



IN THE CIRCUIT COURT OF THE 16<sup>TH</sup>  
JUDICIAL CIRCUIT OF THE STATE OF  
FLORIDA IN AND FOR MONROE COUNTY

APPELLATE DIVISION

CASE NO: 2007-CA-1054-K

*rec'd  
4/14/08  
aw*

J. SEWARD JOHNSON,

Petitioner

vs.

CITY OF KEY WEST BOARD OF  
ADJUSTMENT,

Respondent

\_\_\_\_\_ /

OPINION DATED APRIL 10, 2008

A Petition for Certiorari from the Key West City Board of Adjustment.

Wayne LaRue Smith, Esq., and Christian Cruz, Esq., for Petitioner.

Shawn Smith, Esq., for Respondent, City of Key West Board of Adjustment.

-----  
**PER CURIAM:**

Petitioner seeks certiorari, challenging the Respondent Key West City Board of Adjustment's approval of Resolution 07-047, on the denial of Petitioner's application for variance, by which he sought to increase the height of a boundary wall from six to eight feet in height.

The role of this court is to review the record and determine whether procedural due process was afforded, whether there was competent substantial

evidence to support the decision below and whether the decision below met the essential requirements of law. It is not the function of the court to reweigh the evidence. Deerfield Beach v. Valliant, 419 So.2d 624 (Fla. 1982), Haines City Com. Dev. v. Hegggs, 658 So.2d 523 (Fla. 1995), Miami-Dade County v. Brennan, 802 So.2d 1154 (3<sup>rd</sup> DCA 2001).

Applications for variances considered by the Key West City Board of Adjustment (“Board”) are governed by Section 90-391 et seq., and Section 90-274 et seq., of the Key West City Code (“Code”). These provisions, when considered together, require that the applicant for variance demonstrate that the application complies with all procedural requirements of the land development regulations, and that the action sought is consistent with provisions of the Comprehensive Plan and the land development regulations. These requirements thus incorporate the standards for variances set forth in Code Section 90-395, including but not limited to the requirement that the applicant show the existence of hardship conditions. Hardship conditions are shown by evidence that “literal interpretation of the provisions of the land development regulations would deprive the applicant of rights commonly enjoyed by other properties in this same zoning district under the terms of this ordinance and would work unnecessary and undue hardship on the applicant.” (Section 90-395(a)(4), Key West City Code).

The Board denied the variance, finding that there was no “hardship” as defined above, based upon the evidence considered by the Board. The evidence

before the Board included the variance application and exhibits thereto, the memorandum from city planning staff to the members of the Board recommending approval of the variance, as well as testimony from two adjacent land owners who objected to the variance.

In the original variance application, the Petitioner requested an increase in the height of a six foot wall to protect his waterfront property from damage from storms on the Atlantic Ocean. The applicant stated "during storms last year, salt water intruded over the existing protective wall and caused damage to the property."

The memorandum from the planning department to the Board described the hardship conditions as follows:

"The applicant has stated that during big storms the storm surge comes over the six foot wall creating damaging effects to the property, thus creating a hardship."

The Board also considered the testimony of two adjacent neighbors who opposed the variance, as well as the presentation of the applicant, photographs showing the wall and the house, and the relationship of the property to the Atlantic Ocean.

The Board found that no hardship existed pursuant to Section 90-395(a)(4) based on the evidence. In making this finding, the Board is vested with the power to consider and weigh evidence, as well as the power to consider the lack of evidence, in determining the facts.

The Board's factual determination that the Petitioner did not prove "hardship" must be considered in light of the record. The weighing of the evidence is done by the Board, not the court. As noted above, the court simply reviews the record to determine if there is competent, substantial evidence to support the Board's determination.

The court has carefully reviewed the record below and finds there is, in fact, competent, substantial evidence that reasonably supports the determination of the Board that no hardship was demonstrated by the Petitioner. Pursuant to the City Code, hardship requires a showing that denying the Petitioner an eight foot wall would deprive him of rights enjoyed by other properties in the zoning district.

"A prerequisite to the granting of a hardship zoning variance is the presence of an exceptional and unique hardship to the individual landowner, unique to the parcel and not shared by other property owners in the area." Town of Indialantic v. Nance, 400 So.2d 37 (5<sup>th</sup> DCA 1981), Nance v. Town of Indialantic, 419 So.2d 1041 (Fla.1982) (approving and adopting the district court's opinion). The surveys and maps of the property, showing its location and relationship to adjacent properties on the Atlantic Ocean side of Key West, constitute evidence that the Petitioner's property may be typical of the properties on the Atlantic Ocean side, with regard to exposure to storms and storm surges. The Board's rejection of "hardship" is thus supported by the evidence presented to the Board for consideration. Petitioner's claim that the

shape and location of the property do create "hardship" cannot be considered by this court. The role of the court is simply to determine whether the Board's decision is supported by competent, substantial evidence. The court may not consider whether the decision was opposed by competent, substantial evidence, and then reweigh the evidence. See Dusseau v. Metropolitan Dade County, 794 So.2d 1270, 1275 (Fla. 2001). "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." Id. at p. 1276.

The record evidence reasonably supports the conclusion that the zoning restrictions complained of by Petitioner "are common difficulties shared by all other oceanfront lot owners in the area, and are therefore not the unique hardship required to support a variance." Nance, supra, at p. 40. Because the record evidence included evidence from which the Board could have reasonably concluded "no hardship", i.e., no deprivation of rights enjoyed by other properties in the zoning district, certiorari is unavailable.

Wherefore, for the reasons set forth above, it is hereby,

**ORDERED** as follows:

1. The Petition for Writ of Certiorari is hereby DENIED, and this action is thereupon DISMISSED.

DONE and ORDERED in Open Court and in Chambers at Key West, Monroe County, Florida, this 9th day of April, 2008.

David J. Audlin, Jr.  
DAVID J. AUDLIN, JR.  
CIRCUIT JUDGE

cc: Wayne LaRue Smith, Esq.  
Christian Cruz,  
Shawn Smith, Esq.