IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2020-AP-30

TIMOTHY L. MALDEN, individually,

Petitioner,

v.

CITY OF JACKSONVILLE BEACH, BOARD OF ADJUSTMENT,

Respondent

_____/

OPINION FILED November 15, 2022

Petition for Writ of Certiorari to the City of Jacksonville Beach, Florida. Board of Adjustment

Donald L. Dempsey III, Esq., for Petitioner.
Sherry Sutphen, Esq., c/o Roper, P.A., for Respondent.

OPINION

SALVADOR, J.

This cause is before the Court upon the Petition for Writ of Certiorari, filed August 6, 2020. Petitioner seeks review of a decision of the City of Jacksonville Beach Board of Adjustment ("City") made on July 8, 2020. The Petition having been timely filed, this Court has jurisdiction.[1] Art. V, § 5(b), Fla. Const.; Fla. R. App. P. 9.030(c)(3); Haines City Community Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). This Court read and considered the Petition, Petitioner's Appendix, and the City of Jacksonville Beach's Response, dated March 29, 2022, and hereby finds and rules as follows:

[1] After reviewing the Appellant's Response and Appendix dated July 15, 2022 and the Appellee's Reply and Supplemental Appendix dated August 1, 2022 to this Court's Order to Show Cause regarding the question of jurisdiction, this Court finds that the Jacksonville Beach Board of Adjustment rendered its written decision, which was filed with the clerk or designee, and thus this Court has jurisdiction to resolve this Petition.

I. Facts and Procedural History

The Petition challenges Respondent's denial of Petitioner's application for a variance of the City of Jacksonville Beach Land Development Code, by which Petitioner sought approval to build a new two-unit multi-family dwelling with reduced setbacks in front, behind and on the sides of the building. On July 7, 2020, a public hearing was held by the City's Board of Adjustment to consider the Petitioner's application. The record of evidence received by the Board in consideration of the Petitioner's application consists of Petitioner's application for the variance, an email sent to the City on June 29, 2020 by a neighboring property owner in opposition to the Petitioner's requested variance, and the Petitioner's letter dated July 3, 2020 -sent to the City in response thereto. On July 7, 2020, the City held a hearing to consider Petitioner's variance application. On July 8, 2020, the City sent a certified letter to the Petitioner, and filed it with the clerk, advising Petitioner that the Board of Adjustment denied his request. There were no written findings or explanations contained in the letter.

Thereafter, on August 6, 2020, Petitioner timely filed the instant Petition wherein he argues that the Board denied his request without written findings or explanations and without competent, substantial evidence. He maintains that the email of one neighboring property owner containing an unfounded hearsay opinion does not constitute competent substantial evidence upon which to deny Petitioner's application for variance. Thus, Petitioner seeks for this Court to grant the Petition, quash the decision of the City's Board of Adjustment, and grant the adjustment requested.

II. Standard of Review

On certiorari review of administrative action, this Court's duty is to determine whether procedural due process was accorded, whether the essential requirements of law have been observed, and 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). This Court is not to reweigh evidence, nor to substitute its judgment for the findings of the agency below. Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So. 2d 106, 108 (Fla. 1989). In applying this standard, the circuit court is strictly limited to reviewing the record as it existed when the local government reached its quasi-judicial decision. Broward County v. G.B.V. International, Ltd., 787 So. 2d 838 (Fla. 2001). The circuit court cannot take new evidence, reweigh the evidence in the record, draw different inferences from the record, re-evaluate witnesses' credibility, or otherwise substitute its factual determination for the local governments. City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So. 2d 202 (Fla. 3d DCA 2003); City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So. 2d 955 (Fla. 4th DCA 1990).

Regarding review of the record for competent substantial evidence, our supreme court's instruction is clear:

> The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. 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 Comm'rs, 794 So. 2d 1270, 1276 (Fla. 2001).

In other words, whether this Court would have reached a different conclusion from that of the Board had it been sitting as the trier of fact is irrelevant, provided that the record contains competent substantial evidence supporting the decision actually reached by the City. Thus, this Court recognizes that the narrow standard under which it must review this matter is not

discretionary, and that it is not allowed *de novo* review nor to substitute its judgment for that of the City of Jacksonville Beach Board of Adjustment.

III. Analysis

Petitioner does not allege that he did not receive procedural due process, but rather that the essential requirements of law have not been observed, and the Board's findings and judgment are not supported by competent substantial evidence. Because the Board's certified letter to the Petitioner denying the requested variance, i.e., the Board's Order, contains no written findings of fact or explanations, this Court must find that the local government's decision departs from the essential requirements of the law. Whether the local government's decision departs from "the essential requirements of the 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, 658 So. 2d at 527, quoting Jones v. State, 477 So. 2d 566, 569 (Fla. 1985); see also Irvine v. Duval County Planning Comm'n, 466 So. 2d 357, 366 (Fla. 1st DCA 1985) (regardless of which party bears the burden of proof, an agency's failure to make adequate findings of fact in its order constitutes a departure from the essential requirements of law) (Zehmer, J. dissenting), quashed 495 So.2d 167 (approving Judge Zehmer's dissent).

Additionally, the Board's findings and judgment are not supported by competent substantial evidence. "Competent substantial evidence is tantamount to legally sufficient evidence." Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000). The evidence before the Board was Petitioner's application, an email sent to the City on June 29, 2020 by a neighboring property owner in opposition to the Petitioner's requested variance, and the Petitioner's letter dated July 3, 2020 sent to the City in response thereto. This Court recognizes that "even if only one witness supports the quasi-judicial decision, despite eight witnesses to the

contrary, some evidence exists in support and certiorari must be denied." Lantz v. Smith, 106 So. 3d 518 (Fla. 1st DCA 2013). However, in this matter, there was no competent substantial evidence from a witness or in the record that supported the Board's decision.

As a general rule the public's unsubstantiated opinions and statements for or against administrative action are generally *not* competent, substantial evidence. See Town of Ponce Inlet v. Rancourt, 627 So.2d 586 (Fla. 5th DCA 1993) (ruling neighbors' lack of objection was not evidence or sufficient to support variance approval); Flowers Baking Co. v. City of Melbourne, 537 So. 2d 1040 (Fla. 5th DCA 1989) ("Objections of local residents to the conditional use permit based on fears as to increased traffic do not constitute such substantial, competent evidence."); BML Investments v. City of Casselberry, 476 So. 2d 713 (Fla. 5th DCA 1985) (finding residents' conjecture that project would increase crime was insufficient to deny preliminary development plan); Pollard v. Palm Beach County, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990) (finding residents' opinions that proposed action would cause traffic problems and light and noise problems was "not factual evidence"); City of Apopka v. Orange County, 299 So. 2d 657 (Fla. 4th DCA 1974) (holding unsworn statements of layperson's objection to special exception was not evidence supporting its denial even if local code requires considering proposed special exception's effect on public). Thus, in this matter, the neighboring property owner's unsworn, hearsay email to the Board does not constitute competent substantial evidence upon which to deny the Petitioner's requested variance. Because the record contains no competent substantial evidence to support the Board's decision, the Petition for Writ of Certiorari shall be granted.

However, despite the granting of the Petition for Writ of Certiorari, Petitioner is not entitled to the additional relief he seeks, i.e., the granting of his application for variance. Certiorari's sole purpose is to halt the miscarriage of justice, nothing more. So, if the Court finds that the quasi-judicial decision by City of Jacksonville Beach Board of Adjustment was improper, the only relief it can afford is to quash the decision, not grant the variance as Petitioner requests. See Broward County v. G.B.V. International, Ltd., 787 So. 2d 838 (Fla. 2001). Quashing the decision merely leaves the parties and controversy pending in the local government as if no decision had ever been entered. Id. The parties stand on their pleadings and proof as it existed before the decision. Id. Consistent with the limited purpose of this writ, this Court, in its appellate capacity, "has no power in exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration nor to direct the respondent to enter any particular order or judgment." Id. at 844. Indeed, the City has recognized same and conceded that this matter should be remanded back to the Board of Adjustment for reconsideration of Petitioner's application. (See City's March 29, 2022 Response at p. 9). Thus, the City of Jacksonville Beach Board of Adjustment can proceed to rehear the quasi-judicial issue, accept additional evidence, and even grant or deny the underlying requested relief again, as long as the City's decision is supported by competent substantial evidence. See Dorian v. Davis, 874 So. 2d 661 (Fla. 5th DCA 2004).

While the Petition includes both a request to grant the Petition and a request to grant the variance Petitioner seeks, which this Court cannot do, Rule 9.040(c) of the Florida Rules of Appellate Procedure provides that "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought." Thus, the Petition shall be treated as if it only sought

the proper remedy of quashing the Board's decision, and not the improper remedy of granting the variance.[2]

Based on the foregoing, the Petition for Writ of Certiorari is hereby **GRANTED, as provided herein.**

CHARBULA J. concurs.

Copies to:

Donald L. Dempsey III, Esq., for Petitioner

Sherry Sutphen, Esq., c/o Roper, P.A., for Respondent.

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[2] Nor will this Court grant the improper remedy of awarding attorney's fees under F.S. 57.105, as requested in the Appellant's Response to this Court's Order to Show Cause.