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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA
APPELLATE DIVISION

BRIAN MYRBACK and
LORI MYRBACK, as Trustees of
THE MYRBACK FAMILY REVOCABLE
TRUST DATED OCTOBER 15, 2015,

Petitioners,

v.

Circuit Court No: 21-000014-AP-88B
Lower Tribunal No: VAR-21-15

JAMES P. DONOVAN; and
PINELLAS COUNTY, a political
subdivision of the State of Florida,

Respondents.
_____/

PETITONER'S REPLY TO RESPONDENTS, JAMES P. DONOVAN AND PINELLAS COUNTY, RESPONSES TO SECOND AMENDED PETITION FOR WRIT OF CERTIORARI

Pursuant to Fla. R. App. P. 9.100(f)(k), and LDC 58-536(d), Pinellas County Land Development Code ("LDC"), Petitioners, BRIAN MYRBACK & LORI MYRBACK, as Trustees of THE MYRBACK FAMILY REVOCABLE TRUST DATED OCTOBER 15, 2015 ("the Myrbacks"), hereby files their Reply to Respondents, JAMES P. DONOVAN ("Mr. Donovan") & PINELLAS COUNTY ("County"), Responses to

Petitioner's Second Amended Petition for Writ of Certiorari ("Responses"), and says,

INTRODUCTION TO THE REPLY

The Myrbacks respectfully contend an objective review of the record and the party's briefs renders it indisputable as a matter of law that Mr. Donovan does not - and cannot – establish the legally cognizable "unnecessary hardship" and "special conditions" required to grant the variance for the proposed boat lift under LDC 138-241 (a-c). He and his predecessors have enjoyed the existing boat lift for at least 20 years, it is fully functional, and provides reasonable use of the property. *Florida law is well settled that if a property owner can make reasonable use of their property without a variance, they are not entitled to a variance.*

In granting the variance for the proposed boat lift, the Board departed from the essential requirements of law by failing to apply the correct test and did not support its decision with competent substantial evidence, resulting in miscarriage of justice under Florida law. The variance for the boat lift should be quashed.

In that event Mr. Donovan would have at least two options to proceed with a proposed boat lift which minimizes the impact on the Myrbacks' waterfront view. First, he is free to seek reconstruction of the existing boat lift "in the same configuration" under LDC 58-544, as his legal counsel repeatedly represented he would do if the variances were denied. Second, he may relocate the proposed boat lift to the north side of the dock as approved by the Water & Navigation Division, and to which the Myrbacks have no objections. However, he is not entitled to his "most preferred location" for the proposed boat lift under Florida law.

THIS COURT SHOULD QUASH THE LOWER TRIBUNAL'S DECISION SO THAT A MISCARRIAGE OF JUSTICE DOES NOT OCCUR

Fundamental to this Court's certiorari review is the correct standard of review, which when correctly applied, makes clear that a miscarriage of justice will occur without this Court exercising its certiorari power. Respondent seeks to have this Court turn a blind eye to the clear departure from the essential requirements of law by urging this Court that "the Florida Supreme Court has made clear

that a decision made according to the form of the law and rules prescribed for rendering it, although it may be erroneous in conclusion as applied to the facts, is not an illegal or irregular act or proceeding remedial by certiorari." (Donovan's Response, p. 27, citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000)). To be clear, the quotation from the Florida Supreme Court is entirely accurate, as rendered both in the *Ivey* decision and its antecedent case of *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995). Entirely accurate, and entirely inapplicable.

The fundamental flaw in the citations raised by Donovan, attempting to excuse the incorrect application of law by the lower tribunal, is that the cases cited are seminal cases for the resolution of *second tier certiorari*, not an initial judicial appeal. Second tier certiorari, sometimes described as "common-law certiorari" is the far more restrictive review of an already appealed decision. *Ivey, supra. See also, Broward County v. GBV Intern., Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) ("In brief, first-tier certiorari review is not discretionary but rather is a matter of right and is akin in many respects to a

plenary appeal, whereas second-tier certiorari review is more restricted and is similar in scope to true common law certiorari"). Thus, if Mr. Donovan were unsatisfied with this Court's decision on appeal, he would not be entitled to the traditional certiorari review described in the Myrbacks' Petition, but would instead be limited to the restricted "second tier" review described at length in *Ivey* and *Heggs, supra*. But, as an initial judicial appeal, Donovan is incorrect to seek this Court to ignore a clearly erroneous application of law. Instead, this Court should utilize the standards detailed within the Petition and quash the variance accordingly.

In that regard, Mr. Donovan also urges this Court that even with an erroneous application of law that this Court should again turn a blind eye on the theory that it somehow does not amount to a "miscarriage of justice." That argument is betrayed by the very language of the certiorari standard, whereby a failure to observe the essential requirements of law is clearly synonymous with a miscarriage of justice. *See, e.g., Kneale v. Jay Ben, Inc.*, 527 So. 2d 917 (Fla. 3d DCA 1988) (quashing the circuit court affirmance of the

county court judgment which erred in the calculation of damages of $100.14 for breach of contract, and that the errors below constituted a miscarriage of justice). Where given a small monetary differential equated to a miscarriage of justice in *Kneale*, the fundamentally erroneous variance granted in this circumstance readily merits greater consideration. For each of the reasons cited here and below, this Court should quash that variance, rectifying the departure from the essential requirements of law.

MR. DONOVAN HAS NO LEGALLY COGNIZABLE "UNNECESSARY HARDSHIP" UNDER LDC 138-231(b-c)

The County's and Mr. Donovan's Responses recognize that LDC 138-241 governs this action, but then fail to correctly apply them or contort its required criteria in an attempt to confuse the issues and uphold a patently unsustainable variance. The central issues *do not* address whether or not the proposed boat lift is "closer to" the Myrbacks' property, or that in 2001 the Myrbacks predecessor signed off on a purported consent to the existing setback. What's relevant is the simple application of the provisions of LDC 138-241 and applicable Florida law.

The analysis begins with the requirement for an "unnecessary hardship." Both Mr. Donovan's and the County's Responses *entirely avoid* the most critical and indisputable fact that the *existing* boat lift is fully functional and provides reasonable use of the property, *as evidenced by* Mr. Donovan's legal counsel's three separate representations to the Board that he would withdraw the application if the variances were not granted and reconstruct the existing boat dock and lift in the same configuration under LDC 58-544. (Second Amended Petition, Page 33; A: 110:13-20; 92: 24-93: 4; 81: 21-24). Otherwise, there is no evidence that the existing boat lift is somehow inferior to others in the neighborhood or zoning district.

Legal counsel's representations are both irrefutable and wholly unrebutted in the Responses, and constitute binding admissions against interest that the existing dock and boat lift are fully functional and provide reasonable use of the property, otherwise Mr. Donovan would not reconstruct them at substantial expense. Section 90.803(18), Fla. Stat.; *Curr v. Helene Transportation Corp.*, 287 So. 2d 695, 697 (Fla. 3d DCA 1974) (holding that legal counsel's in-court

admission as to liability in personal injury action was valid and binding on the parties and the trial court).

Neither the County nor Mr. Donovan argue that the existing dock and boat lift were non-functional or did not provide him with reasonable use of the property. At most, Mr. Donovan's Response at Pages 18 & 42-43 attempts to argue that the existing boat lift is "impractical" via the testimony of his witness, or somehow inferior to his neighbors. But these are the words of his appellate counsel, which are belied by the record.

To be clear, neither the word "impractical" - or similar verbiage - appears *anywhere* in the transcript, nor is there any testimony or evidence that Mr. Donovan's existing boat lift is somehow inferior to his neighbors, non-functional, or fails to provide reasonable use. (A. 68-117).

What Mr. Donovan's witness actually stated was that it, "makes absolutely no sense" to move the boat lift to the north side of the dock (A. 87: 3-14), and that moving the proposed boat lift six (6) feet seaward offers "better depth." (A. 96: 20-21). In summary, the

witnesses testimony was that the proposed boat lift is "better" than the existing, but that is not the legal standard. Consequently, the County's and Mr. Donovan's argument that the Myrbacks are asking this Court to reweigh the evidence fails to recognize the utter lack of any evidence that the existing boat lift does not provide reasonable use required to establish an unnecessary hardship and variance.

Mr. Donovan's Response at Pages 13-14 further admits that he had the option to seek reconstruction of the existing boat lift "in the same configuration" under LDC 58-544, but was required to pursue the variance because he is *redesigning* the dock and boat lift. Under the LDC, Mr. Donovan can construct a new dock anywhere in the center 1/3 of his 85.4 feet of seawall without a variance.

Again, the proposed boat lift is merely Mr. Donovan's "*most preferred location*" enhancing his waterfront view at the expense of the Myrbacks view. This is perhaps best illustrated by the photographs in the Amended Appendix at Pages 32, 53 & 56.

Florida law is dispositive that Mr. Donovan does not have a bonafide unnecessary hardship beginning with LDC 138-241(b) which states:

> That literal interpretation of the provisions of this Code would *deprive or make it practically difficult* for the applicant to achieve the *same proportion of development potential* commonly enjoyed by other properties in the same zoning district. The hardship shall not be self-imposed. (Italics added) (App. 9, 118).

Correctly applying the Ordinance, the Water & Navigation Division's Report found there was "no unnecessary hardship justifying the Boat Lift," where other owners in the neighborhood had to work with the same setback restrictions. (A. 9).

Florida courts have consistently held that, "a hardship may not be found unless *no reasonable use* can be made of the property without the variance; or as stated otherwise, the hardship must be such that it renders it *virtually impossible* to use the land for that purpose for which it was zoned." *Bernard v. Town Council of Town of Palm Beach*, 569 So. 2d 853, 844-844 (Fla. 4th DCA 1990) citing *Town of Indialantic v. Nance*, 485 So. 2d 1318, 1320 (Fla. 5th DCA 1986), *rev. denied*, 494 So. 2d 1152 (Fla. 1986) (Italics added).

The phrase "reasonable use" as used in *Bernard* is woven into the third requirement of "Minimum Code Deviation Necessary" for a variance under LDC 138-231(c) which states:

> That the granting of the variance is the *minimal code deviation* that will make possible the *reasonable use* of the land, building or structure. (Italics added).

Mr. Donovan's Response at Page 30 untenably attempts to distinguish *Bernard* by arguing that it actually addresses the issue of competent substantial evidence and not the essential requirements of law. (Donovan Response, p. 30). However, that is an obvious misstatement where the Fourth District expressly held that, "*the circuit court failed to apply the correct test,*" and after articulating the correct test, "remand[ed] with directions to apply the test recited and adopted herein." *Bernard*, 569 So. 2d 853, 854-855 (Italics added).

The instant case is controlled by *Auerbach v. City of Miami,* 929 So. 2d 693, 694 (Fla. 3d DCA 2006) where the developer's original development plan did not include the variance, but the subsequent plan did. The Third District held the absence of the variance in the original plan conclusively demonstrated that the, "indispensable

requirement of a hardship variance … *did not exist*," and quashed the variance. *Id*. (Italics added).

Compared to *Auerbach* where the developer's plan had not even been constructed, the instant case is more egregious where Mr. Donovan's and his predecessors have enjoyed the existing boat lift for at least 20 years.

Mr. Donovan's Response at Page 31 raises an equally unsupportable attempt to distinguish *Auerbach* by arguing that it does not include discussion of whether the City, "discussed or considered the 'hardship' criterion." (Donovan Response, p. 31). Notwithstanding the standard of review which entirely disposes of this argument, and *Auerbach*'*s* Footnote No. 3 which details some of the relevant proceedings, the Third District made clear that it was the law that controlled, instructing that, "it is the unshirkable obligation of the courts, on whatever 'tier' of consideration 'to say what the law is.'" *Auerbach*, 929 So. 2d at 695, n. 3.

The County's Response does not address any of the Myrbacks cited caselaw. That omission speaks volumes.

The law is clear that if you can make reasonable use of a property without a variance, then you are not entitled to a variance. In the instant case, Mr. Donovan has reasonable use and is not entitled to his "most preferred location" at the Myrbacks expense. The Board departed from the essential requirements of law by failing to apply the correct test for an unnecessary hardship, the variance is not supported by competent substantial evidence, and therefore, must be quashed.

MR. DONOVAN HAS NO LEGALLY COGNIZABLE "SPECIAL CONDITIONS" UNDER LDC 138-231(a)

There are no "special conditions" in the instant case which support the variance under LDC 138-231(a) and applicable Florida law, resulting in a miscarriage of justice. In other words, there is nothing "peculiar" about Mr. Donovan's property despite his arguments about the County's "new interpretation" of riparian boundary lines, water depth, and seagrass.

The existence of "special conditions" is a required criteria for granting a variance under LDC 138-231(a) which states:

> That special conditions exist which are *peculiar* to the *land, building, or structure* involved." (Italics added) (App. 8-9, 118).
>
> The County's Water & Navigation Division's Report found:
>
> There are no special conditions present on the property justifying the Boat Lift. The Boat Lift can be placed on the north side of the Dock without the need for the north neighbor's signature of no objection (or a variance to this signature requirement). (A: 8-9).

Consistent with a plain reading of the Ordinance, the Court have construed the word peculiar to mean, "unique to the parcel and not shared by other property owners in the area." *Nance v. Town of Indialantic,* 419 So. 2d 1041, 1041 (Fla.1982).

Mr. Donovan's Response at Pages 36-40 again contorts the Ordinance by attempting to satisfy the requirement for special conditions through the County's "new interpretation" of riparian boundary lines under LDC 58-555. (A. 123; Donovan Response, pp. 36-40). Previously, the County would extend side setback lines perpendicular to the seawall or shoreline for purposes of side setback requirements, but sometime after 2016 it began extending them as they exist in a straight line.

However, this argument is critically flawed in at least four separate ways. First, Mr. Donovan's argument that the County's new interpretation is peculiar is categorically outside the express definition of the special condition that it is, "peculiar to the *land, building, or structure involved.*"

Second, Mr. Donovan's argument is the literal antithesis of "peculiar" where the County's interpretation is entirely "universal" and applies to every single property owner in its jurisdiction who seeks to either construct or modify a private dock or boat lift.

Third, the word "peculiar" - or similar verbiage - does not appear anywhere in the transcript, and there is nothing which evidences that the Board considered the requirement of peculiarity under LDC 138-231(a). (A. 68-117).

And fourth, the caselaw cited in Mr. Donovan's Response at Pages 37, Footnote 5, addressing riparian boundary lines, stand for the proposition that Courts must be mindful of "the lay of the upland shore line" and "unobstructed views" under equitable principles and often in tight quarters. Although Mr. Donovan's Response frequently

refers to the County's new interpretation as a "technicality," as applied to the instant case where *both* the Myrbacks and Mr. Donovan's houses were constructed *parallel* to the side lot lines as illustrated in the Amended Appendix at Pages 32, 53 & 56, extending the side lot lines as they exist incorporates the alignment of the houses, their respective waterfront views, and the inequitable impact on the Myrbacks view under the caselaw cited in his Response.

Mr. Donovan's Response at Pages 40-44 further attempts to argue that "environmental conditions" of water depth and seagrass are special conditions under 138-231(a), but as set forth in the Second Amended Petition, there is no evidence that either water depth or seagrass conditions are peculiar to Mr. Donovan's property. (Donovan Response, pp. 40-44). Neither Mr. Donovan's nor the County's Responses allege water depth and seagrass are "peculiar." This is, of course, because these are not peculiar, but common, and for that reason the County's Report found there were "no special conditions."

Further, the County has no blanket prohibition on any impacts to seagrass as the Response argues at Page 42. (Donovan Response, p.42). The LDC recognizes there will be some impacts from private docks. LDC 58-530(b)(6) (addressing "material" adverse effects to marine life).

More fundamentally, whether or not there are "environmental conditions" is not the correct test. They would have to be peculiar to Mr. Donovan's submerged land compared to the neighborhood *and* so substantial that reasonable use of the land could not be made without the variance as discussed above. Given Mr. Donovan's existing boat lift and the absence of any evidence to support these findings, he cannot satisfy these requirements. The Board departed from the essential requirements of law by failing to apply the correct test for special conditions, and its variance is not supported by competent substantial evidence.

THE MYRBACKS PREDECESSOR'S 2001 "CONSENT" AND COUNTY APPROVAL, AND WHETHER OR NOT THE PROPOSED BOAT LIFT IS "CLOSER," ARE IRRELEVANT UNDER LDC 138-231

Mr. Donovan's Response at Pages 24-26 argues that the Myrbacks are precluded from challenging the proposed and redesigned boat lift because their predecessor "consented to the setback of the boat lift in 2001" which was approved by the County,[1] and the proposed boat lift is not being moved "any closer" to the Myrbacks' property. (Donovan Response, pp. 24-26).

However, the 2001 "Consent" is irrelevant for a new variance. First, at most the predecessor was consenting to what was already there and the replacement of six dock pilings. He certainly did not consent to any conceivable modifications to the dock or boat lift some 20 years in the future. Second, and more fundamentally, Mr. Donovan is squarely asking this Court *rewrite* the LDC regarding

[1] The image of this document incorporated into Mr. Donovan's Response at Page 5 curiously omits that the "SCOPE OF WORK" indicates it was limited to "REPLACE 6 DOCK PILINGS," and that "ALL STRUCTURES ARE EXISTING." (A. 33) In other words, the dock and boat lift were already there, just being repaired.

private dock permits and ignore applicable Florida law. Mr. Donovan had two basic options with his dock and boat lift. One was to reconstruct the dock and boat lift "in the same configuration" under LDC 58-544 which does not require a variance, and to which the 2001 "Consent" would be relevant. Another, if he chose to *redesign* the dock or boat lift and seek to locate it *outside* the center 1/3 of his seawall, was to obtain a variance under LDC 138-231 and applicable Florida law. Obviously, he chose the latter.

Crucially, whether or not the proposed boat lift is "*closer*" to the Myrbacks' property than the existing boat lift is irrelevant to the legal analysis under LDC 138-231 and applicable Florida law. As set forth above, the requirements for an unnecessary hardship and special conditions cannot be satisfied as a matter of law, and the arguments raised in Mr. Donovan's Response are specious at best.

Mr. Donovan simply has no "vested rights" as to the existing side setbacks alone under the 2001 "Consent," unless he seeks to reconstruct the entire dock or boat lift "in the same configuration"

under LDC 58-544. That is what's "grandfathered," the right to reconstruct the entire dock and boat lift, not discrete aspects of them.

Mr. Donovan otherwise cites to inapplicable cases in *Poinciana Properties, Ltd. v. Englander Triangle, Inc.,* 437 So. 2d 214 (Fla. 4th DCA 1983), involving a dispute between a successor landlord and tenant under a commercial lease agreement and contract law. Also, *Jones v. U.S. Steel Credit Corp.*, 382 So. 2d 48 (Fla. 2d DCA 1979) in which a lender challenged the downzoning of real property *after* it had loaned the borrower $2,300,000.00 based on the upzoning, where the property was previously only worth $475,000.00. The Second District found these facts "extraordinary," and its holding was based on the based on the doctrine of equitable estoppel because the lender only made the loan *after* the upzoning was approved and the loan was fully collateralized. In the instant case, there are no such changes in position or extensive expenditures that make this case remotely applicable. Consequently, while successors may "stand in the shoes" of their predecessors, that proposition has no application to the instant case.

Briefly returning to the analysis of "unnecessary hardship," Mr. Donovan's Response at Pages 39-40 makes this same argument regarding the 2001 "Consent" and County Approval that to deprive him, "of an approval of a boat lift with the same setback as the previously approved boat lift would deny him the development rights enjoyed by others … an constitute an unnecessary hardship." (Donovan Response, pp. 39-40).

This is false. Every other similarly situated owner would be in the same position and have to chose between reconstructing "in the same configuration" under LDC 58-544, or redesigning and obtaining a variance under LDC 138-231. Mr. Donovan cites no authority that would allow him to keep in perpetuity the existing side setback, but construct a redesigned dock or boat lift.

NO *"DE MINIMIS"* EXCEPTION FOR VARIANCES EXISTS

Mr. Donovan's Response at Pages 13 & 22 further attempts to argue that the proposed boat lift is "*de minimis*" deviation, but fails to cite to any caselaw for this proposition. (Donovan Response, pp. 13;24). However, this precise issue was addressed in *Auerbach* where

the Third District specifically *rejected* the developer's argument that the proposal was, "*to minor to warrant our attention.*" *Auerbach*, 929 So. 2d 693, 695, n. 3.

The County's Response at Page 20 cites to LDC 138-231(c) governing "minimum deviation necessary" and argues that moving the proposed boat lift six feet seaward is *de minimis.* However, this fails to recognize that the existing boat lift already provides reasonable use as a result of a prior variance and therefore violates *Auerbach.*

ATTORNEY MACKESAY'S STATEMENTS ARE NOT EVIDENCE, BUT ARE AN EXCELLENT SUMMATION OF THE EVIDENCE AND APPLICABLE LAW

The central argument in the County's Response is that the Myrbacks are relying on - *as evidence* - the closing argument by Brendan Mackesay, Esq., counsel for the Water & Navigation Division.

That assertion is incorrect. Mr. Mackesay's statements constituted a closing argument and excellent summation of the evidence and correct application of Florida law. That summation

concludes, as should this Court, that the variance is unnecessary and should not have been granted.

PETITIONERS DID NOT CONSENT TO SETBACK OF THE PROPOSED BOAT LIFT OR RECONSTRUCTION OF THE EXISTING BOAT LIFT UNDER 58-544

Despite the Myrbacks manifest opposition to the proposed boat lift both before the Board and here, Mr. Donovan's Response at Page 40 attempts to argue that the Myrbacks have taken the position that Mr. Donovan "could rebuild the lift in its existing position" under LDC 58-544, and therefore, "implicitly concede" that Mr. Donovan is entitled to "the setback of the proposed boat lift."

No clarification was needed, below or here, that the unnecessary variance was and is contrary to law and should be quashed. The Myrbacks consistent position is that Mr. Donovan has, "the right to *seek* reconstruction" of the existing boat lift with the "exact same footprint" under procedures of LDC 58-544 as set forth in the Second Amended Petition at Pages 28, 31, 33, 35, 47 & 48. Any language or potential inferences to the contrary were unintentional and mistaken.

CONCLUSION

For each of the reasons cited in the Petition, this Reply, and as argued below, the variance issued on May 5, 2021, by the Pinellas County Board of Adjustments and Appeals was not supported by the essential requirements of law. Accordingly, Petitioners, BRIAN MYRBACK & LORI MYRBACK, as Trustees of THE MYRBACK FAMILY REVOCABLE TRUST DATED OCTOBER 15, 2015, respectfully request this Court to quash the May 5, 2021, variance, and to order such relief as this Court deems just and appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 25, 2022, I electronically filed the foregoing with the Clerk of Pinellas County by utilizing the Florida Courts E-Filing Portal which will send a notice of electronic filing and a true and correct copy of the foregoing to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045(b) and Fla. R. App. P. 9.210(a)(2)(B), I hereby certify that this brief was prepared using proportionately spaced Bookman Old Style 14-point font and complies with the applicable font and word count limit requirements.

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