

In Re: KLAUS AND BRIGITTE GOERSCH,

Owners

v.

CITY OF SATELLITE BEACH,

Government Entity

**REQUEST FOR RELIEF PURSUANT
TO SECTION 70.51, FLORIDA STATUTES
RECOMMENDATION OF SPECIAL MAGISTRATE**

This proceeding came before Daniel F. Mantzaris, Special Magistrate as agreed upon by the parties, pursuant to a Request for Relief filed by Klaus and Brigitte Goersch (the “Owners”) under the authority of Section 70.51, *Florida Statutes*. The proceedings were held on November 13, 2015 after appropriate notice. The appearances were as follows:

For the Owners: Clifford R. Repperger, Jr., Esq.
GRAYROBINSON, PA
1795 W. NASA Blvd
Melbourne, FL 32902

For the Government Entity: James P. Beadle, Esq.
SPIRA, BEADLE & MCGARRELL, P.A.
5205 Babcock Street N.E.
Palm Bay, FL 32905

Statement of Proceedings

1. Owners submitted a Variance Application dated June 7, 2013 requesting the City of Satellite Beach Board of Adjustment grant Owners a variance from Section 30-516 “Setback, height, and construction of fences.”, more particularly Section 30-516(d) of the City Code of Satellite Beach, which states as follows:

All fences located east of Highway A1A shall be constructed of plastic-coated chainlink, ultraviolet-resistant polyvinyl chloride (PVC), or aluminum. A fence

shall not have more than 30 percent of any vertical surface areas per running foot constructed of opaque materials.

Owners' Variance Application was assigned BOA case no.: 06-13.

2. After due notice to Owners a hearing was held before the Board of Adjustment on September 9, 2013. At the hearing the Board of Adjustment unanimously denied Owners' Variance Application.

3. The Board of Adjustment, through its Chairperson, issued a Final Order on Variance Request BOA 06-13 dated September 12, 2013. The Final Order denied Owners' application stating:

THIS MATTER came for public hearing before the Board of Adjustment the 9th day of September, 2013, and the Board, after considering the captioned application and evidence presented to it in support of, and in opposition to, the application, denied the application.

4. The Owners timely submitted to the City of Satellite Beach a Request for Relief Pursuant to Section 70.51, *Florida Statutes*. The Owners' Request for Relief sought review of the Board of Adjustment's Final Order as a Development Order and also sought review and relief from a code enforcement Statement of Violation issued September 10, 2013 by the City of Satellite Beach pursuant to Chapter 162 *Florida Statutes*.¹

5. At the time that the Request for Relief was submitted to the City, the parties agreed to abate this proceeding, in part based upon pending litigation between the parties on a different but related issue.

¹ At the onset of the hearing portion of the proceedings the Special Magistrate determined that since the Statement of Violation had not been pursued before the Code Enforcement Board by the City and the Code Enforcement Board had not reviewed or issued any order or decision on the statement of Violation, the Statement of Violation was not ripe for review pursuant to Sec. 70.51, *F.S.*

6. This proceeding remained in abatement until the parties agreed to proceed; selected the undersigned as the Special Magistrate; and scheduled the proceedings to occur on November 13, 2015.

7. On November 11, 2015, Owners submitted a Motion to Stay Hearing on Request for Relief Pursuant to Section 70.51, *Florida Statutes*. On November 12, 2015 in a telephone conference, the Special Magistrate reviewed Owners' Motion to Stay and statements from both parties' counsel and determined that the proceedings would proceed as scheduled.

8. On November 13, 2015, the Special Magistrate initiated the dispute resolution proceeding set forth in Section 70.51, *Florida Statutes*. Owners Klaus and Brigitte Goersch and their legal counsel participated in the dispute resolution proceedings. City Manager, Courtney Barker, City Building Official, John Stone, and the City's legal counsel also participated in the dispute resolution process. The Owners and the City were unable to reach a mutually agreeable settlement agreement and the dispute resolution proceeding was terminated.

9. In accordance with Section 70.51 *Florida Statutes*, the matter continued to the hearing portion of the proceedings in order for the Special Magistrate to receive testimony, consider the facts and render a recommended order on whether the City of Satellite Beach Board of Adjustment's denial of the Owners' application for a variance from City Code Section 30-516(d) was unreasonable or unfairly burdens Owners' property.

Findings

The undersigned, after hearing and considering the testimony of the parties including Owner Brigitte Goersch and City Building Official John Stone, public comments from Joseph Correnti, arguments, evidence, documentation and the criteria to be considered to approve an application for a variance, does hereby make the following findings:

1. The subject property located at 1687 Hwy A1A, Satellite Beach, Florida consists of two lots (8 & 9) and has been used for residential purposes since 2002.
2. In March 2006 a completely opaque fence was installed on the north line of Lot 8 and the south line of Lot 9, hereinafter referred to as the “pre-existing fence”. At the time the pre-existing fence was installed it met all applicable City Code requirements.
3. In August 2007, the City amended its land development regulations, specifically, Section 30-516 (d) to limit the opaqueness of fences east of Highway A1A.
4. The subject property is east of Highway A1A thus the completely opaque pre-existing fence located thereon, is not in compliance with the amended code. The pre-existing fence, however, was constructed in 2006 in accordance with the applicable code at the time, and the City acknowledges the pre-existing fence has non-conforming legal status.
5. Owners purchased the subject property in May 2012.
6. Since approximately 2006, the City has maintained a public beach access and public parking area on City property located near the subject property.² The public beach access and public parking area was described as a passive park. The parking area is unpaved. There are no restrooms or playground equipment on the City property. The only public facility other than the parking area is a walkway or cross-over that enables the general public to access the beach.
7. In 2012 the City dedicated and named the City property described above as Michael P. Crotty Park. The park was not expanded in size, use or facilities in 2012 and continues to essentially be used by the public in the same manner as it has been since 2006.

² The Owners maintained that a portion of the City property is adjacent to the subject property. However, a visual inspection by the Special Magistrate and testimony at the hearing confirms that there is an “undeveloped” and naturally overgrown area of City property adjacent to the parking and beach access area that is not regularly used by the general public for parking or beach access.

8. On or about January 7, 2013, Owners applied for a building permit to extend the pre-existing fence. Based on the application submitted the City issued a building permit dated January 8, 2013 for the extension of the pre-existing fence.

9. Thereafter, the extension of the existing pre-existing fence was constructed. The new portion was constructed to match, as closely as possible, the completely opaque PVC fence material used in the pre-existing fence.

10. Upon inspection of the newly constructed fence, the City denied final approval of the permit as the completely opaque new fence failed to meet the requirements of Section 30-516 (d). According to the City, the permit was subsequently rescinded.

11. Owners, in an attempt to bring the new fence into compliance with City codes, submitted an application dated June 7, 2013, for a variance from the opaqueness provisions of Section 30-156(d).

12. A hearing was held before the Board of Adjustment on September 9, 2013. The official minutes from the hearing reflect that Owner Brigitte Goersch and Attorney Clifford R. Repperger, Jr presented information and answered questions from the Board in support of the Owners' variance application.

13. The official meeting minutes were submitted in this proceeding and state the following:

Chair Castaldi led the board through the check list for variance approval. The Board was unable to find special circumstances as required in Section 1a of the variance check list.

VOTE: All no. MOTION DENIED.

14. As reflected in the application submitted by the Owners "Section 1a" states the following:

What special circumstance exists which is peculiar to the land, building, or structure involved and not applicable to other land, buildings, or structures in the same zoning district?

15. The Board of Adjustment issued its September 13, 2013 Final Order denying Owners' Variance Application.

16. In Owners' Request for Relief and again at the conclusion of the hearing before the Special Magistrate, Owners' counsel argued that the Board's September 13, 2013 Final Order failed to comply with Section 166.033 *Florida Statutes*, because it did not "include a citation of the applicable portions of an ordinance, rule, statute, or other legal authority for the denial". Presumably, the Owners' position on this issue is that the variance denial should be overturned because the Final Order did not comply with Section 166.033 *F.S.*³ In response the City argued that the Final Order substantially complied with the requirements of the statute.

17. The requirements of Section 166.033 *Florida Statutes* related to the content of the Final Order are presumably in place to ensure that the affected party is aware of the specific legal authority on which the denial is based. The mater at hand is a variance application in which the application form provided by the City and completed by the Owners clearly set forth the established criteria for the award of a variance in accordance with the City Code in effect at the time the variance application was heard. Owners in fact argue in their Request for Relief they had "demonstrated compliance with all required variance conditions of Sec. 30-205 (b)(3), Code of Ordinances of the City of Satellite Beach." Owners' have not challenged the applicability of the criteria or the fact that if any of the five conditions are not met, the variance application should be denied.

18. Instead, as reflected in the application and the minutes from the meeting, Owners and their attorney argued that they had met the criteria and for that reason were entitled to the requested variance. Furthermore, at the hearing in this proceeding the Owners presented evidence and argument that there were special conditions peculiar to the subject property that supported the variance. As a result, the Owners were well aware of the specific issues and the code provisions involved in the variance proceeding, therefore, the failure to strictly comply with Section 166.033 *F.S.* does not in and of itself warrant a recommendation that the action of the Board of Adjustment was unreasonable or unfairly burdens the subject property.

19. At the hearing before the Special Magistrate, Owner Brigitte Goersch testified that among the special conditions peculiar to the subject property are that it is located on the beach and that it is near or adjacent to a public access and parking area (Michael P. Crotty Park). Mrs. Goersch maintained that by virtue of the property's location, individuals walk into her backyard; individuals look into her yard and her house as they use the beach access cross over; that there are greater security risks for her home and liability risks due to individuals being able to access her swimming pool. Additionally, she maintained that the lights from vehicles parking and driving in the public use area created the special condition that justified the variance.

20. It is not unreasonable that the Board of Adjustment would determine that these expressed issues and concerns do not rise to the level of special conditions for a property located on the beach. It is also not unreasonable to assume that most, if not all, beach front homeowners experience the "openness" of their back yards to the public beach

³ At the November 13, 2015 proceeding and in the Request for Relief no authority was cited to support the "reversal" of a denial due to failure to comply with Sec. 166.033. Additionally, the undersigned has found no

areas. Furthermore, the variance request was for a completely opaque fence. As presented by the City and as set forth in the code, the Owners can construct a fence to address the security and risk issues, provided the fence meets the opaqueness limitations in the current code.

21. With regard to the stated light and nuisance intrusion into the Owners' property from the public beach access and parking area, the City presented testimony that there were numerous other beach access areas in the City adjacent to and near residential properties. Additionally, based on the location of the parking area and the distance to the Owners' property line, and the testimony of the neighbor, it is reasonable to conclude that the light and nuisance intrusion claims are not sufficiently bothersome to create a special condition unique or peculiar to the subject property.

22. Furthermore, at the hearing the City presented reasonable alternatives to address the Owners concerns, specifically, the construction of a fence that meets the opaqueness limitations and the installation of landscaping along the property lines. The fact that there are reasonable alternatives available to the Owners, without a variance, demonstrates that the denial of the variance has not unfairly burdened the property.

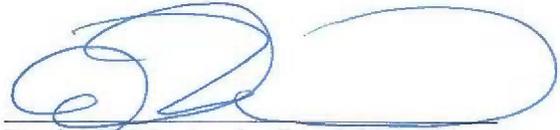
Recommendation

As a result of the foregoing, the Special Magistrate finds that that the September 13, 2013 denial of the June 7, 2013 Variance Application was not unreasonable and does not unfairly burden the subject property and as such it is the recommendation of the Special Magistrate that

authority requiring such a reversal.

the Board of Adjustment denial remain undisturbed. In making this recommendation I have fully considered those elements of Section 70.51 (18) *Florida Statutes*.

Dated: November 23, 2015



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