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Municipal corporations -- Zoning -- Variances -- Undue hardship -- Certiorari challenge to city board of adjustment's grant of setback variances to allow hotel owner to rebuild previously existing cabanas near pool -- Hotel owner's motion to dismiss for mootness due to its abandonment of rights under variance order is denied -- Abandonment of rights does not render variance order null and void -- Standing -- Owner of abutting property has standing to challenge variance order -- "No reasonable use" standard is appropriate measure of undue hardship for non-use variances -- Where record contains no competent substantial evidence to support finding that hotel owner would have no reasonable use of property absent requested variances, variance order is quashed

PHILIPS SOUTH BEACH, LLC d/b/a THE SHORE CLUB, Petitioner, v. THE CITY OF MIAMI BEACH & INSITE MIAMI BEACH, LLC, Respondents. Circuit Court, 11th Judicial Circuit, (Appellate) in and for Miami-Dade County. Case No. 12-295AP. October 31, 2013.[1] On certiorari review from a Variance Order rendered by the City of Miami Beach Board of Adjustment. Counsel: Jacqueline B. Savir and Steven M. Ebner, for Petitioner. Gary M. Held, for Respondent City of Miami Beach. Michael Larkin and Graham Penn; Gerald B. Cope, Jr. and Nancy Copperthwaite, for Respondent Insite Miami Beach, LLC[2].

(Before FERNANDEZ, RUIZ-COHEN, and FABER, JJ.[3])

(FERNANDEZ, Judge.) The case before this Appellate Court stems from a Variance Order from the City of Miami Beach Board of Adjustment. Respondent Insite Miami Beach, LLC is the operator of "The Continental Hotel" in Miami Beach, Florida. Petitioner Philips South Beach, LLC is the operator of the hotel "The Shore Club" in Miami Beach, Florida, located on the abutting property to the north of Respondent's property.

On May 8, 2012, Respondent submitted an amended application to the City of Miami Beach Board of Adjustment for several zoning variances associated with planned renovations to the hotel. Specifically, Respondent requested variances from the side-yard and rear-yard setback requirements to build cabanas that had previously existed near its pool, which Respondent claims were historic features of the hotel. On July 9, 2012, the Board of Adjustment held a hearing on Respondent's variance application. The Board heard testimony from both Respondent and Petitioner, as well as from the City of Miami Beach Planning Department staff. After the hearing, the Board voted unanimously to grant Respondent's requested setback variances, having found that Respondent met the standards for the variances. The Board's Variance Order changed the north side-yard setback requirement from 7'-6" to 3'-6" and the rear-yard setback requirement from 129'-7" to 58'-0".

Petitioner now seeks a writ of certiorari from this Court to quash the Variance Order, claiming that Respondent failed to meet the "undue hardship" standard for zoning variances. For the reasons set out in this opinion, this Appellate Court finds that the decision of the City of Miami Beach Board of Adjustment is not supported by competent substantial record evidence.

Respondent's Motion to Dismiss for Mootness

Respondent Insite Miami Beach, LLC filed a Suggestion of Mootness & Related Motion to Dismiss on September 12, 2013. The Motion asserts that Respondent has abandoned any rights it had under the Variance Order, rendering the Order null and void, and thus rendering the Petition for Writ of Certiorari moot. Upon review of the Motion, this Court is not convinced that Respondent's abandonment of its rights under the Variance Order has the legal effect of rendering the Variance Order null and void. Accordingly, Respondent's Motion to Dismiss for mootness is hereby denied, and this Court will rule on the merits of the Petition for Writ of Certiorari.

Standard of Review

First-tier certiorari review of a quasi-judicial decision of a local zoning authority consists of a review of the record to determine: (1) whether procedural due process was accorded; (2) whether the "essential requirements of the law" were observed; and (3) whether the administrative findings and judgment are supported by "competent substantial evidence." *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *see also* Dusseau v. Metro. Dade C'ty Bd. of C'ty Comm'rs, 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a]; Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. On first-tier certiorari review, the circuit court should not re-weigh the evidence or substitute its judgment for that of the zoning authority. *Dusseau*, 794 So. 2d at 1275-76; Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1093 (Fla. 2000) [25 Fla. L. Weekly S461a]; *Bd. of County Com'rs of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993); *Vaillant*, 419 So. 2d at 626; *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The reviewing court may not reweigh the "pros and cons" of conflicting evidence. *Dusseau*, 794 So. 2d at 1276. Lastly, the reviewing court is prohibited from performing a *de novo* review, and by law is limited to a review of the record made at the previous zoning hearing. *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943 (Fla. 5th DCA 1988). With this standard of review in mind, this Court will consider the arguments presented by the parties regarding the Variance Order.

Petitioner's Standing

As a preliminary matter, Respondent asserts that Petitioner lacks standing to substantively challenge the Board of Adjustment's decision through a petition for writ of certiorari. Respondent claims that Petitioner failed to demonstrate at the zoning hearing that it possessed the standing necessary to raise a substantive challenge to the variance application, and therefore does not have standing to petition for a writ of certiorari. Petitioner contends that it established its standing at the zoning hearing and has standing to petition for a writ of certiorari.

The general rule for standing in zoning disputes, as enumerated by the Florida Supreme Court, is:

> An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. . .An individual having standing must have a definite interest exceeding the general interest in community good share in common with all citizens. . .In determining the sufficiency of the parties' interest to give standing, factors such as the proximity of his property to the property to be zoned or rezoned, the character of the neighborhood, including the existence of common restrictive covenants and set-back requirements, and the type of change proposed are considerations.

Renard v. Dade County, 261 So. 2d 832, 837 (Fla. 1972).

Respondent claims that Petitioner does not meet this standard because Petitioner failed to demonstrate a negative effect to a legally recognizable interest, and therefore does not have standing. Petitioner counters that it satisfied the requirements set out in *Renard*, and therefore has standing to substantively challenge the Variance Order.

Florida courts generally find that an abutting neighbor has a legally recognized interest in the outcome of a zoning decision for a variance application. As stated by the Second DCA, "[a] multitude of cases recognize that neighboring property owners affected by zoning changes have standing to challenge the changes." *See* City of St. Petersburg, Bd. of Adjustment v. Marelli, 728 So. 2d 1197, 1198 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D668a] (citing *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So. 2d 904 (Fla. 3d DCA 1987)). As an example, in *Chisholm Properties South Beach, Inc. v. City of Miami Beach*, this Court found that the petitioner, as a neighbor in close proximity to the property that was granted variances, would be adversely impacted by the variances to a greater extent than the rest of the community. *See* Chisholm Properties South Beach, Inc. v. City of Miami Beach, et. al., 8 Fla. L. Weekly Supp. 689b (Fla. 11th Cir. Ct. Aug. 9, 2001). The Court further found that the petitioner had an interest in protecting the character of the neighborhood, and to promote the continuation of existing zoning conditions in the absence of a showing that a variance was necessary. *Id.* (citing *Herrera v. City of Miami*, 600 So. 2d at. 563).

Upon review of the July 9, 2012 hearing transcript, along with the relevant case law, this Court finds that Petitioner presented sufficient evidence of its status as a neighboring property owner, along with its interests in

the zoning decision, to establish standing to challenge the Variance Order through a petition for writ of certiorari.

The "Undue Hardship" and "No Reasonable Use"

Standards for Zoning Variances

The parties' actions before the Board of Adjustment, as well as the arguments presented in their respective briefs to this Court, illustrate that they disagree on the applicable standards and criteria that must be met to be eligible for a non-use zoning variance. Accordingly, before analyzing whether the Board of Adjustment complied with the essential requirements of law or whether the Board's decision is supported by competent substantial evidence, this Court must first determine the proper standards and criteria necessary for granting a non-use zoning variance.

Undue Hardship

Section 118-353(d) of the Code of the City of Miami Beach, Florida (the "Code") lists seven criteria that must be met for the Board of Adjustment to grant a variance to existing zoning regulations. Most relevant to this case, subsection (4) states:

> (4) Literal interpretation of the provisions of these land development regulations would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of these land development regulations and would work *unnecessary and undue hardship* on the applicant;

See § 118-353(d), Code (emphasis added).

Both the City of Miami Beach Planning Department staff and Board of Adjustment analyzed Respondent's variance application and granted the variances based on a finding that Respondent's application met the criteria in Section 118-353(d). *See* R. at 1-4 (Variance Order); R. at 39-40 (Staff Report).

The parties' main argument is whether the Board of Adjustment properly applied subsection (4) to find that the existing zoning regulations would work an "unnecessary and undue hardship" on Respondent. Petitioner argues that the Board failed to apply the proper standard for "undue hardship," while Respondent asserts that the Board properly found that a hardship existed to grant the variance.

The "No Reasonable Use" Hardship Standard

The phrase "unnecessary and undue hardship" in Section 118-353(d)(4) is undefined by the Code. Petitioner argues that the "undue hardship" required for granting a zoning variance is that "no reasonable use can be made of the property without the requested variance." *See Herrera v. City of Miami*, 600 So. 2d 561 (Fla. 3d DCA 1992); *Thompson v. Planning Com'n of City of Jacksonville*, 464 So. 2d 1231, 1234 (Fla. 1st DCA 1985). This hardship standard is generally referred to as the "no reasonable use" standard.

Conversely, Respondent urges this Court not to apply the "no reasonable use" standard for undue hardship for non-use variances such as the setback variances involved in this case. Respondent argues that the "no reasonable use" standard was originally intended to be applied to use variances, and is inappropriately applied to a non-use variance. *See George v. Miami Shores Village*, 154 So. 2d 729, 731 (Fla. 3d DCA 1963); *Elwyn v. City of Miami*, 113 So. 2d 849 (Fla. 3d DCA 1959).

The precedent case law from the Third District Court of Appeal is clear, however, that the "no reasonable use" standard is the appropriate measure for "undue hardship" for non-use zoning variances. For instance, in *Maturo v. City of Coral Gables*, the Third DCA quashed an Eleventh Judicial Circuit Appellate Court decision for failing to apply the "no reasonable use" hardship standard to a height variance. *See* 619 So. 2d 455, 456 (Fla. 3d DCA 1993). In *Auerbach v. City of Miami*, the Third DCA quashed a variance to a setback requirement, and held that the Eleventh Judicial Circuit Appellate Court failed to apply the correct law by failing to apply the "no

reasonable use" standard. *See* 929 So. 2d 693, 694 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1432a]. In *Fine v. Coral Gables*, the Third DCA affirmed a City of Coral Gables decision denying a variance application for a resident to install a metal roof on their house, and expressed that the "no reasonable use" standard was the appropriate measure for "undue hardship," even for the non-use variance at issue. *See* 958 So. 2d 433 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1155a].

Based on this precedent case law, this Court finds that it must apply the "no reasonable use" hardship standard when reviewing the Board of Adjustment's Variance Order. Accordingly, this Court also finds Respondent's arguments regarding undue hardship for historic properties, and the "practical difficulties" language of the City of Miami Beach Charter unpersuasive.

Essential Requirements of Law & Competent Substantial Evidence

Petitioner argues that the City of Miami Beach Board of Adjustment departed from the essential requirements of law when granting the Variance Order because the Board failed to apply the "no reasonable use" hardship standard. Petitioner further asserts that the record does not contain competent substantial evidence to satisfy the "no reasonable use" hardship standard. Respondent counters that the Board of Adjustment complied with the essential requirements of law by applying Section 118-353(d) of the Code, and that the Board's decision is supported by competent substantial evidence.

Examining the essential requirements of law, it is clear from the record that the Board of Adjustment and its staff applied Section 118-353(d) of the Code when analyzing Respondent's variance application. The record is unclear, however, whether the Board or its staff applied the "no reasonable use" standard when considering subsection (4) of Section 118-353(d) to determine whether there was an "undue hardship." Since it is difficult to determine whether the Board applied the "no reasonable use" standard when considering Respondent's variance application, this Court will instead look to the record to ascertain whether the Board's decision to grant the variances is supported by competent substantial evidence.

With regards to competent substantial evidence, this Court finds that the instant case is similar to two other Eleventh Judicial Circuit Appellate Court cases dealing with non-use variances granted by the City of Miami Beach. In *Szabo v. City of Miami Beach*, the City of Miami Beach Board of Adjustment granted a setback variance to allow The Clevelander Hotel to build within five feet from the property line, rather than the twenty feet required by the Code. *See* 1 Fla. L. Weekly Supp. 476b (Fla. 11th Cir. Ct., Jul. 16, 1993). Applying the "no reasonable use" standard, this Court held that:

> [t]he law requires. . .that the owner not be able to use the *entire* property without the variance. No evidence was presented to the Board that the owner could not use his entire property without the variance. In fact, the evidence was quite to the contrary, establishing that a successful and valued Hotel was already in operation.

Id.

Similarly, in *Chisholm Properties South Beach, Inc. v. City of Miami Beach et. al.*, the City of Miami Beach Board of Adjustment granted a zoning variance to the Ritz Plaza Hotel to build a seven-story addition to an existing hotel. *See* 8 Fla. L. Weekly Supp. 689b (Fla. 11th Cir. Ct. Aug. 9, 2001). On first-tier certiorari review, the Eleventh Judicial Circuit Appellate Court held that "the essential requirements of law were not observed, and that substantial competent evidence does not support the Board's decision of granting [the] Ritz two variances. . ." *Id.* The Court continued:

> Markedly absent from the Staff findings, and from the record below, is any evidence that the subject property is virtually unuseable or incapable of yielding a reasonable return without the granting of the variances. Ritz has been utilizing its property for hotel purposes, presumably yielding a reasonable return. . .The subject property is not unusable under the existing zoning regulations.

Id.

Much like in *Szabo* and *Chisholm* discussed above, the record on appeal in the instant case does not appear to contain any competent substantial evidence to support a finding that Respondent would have no reasonable use of its property absent its requested variances. To the contrary, the record demonstrates that Respondent operates the property as a hotel and may continue to renovate and use the hotel without the zoning variances. Applying the "no reasonable use" hardship standard, there is no competent substantial evidence in the record that Respondent's property is unusable under the existing zoning regulations.

Appellate Attorney's Fees

As a last issue for this Court to consider, Respondent moved for appellate attorney's fees pursuant to Section 57.105, Florida Statutes. Upon review of the Motion and Response, it appears that Respondent is requesting the Court to sanction Petitioner on a moot issue. Respondent moved to strike one page of extra-record material from Petitioner's Appendix on October 25, 2012. The Court granted Respondent's Motion to Strike on November 7, 2012. After the Court ruled on the Motion, Respondent served Petitioner with its Motion for Sanctions on November 8, 2012.

Since Respondent's Motion for Sanctions was served after this Court had already ruled on the underlying issue, Petitioner had no opportunity to withdraw or correct the challenged defense as provided in Section 57.105 and Rule 9.410. *See* § 57.105, Fla. Stat. (2010); Fla. R. App. P. 9.410. With the issue moot, Petitioner could take no action to resolve Respondent's issue with its response to the motion to strike. Given these facts and the procedure outlined by Rule 9.410(b), Respondent's Motion for Appellate Attorney's Fees is denied.

THEREFORE, based on the foregoing analysis, this Appellate Court finds that the decision of the City of Miami Board of Adjustment to grant the Variance Order was not supported by Competent substantial record evidence. Accordingly, Respondent's Motion to Dismiss for Mootness is hereby DENIED, Respondent's Motion for Appellate Attorney's Fees is hereby DENIED, Petitioner's Petition for Writ of Certiorari is hereby GRANTED, and the Variance Order is hereby QUASHED. (RUIZ-COHEN, J., concurs.)

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[1]This opinion corrects a scrivener's error in the original opinion filed October 17, 2013 regarding the attorneys' appearances and a related footnote. There are no substantive changes.

[2]Gerald B. Cope, Jr. and Nancy Copperthwaite substituted as Respondent's counsel after oral arguments.

[3]FABER, J. heard oral argument but did not participate in deliberations due to recusal.

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