IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
APPELLATE DIVISION

CHARLES DOHERTY, ET AL,
Petitioner,

v.

TOWN OF HILLSBORO BEACH, ET AL,
Respondent.

APPEAL NO.: CACE22-001479
ADMIN.HEARING:
RE: January 11, 2022,
Development Order regarding
1174-1185 Hillsboro Mile

Dated: April 21, 2023.

Petition for Writ of Certiorari from Petitioners, Charles Doherty, Richard Crusco and Frank J. Kolb Jr.

Ralf Brooks, Cape Coral, for Petitioners.

Martin J. Alexander, Miami and Jeffery Scott Bass, Shubin & Bass, Miami and Donald J. Doody, Hillsboro Beach, for Respondents.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

PER CURIAM.

This cause, comes before the Court for consideration on Petitioners, Charles Doherty, Richard Crusco and Frank J. Kolb Jr's "Petition for Writ of Certiorari," filed on January 31, 2022. Having carefully considered the Petition and its Appendix, and the applicable law, being otherwise duly advised, the Petition for Writ of Certiorari is hereby **GRANTED** and the Final Order is hereby **QUASHED** for the reasons discussed below.

Factual and Procedural History

Hillsboro Mile Property Owner, LLC ("the Applicant") is the owner of real property located at 1174-1185 Hillsboro Mile ("the Property") in the Town of Hillsboro Beach ("Hillsboro"). The Applicant, Hillsboro and Eric Fordin are co-defendants in this case and

shall be collectively referred to herein as “Respondents.” The Applicant is the developer of the Residences at Hillsboro Mile Project that was the subject of the proceedings below. Charles Doherty, Richard Crusco and Frank J. Kolb Jr. (referred to herein collectively as “Petitioners”) are all residents of Hillsboro Beach who reside within 500 feet of the Property.

The Property consists of two parcels of land which are bisected by State Road A1A/Hillsboro Mile (“A1A”), creating two distinct parcels of land, parcel A and parcel B. Parcel B is located on the east side of A1A and is burdened with an environmentally sensitive coastal dune environment that is designated as a Local Area of Particular Concern in Broward County's Land Use Plan (“the conservation area”). Broward County required the prior owner of the parcel to agree to the conditions set forth in the Compliance with Conditions of Environmental Impact Report (“the conservation agreement”). The development of the environmentally sensitive dune area has since been prohibited through the conservation agreement with the prior owner of the Property. The conservation area is composed of 2.877 acres, roughly 47 percent of Parcel B, and renders one-third of the otherwise developable land within the parcel completely undevelopable.

The Property is zoned RM-16, as a Multiple-Family Dwelling Residential District, by the Town of Hillsboro Beach. Hillsboro’s Land Development Code (“Code”), section 12-142, limits the height of structures erected within the RM-16 district to prohibit their construction or alteration to a height exceeding 35 feet, or three stories above dune elevation.

On July 29, 2021, the Applicant submitted a site plan to Hillsboro in order to develop the site. The July 29, 2021, site plan proposed by the Applicant stipulated that the units on Parcel B would be built within a 15-story, 170-foot tower. This proposal was brought before Hillsboro’s Zoning Board of Appeals (“the Board”) at a December 7, 2021, public meeting in the form of a variance request. After the Board’s discussion, Mayor Tarrant directed the Applicant that a 10 or 11 story building would better suit the general scheme of the town, and the Board voted to table the variance until January 11, 2022, to allow the Applicant time to revise its proposal.

On December 17, 2021, the Applicant submitted a revised site plan to Hillsboro and is the subject of the variance at issue herein. The December 17, 2021, revised site plan proposes 28 residential units for Parcel A within a 3 story building and 102 units for Parcel B. The units within Parcel B would be constructed within a 10-story, 130-foot tower. On January 11, 2022, a public meeting on the revised variance request was held before the Board. At this meeting, the Board voted in favor of the variance citing difficulties resulting from the conservation area, particularly a reduction in developable space, adjustments to the way the buildings must be laid and a restricted view of the beach from the beach-front property. Petitioners timely filed suit with this Court on January 31, 2022.

Standard of Review

On a petition for writ of certiorari seeking review of the decision of an administrative agency, the reviewing court is limited to a three-part standard. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). The court must review the record to determine whether: (1) procedural due process is accorded; (2) essential requirements of the law have been observed; and (3) administrative findings and judgment are supported by competent, substantial evidence. *Id*. If the Court determines that any one of the three requirements was not met, the Court can only quash the order below but not enter an order to the contrary. *See Nat'l Adver. Co. v. Broward Cnty.*, 491 So. 2d 1262 (Fla. 4th DCA 1986) ("A court's certiorari review power does not extend to directing that any particular action be taken but is limited to denying the writ of certiorari or quashing the order reviewed.").

Standing of the Parties

Respondents maintain Petitioners lack standing to challenge the variance in question. For a court of law operating as one of the three branches of government under the doctrine of the separation of powers, standing is a threshold issue which must be resolved before reaching the merits of a case. *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015). Before a court can consider whether an action is illegal, the court must be presented with a justiciable case or controversy between parties who have standing. *Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So.2d 374, 376 (Fla. 3d DCA 2006)

("The issue of standing is a threshold inquiry which must be made at the outset of the case before addressing [the merits].").

Herein, the Petitioners are all residents who live within 500 feet of the Property. Charles Doherty and Richard Crusco both reside at 1194 Hillsboro Mile. Frank J. Kolb Jr. resides at 1173 Hillsboro mile, on the parcel directly south of the property that was granted the variance at issue. Thus, Petitioners will be adversely affected by the variance to a greater extent than the community in general. *See Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). The right of an adjacent or nearby home-owner directly affected by zoning action to sue is generally recognized. *Id*.; see *Elwyn v. City of Miami*, 113 So. 2d 849, 853 (Fla. 3d DCA 1959). Thus, as neighboring and proximate property owners, Petitioners have a cognizable right to sue and thus have standing.

Approval of the Variance

Section 12-283(C) of the Town of Hillsboro Beach Land Development Code ("the Code") contains the authority on which the Hillsboro Board of Zoning Appeals ("the Board") may grant a variance. The portions relevant to this analysis are as follows:

> (2) *Instances of hardship.* Authorize upon appeal, whenever a property owner can show that a strict application of the terms of this chapter relating to the use, construction or alterations of buildings or structures, or the use of land will impose upon him or her unusual and practical difficulties or particular hardship, such variances of land will impose upon him or her unusual and practical difficulties or particular hardship, such variances of the strict application of the terms of this chapter as are in harmony with its general purpose and intent, but only when the Board is satisfied that a granting of the variance will not merely serve as a convenience to the applicant, but will alleviate some demonstrable and unusual hardship or difficulty so great as to warrant a variance from the comprehensive plan as established by this chapter, and at the same time, the surrounding property will be properly protected.

The correct test for an applicant seeking a variance from a zoning restriction is whether the applicant can demonstrate a unique hardship in order to qualify for a variance. *Town of Indialantic v. Nance,* 485 So.2d 1318, 1320 (Fla. 5th DCA), *rev. denied,* 494 So.2d 1152 (Fla.1986). The presence of an exceptional and unique hardship to the individual landowner, unique to that parcel and not shared by other property owners in the area is a prerequisite to the granting of a zoning variance on the basis of hardship. *Id*. The requisite hardship may not be found unless there is a showing that under present zoning, no reasonable use can be made of the property. *Id.*; *Elwyn*, 113 So.2d at 851. "[T]he hardship must be such that it renders it virtually impossible to use the land for the purpose for which it is zoned." *Bernard v. Town Council of Town of Palm Beach*, 569 So. 2d 853, 855 (Fla. 4th DCA 1990); *Town of Indialantic v. Nance*, 485 So.2d at 1320.

Considering the aforementioned Code provisions regarding instances of hardship, against the decisional law for the granting of a variance based on hardship, it is clear that the essential requirements of law were not followed in the granting of the subject variance. Indeed, the record below is devoid of any indication by the Applicant that, without the variance, no reasonable use could be made of the property. In fact, an appraisal prepared by a real estate advisory and valuation service for Hillsboro shows that a low-rise structure conforming to the requirements of Hillsboro's code is entirely possible and profitable.

Respondents argue the Board's decision complies with the essential requirements of law because the plain language of the Code creates an option between two alternative standards. Respondents posit that the Code's use of the term *or* when describing unusual and practical difficulties *or* particular hardship, creates two separate and disjunctive standards under which the Board may grant a variance from the Code. The argument is essentially that one of these standards is bound by the decisional law surrounding hardship variances and the other is not so encumbered, therefore creating a lower and easier-to-meet standard.

This argument is without merit because municipal ordinances and codes are to be considered in light of the jurisprudence surrounding what criteria could serve as a basis for the granting of a variance. *See Chisholm Properties South Beach, Inc. v. City of Miami Beach*, 8 Fla. L. Weekly Supp. 689 (Fla. 11th Cir.Ct. August 9, 2001). Furthermore, the provision is entitled *Instances of Hardship*. Even if it were true that the legislative inclusion

of the word *or* created two disjunctive standards, it would not therefore mean that the *unusual and practical difficulties* standard relied upon by Respondents does not fall within the broad scope of hardship variances which must be considered in light of Florida decisional law.

This Court considered Petitioners' argument that the Board's public disclosure of ex parte communications violated Petitioners' procedural due process rights, under *Jennings v. Dade Cnty.*, 589 So. 2d 1337 (Fla. 3d DCA 1991). However, we find there was no such violation pursuant to section 286.0115, Florida Statutes.

Accordingly, it is hereby **ORDERED** that the Petition for Writ of Certiorari is **GRANTED**.

* * *

Judges J. Bowman, E. Kollra & M. Weekes, JJ., CONCUR

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