approving this variance.

## **DISPOSITION**

Certiorari denied.

**ORDERED** in Chambers at Clearwater, Pinellas County, Florida, this

ZB<sup>th</sup> day of \_\_\_\_\_, 2023.

Original Order entered on September 28, 2023 by Circuit Judges Sherwood Coleman, George Jirotko, and Keith Meyer.

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