HPB22-0506, 1 Lincoln Rd & 1671 Collins Av 4/12/22 meeting "Exhibit A"

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Counties -- Zoning -- Non-use variance -- Certiorari challenge to county zoning board's denial of non-use variances needed to cure code violations and obtain permission to close road across which petitioners have constructed unpermitted gate and structures is denied -- Neighbors' testimony that illegally-constructed gate and structures clashed with character of neighborhood, negatively impacted traffic, and created safety and access issues for neighboring properties was competent substantial evidence supporting denial of variances where testimony was fact-based and directly relevant to non-use variances sought -- Weighing competent substantial evidence that supports decision to deny variances against staff report recommending approval is beyond scope of certiorari review -- Where board's decision addressed factors set forth in zoning code, decision comported with essential requirements of law

JUAN CARLOS FERNANDEZ, et al., Petitioners, v. MIAMI-DADE COUNTY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-1-AP-01. L.T. Case No. CZAB12-14-19. December 21, 2020. On Petition for Certiorari from the Miami-Dade County Community Zoning Appeals Board 12. Counsel: W. Tucker Gibbs, W. Tucker Gibbs, P.A., for Petitioners. Cristina Rabionet and Lauren E. Morse, Assistant County Attorneys, on behalf of Abigail Price-Williams, County Attorney, for Respondent.

(Before TRAWICK, WALSH, and SANTOVENIA, JJ.)

(WALSH, J.) Petitioners Juan Carlos and Margarita Fernandez seek a writ of certiorari to quash the Miami-Dade County Community Zoning Appeals Board 12 ("CZAB 12") denial of their application for six non-use variances. Respondent, Miami-Dade County, acting through its CZAB, passed Miami-Dade County Zoning Resolution No. CZAB12-14-19 denying the Petitioners' non-use variance applications.

Background

Petitioners own two properties at 655 SW 79th Avenue (Lot 1), and 685 SW 66th Street (Lot 2) in unincorporated Miami-Dade County. These properties are located across from each other on a portion of SW 79th Avenue. Beyond the two properties, the road reaches a dead end. In 2017, without obtaining any approvals from the CZAB or Miami-Dade County, Petitioners built an eight-foot tall wrought iron fence, structures, and a gate across this portion of SW 79th Avenue, closing in both properties behind the gate. In so doing, Petitioners closed and restricted access to a public road.[1]

Miami-Dade County Code Compliance cited the Petitioners for the unpermitted construction. The Petitioners thereafter sought permission from the County to close a portion of SW 79th Avenue to the public. To obtain permission to close the road, Petitioners were required to cure their code violations. To resolve the code violations, Petitioners entered into a consent agreement in which they agreed to obtain six subject non-use variances as a condition to resolve the code violations without having to dismantle and remove the unpermitted gate and structures.

The required non-use variances[2] would: (1) reduce Lot 1 setback from the required 25 feet from one of the residences to 17 feet and three inches; (2) permit curvilinear proposed Lot 1 frontage (less than the required 85 feet) of 73.59 feet; (3) permit a wrought iron fence with columns to encroach on the SW 79 Avenue right-of-way; (4) permit an 8-foot high (exceeding the limit of two feet, six inches) wrought iron fence to be placed within 10 feet of either side of the driveway of proposed Lot 1; (5) permit the gate and columns at a maximum height of 8 feet (exceeding the limit of six feet) along with an abutment into SW 79 Avenue; and (6) permit a pool gazebo setback of only 10.3 feet (less than the required 20 feet minimum) of proposed Lot 2 on the east interior side boundary.

Non-use variances 3, 4, and 5 directly relate to the gate and 8-foot wrought iron fence. Non-use variances 1, 2, and 6 do not directly address the illegal gate and fence but are related to a replat and road closure application required by the Public Works and Waste Management Department. If the closure of SW 79th Avenue is permitted, Public Works and Waste Management would require Lots 1 and 2 to be re-oriented towards SW 66 Street. The site plan, drawings, accessory building plans, maps, and photographs, as well as a zoning analysis in the record, all support the requirements for variances 1, 2, and 6 to reorient the properties if SW 79th Avenue is closed.

At the public hearing before the CZAB, the Petitioners' neighbors offered written letters and testimony. Several neighbors testified that granting the non-use variances would impact traffic on the abutting right-of-way. The neighbors at 6501 SW 79 Court and 7801 SW 66 Street testified that the growing number of dead-end streets created too many road closures, dramatically affecting the character of the neighborhood. In addition, closing the road restricts access to the back of the neighboring property at 6501 SW 79th Court.

Another neighbor at 6600 SW 79 Avenue testified that delivery trucks waiting at the gate to make deliveries block traffic. This neighbor was opposed to the road closure, because it also restricts her own right of access to the public road. Another neighbor testified that the gate impedes visibility of oncoming cars coming through the gate, causing a traffic safety issue.

Memorial Plan Cemeteries and Funeral Homes owns a cemetery adjacent to the Petitioner's properties and submitted a letter complaining that the gate and road closure blocks access to their cemetery, interfering with their business.

The CZAB determined that the six non-use variances were detrimental to the public interest and denied the application by a 5 to 1 vote. Petitioners timely challenged the denial by petition for writ of certiorari.

Analysis

Local government approval of a non-use variance is quasi-judicial and subject to certiorari review. *Park of Commerce Assoc. v. Delray Beach,* 636 So. 2d 12, 15 (Fla. 1994); *Skraggs v. Key West,* 312 So. 2d 549, 551-552 (Fla. 3d DCA 1975); *Broward County v. G.B.V. International, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S463a]. We apply a three-part standard of review: (1) whether procedural due process was afforded; (2) whether the essential requirements of law have been observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *Board of County Comm'rs of Brevard County v. Snyder,* 627 So. 2d 469, 476 (Fla. 1993); *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

The Petitioners argue that the decision to deny the non-use variances was not supported by competent, substantial evidence. Petitioners alternatively argue that in denying the non-use variances that CZAB 12 departed from the essential requirements of law.[3]

Competent Substantial Evidence

To determine whether a decision is supported by competent substantial evidence, the reviewing court must review the record for evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of review. If the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's review is complete. *Dusseau v. Metro. Dade County Bd. of County Com'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Norwood-Norland Homeowners' Ass'n, Inc. v. Dade County,* 511 So. 2d 1009, 1012 (Fla. 3d DCA 1987).

The Petitioners complain that testimony by community members was not properly considered by the CZAB and was not competent substantial evidence. To constitute competent substantial evidence supporting a zoning authority decision on a variance, testimony of affected neighboring property owners must be fact-based, relevant and material. *See Grefkowicz v. Metro. Dade County,* 389 So. 2d 1041 (Fla. 3d DCA 1980) (testimony of affected residents that owners intended to use residential property for commercial purposes went squarely to the

variance issue in question and was therefore competent, substantial evidence); *Metropolitan Dade County v. Section 11 Property Corp.*, 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1866a] ("fact-based testimony regarding the aesthetic incompatibility of the project with the surrounding neighborhood, coupled with the site plan, elevation drawings, and the aerial photograph constituted substantial competent evidence supporting the denial of the exception"); *Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc.*, 750 So. 2d 738, 739 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D308a] (the circuit opinion erroneously ignored relevant, material, fact-based testimony of residents "that the establishment of [ ] a facility requires a 2.5-acre lot which is not available at this location").

Here, the neighbors testified that the illegally-constructed gate and structures -- the subject of non-use variances 3, 4, and 5 -- clashed with the character of the neighborhood, blocked traffic when delivery trucks were present, impeded visibility for oncoming traffic and blocked access to the neighbors' own properties. With respect to non-use variances 1, 2, and 6, required as corollary changes to closing the road, the neighbors testified that the road closure impeded access to their own properties, blocked use of the public road, caused traffic delays and changed the character of their neighborhood. This testimony was directly relevant to the considerations set forth within Section 33-311(A)(4)(b) of the Miami-Dade County Zoning Code. The neighbors' testimony was therefore fact-based, relevant and material to the CZAB decision denying the six non-use variances at issue.[4]

Petitioners argue that the testimony of the neighbors was not competent substantial evidence because the neighbors did not testify specifically about each non-use variance. Petitioners rely upon *Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So. 2d 708, 709 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1179b], *citing City of Apopka v. Orange Cty.*, 299 So. 2d 657 (Fla. 4th DCA 1974). Petitioners further argue that the objections of residents of a neighborhood, without more, is not competent, substantial evidence supporting denial of a variance.

Petitioners' argument does not apply to the neighbors' testimony here. In *Jesus Fellowship,* the county granted a permit to enlarge a proposed religious day school but limited the expansion to grades K-6 with a maximum of 150 students. The neighbors in *Jesus Fellowship* testified about changes to the character of the neighborhood, traffic, and loss of green space. This testimony was not relevant or material to the only issue before the county -- whether the day school expansion should be limited to grades K-6 and 150 students. Likewise, in *City of Apopka,* the court explained that in considering a zoning exception, a municipal board is not to conduct a plebiscite of neighborhood objectors.

Here, there were no generalized objections or incompetent opinions. Rather, the neighbors' testimony was directly relevant to the non-use variances here.[5] *See* *Metropolitan Dade County v. Section 11 Property Corp.*, 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1866a] ("fact-based testimony regarding the aesthetic incompatibility of the project with the surrounding neighborhood, coupled with the site plan, elevation drawings, and the aerial photograph constituted substantial competent evidence supporting the denial of the exception."); *Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc.*, 750 So. 2d 738, 739 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D308a] (" . . . not one but six variances are needed in order to shoehorn a church/day care center onto this property. . . . The Commission properly allowed the neighbors to be heard on these issues and lawfully exercised its discretion in accepting their perspective.").

Petitioners additionally claim that because the staff report recommended approval of the non-use variances there is not competent substantial evidence to deny the requests for the variances. True, a staff report recommending approval does not support a decision to *deny* a variance. But Petitioners' argument invites this panel to misapply the standard of review. The question we must determine is not whether there was some evidence supporting approval of the variances, but rather, whether there was competent substantial evidence *in support of the decision to deny the variances. See* *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000) [25 Fla. L. Weekly S461a] (circuit court improperly granted first-tier certiorari by reweighing evidence heard by the city; instead, a circuit court must only determine whether the record contains competent substantial evidence supporting the decision). Here, there was substantial evidence supporting the denial. The fact that other evidence supported granting the non-use variances is beyond the scope of our review. We do not re-weigh evidence.

The testimony of neighbors, coupled with the documentary evidence on file prepared by the staff in the form of reports, diagrams and drawings, support the conclusion that non-use variances which would allow the unpermitted gate and wrought iron fence to remain and the road to remain closed is against the public interest. Because the non-use variances required to further the objective of closing SW 79th Avenue would create incompatibility, safety, and access issues for the neighboring properties, we find that the photographs, diagrams, maps, site plan, and the drawings, coupled with the neighboring residents' testimony, constitute substantial competent evidence to support the denial.

The Essential Requirements of Law

To comply with the essential requirements of law, the decision below must comport with the requirements of Section 33-311(A)(4)(b) of the Miami-Dade County Zoning Code, which provides:

> Non-use variances from other than airport regulations. Upon appeal or direct application in specific cases to hear and grant applications for non-use variances from the terms of the zoning and subdivision regulations, the Board (following a public hearing) may grant a non-use variance upon a showing by the applicant that **the non-use variance maintains the basic intent and purpose of the zoning, subdivision and other land use regulations, which is to protect the general welfare of the public, particularly as it affects the stability and appearance of the community and provided that the non-use variance will be otherwise compatible with the surrounding land uses and would not be detrimental to the community. No showing of unnecessary hardship to the land is required.** For the purpose of this subsection, the term "non-use variances" involves matters such as setback lines, frontage requirements, subdivision regulations, height limitations, lot size restrictions, yard requirements and other variances which have no relation to change of use of the property in question.

§ 33-311(A)(4)(b) of the Miami-Dade County Zoning Code (emphasis added). The CZAB decision addressed the factors set forth in Section 33-311(A)(4)(b) of the Miami-Dade County Zoning Code, and thus comported with the essential requirements of law. The CZAB considered evidence that the non-use variances were detrimental to the community and contrary to public welfare. The non-use variances would affect traffic safety, visibility, the character of the neighborhood, would result in blocking traffic and restricting access to the properties of other neighbors. The CZAB properly applied the evidence to the considerations set forth in 33-311(A)(4)(b) and therefore observed the essential requirements of law.

The petition for certiorari is therefore denied. (TRAWICK and SANTOVENIA, JJ., concur.)

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[1]As a result of a prior home invasion burglary, the Petitioners wanted to close the street off for security reasons.

[2]The zoning designation is E-1 residential.

[3]The Petitioners do not argue that they were deprived of their due process rights.

[4]Moreover, it is appropriate to deny a non-use variance if competent evidence shows it was in opposition to the public interest. *See Metropolitan Dade County v. Fuller,* 497 So. 2d 1322 (Fla. 3d DCA 1986).

[5]Likewise, *Miami-Dade Cty. v. Publix Supermarkets, Inc.*, No. 3D19-1203, 2020 WL 2176653, at *1 (Fla. 3d DCA, May 6, 2020) [45 Fla. L. Weekly D1089a] does not apply. In that decision, the Third District quashed the circuit opinion upholding denial of non-use variances that would have permitted a liquor store but relied upon the objectors' evidence, rather than reviewing the record for competent substantial evidence supporting the County's decision. The opinion did not conclude whether the variance below was correctly denied.

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