

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

ELAINE SMITH,

Petitioner,

CASE NO.: 2006-CA-6738

WRIT NO.: 06-66

v.

BOARD OF ADJUSTMENT,
CITY OF WINTER PARK
FLORIDA,

Respondent.

Petition for Writ of Certiorari.

F. Lee Morrison, Esquire,
for Petitioner.

James Edward Cheek, III, Esquire,
for Respondent.

Before WATTLES, M. SMITH, and MUNYON, J.J.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Elaine Smith, appeals the July 18, 2006 order of the Board of Adjustment for the City of Winter Park (“Board”) granting a hardship variance to Eunice Whittaker (“Applicant”) under section 58-88, City of Winter Park Code. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C). We dispense with oral argument. Fla. R. App. P. 9.320.

On June 21, 2006, Applicant, with the help of her son-in-law David McCully, filed a variance application with the Board of Adjustment, City of Winter Park. Applicant is the

owner of a home located at 924 Grover Avenue, Winter Park, Florida 32789. Petitioner owns a home located on Nottingham Street directly behind Applicant's residence. Applicant requested a variance from section 58-66(f), City of Winter Park Code.¹ Applicant requested a variance from the rear set-back requirements for the first and second floors so she could build an addition to her home within twenty one feet of the rear lot line. Applicant requires additions to her home to make it handicap accessible and to provide room for her family to reside with her because she needs their daily assistance.

On July 18, 2006, the Board held a hearing and received evidence on Applicant's request for a variance. The Board considered a variety of evidence at the hearing regarding Applicant's request for a hardship variance: 1) the variance application; 2) nine letters signed by neighbors living on Grover Avenue approving the variance; 3) proposed drawings for the addition to Applicant's home; 4) a floor plan of the new additions; 5) a floor plan comparison between the existing home and the proposed additions; 6) a survey of Applicant's property; and 7) a July 10, 2006 memorandum from the Director of Building and Code Enforcement. The evidence established that Applicant's home is located on a 106 foot lot with a width of 87.5 feet and bordering the dividing line between the City of Winter Park and the City of Orlando.

The Board also received public comment from several individuals at the hearing: 1) David McCully, Applicant's son-in-law; 2) Jeff York, a neighbor of Applicant and in favor of the variance; 3) Petitioner, a neighbor of Applicant opposed to the variance; 4) Ralph Cuccuro, a neighbor of Applicant opposed to the variance; and 5) Nancy McCully,

¹ Winter Park, Florida, Code section 58-66(f)(7) provides in part:
Rear Yard Setbacks. The rear setback shall be 25 feet to a one-story structure and 35 feet to the two-story portion of any building.

Applicant's daughter. Petitioner objected to the variance request on two grounds: 1) that a two-story addition would not conform to the mostly one-story neighborhood; and 2) that the two-story addition would encroach on her privacy. Cuccuro objected because he felt it was a detriment to the neighborhood to have two-story houses built in a neighborhood with only one-story houses.

After receiving evidence and hearing public comment, the Board, upon motion, approved the Applicant's request for a variance by a vote of four to one based on Applicant's hardship of a shallow lot. Petitioner timely filed this petition for writ of certiorari on August 17, 2006.

A circuit court review of a quasi-judicial decision of an administrative board is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence.

Haines City Comty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995); *Kelly v. Dep't of Health & Rehabilitative Servs.*, 617 So. 2d 756 (Fla. 1st DCA 1993).

Petitioner argues that the Board failed to observe the essential requirements of the law by approving Applicant's hardship variance for setback requirements when Applicant failed to establish a hardship unique to Applicant's land. Petitioner further argues that the Board erred in granting the variance because Applicant created the need for the variance by wanting to build a larger home to accommodate her family living with her. Finally, Petitioner argues that the Board erred because its decision was a de facto attempt to amend zoning ordinances prescribed by the City of Winter Park. The Board argues that the Court's review of its actions is limited to considering the competence and substantiality of the evidence before the Board.

The Board further argues that even if the Court reweighed the evidence, it would find that the lot size supported the granting of the variance.

Under relevant procedures of the City of Winter Park Code, the Board has the power to authorize variances where, owing to special conditions, literal enforcement of the Code provisions would result in unnecessary hardship. Winter Park, Fla., Code § 58.88(a) (2006). A person aggrieved by the granting of a variance may file, within thirty days, a petition for writ of certiorari with the Orange County Circuit Court. Winter Park, Fla., Code § 58.89 (2006).

It is well established that an issue not presented at the trial level will not be considered for the first time on appeal. *Jackson v. Whitmire Constr. Co.*, 202 So. 2d 861, 862 (Fla. 2d DCA 1967). *See also Augustin v. State Unemployment Appeals Comm'n*, 906 So. 2d 1238, 1239 (Fla. 4th DCA 2005); *Sparta State Bank v. Pape*, 477 So. 2d 3, 4 (Fla. 5th DCA 1985) (citing *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981)).

One of the issues before the Board at the July 18, 2006 public hearing was whether Applicant should be entitled to a variance from section 58-66(f), City of Winter Park Code. At the hearing, the Board considered Applicant's request for the hardship variance and received public comment on the issue. Among those present and offering comment was Petitioner. At the hearing, Petitioner raised two basic issues when opposing the granting of the variance: 1) that the new two story addition would not be aesthetically pleasing because the neighborhood consisted, almost exclusively, of single story houses, and 2) that the two story addition would encroach on her privacy by overlooking her backyard.

Upon a careful review of the record below, Petitioner did not present to the Board any of the issues that she now raises on appeal. Specifically, Petitioner did not argue that

Applicant failed to establish a hardship unique to her property, nor did she argue that the variance should be denied because the Applicant created the hardship. In addition, Petitioner made no mention that the Board was attempting a de facto amendment to the City of Winter Park Zoning Ordinances by granting this variance. Consequently, all of Petitioner's arguments are being raised for the first time on appeal. As a result, the Court cannot properly consider these issues.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 6th day of July, 2007.

_____/S/_____
BOB WATTLES
Circuit Judge

_____/S/_____
MAURA T. SMITH
Circuit Judge

_____/S/_____
LISA T. MUNYON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to **F. Lee Morrison, Esq., GrayRobinson, P.A., 301 E. Pine Street, Suite 1400, Orlando, FL 32801** and **James Edward Cheek, III, Esq., and Jennifer Nichole Latham, Esq., Winderweedle, Haines, Ward & Woodman, P.A., 329 Park Avenue, North Second Floor, Winter Park, FL 32790** on the 16 day of July , 2007.

_____/S/_____
Judicial Assistant