

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 Case No: _____
Lower Tribunal Case No: VAR-21-15

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

Respondents.

_____ /

PETITION FOR WRIT OF CERTIORARI

Pursuant to Fla. R. App. P. 9.100(f), and Section 58-536(d), Pinellas County Land Development Code (“LDC”), Petitioners, BRIAN MYRBACK and LORI MYRBACK, as Trustees of THE MYRBACK FAMILY REVOCABLE TRUST DATED OCTOBER 15, 2015 (“Petitioners” or “Mr. Myrback”), petitions this Honorable Court for a Writ of Certiorari to review and quash the decision of the local administrative body, the Pinellas County Board of Adjustment and Appeals (“Board of Adjustment”), that was issued on May 5, 2021 and granted a variance to Respondent to reconstruct a boat lift with only

a 4.7 foot setback from Petitioners property line, in violation of Section 58-555 of the Pinellas County Land Development Code (“LDC”) which requires a 28.4 foot setback, where Respondent does not have a legally cognizable “unnecessary hardship” under Section 138-231, LDC, or Florida law.¹

I. BASIS FOR INVOKING JURISDICTION

This Honorable Court has jurisdiction to issue a Writ of Certiorari pursuant to Article V, §4(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(c)(3). The decision of the Board of Adjustment was issued on May 5, 2021, and this Petition is timely under Fla. R. App. P. 9.100(c)(1), and Section 58-536(d), Pinellas County Land Development Code (“LDC”), which specifies that:

¹ While this Petition for Writ of Certiorari is more substantial than a “bare-bones” petition as described in case law authorizing the amendment of a petition for writ of certiorari, *e.g.*, *Penate v. State*, 967 So. 2d 364 (Fla. 5th DCA 2007), it nonetheless is in a form for which amendment has been correspondingly requested by way of a motion for leave to serve an amended Petition for Writ of Certiorari and an amended Appendix, once all of the necessary appendix documents have been received, reviewed, and are available for incorporation into an amended petition for the use and benefit of this Court.

Appeals of variances granted or denied by the board or board of adjustment and appeals may be made to the Circuit Court for the Sixth Judicial Circuit of the State in and for the county. Requests for appeal shall be filed within 30 days after the public hearing date from which the decision to grant or deny the variance was made.

II. STATEMENT OF THE CASE AND FACTS

A. Overview of the Pinellas County Land Development Code and Introduction

This Petition involves Respondent's application for a variance to *entirely reconstruct the existing dock and boat lift* which was granted by the Board of Adjustment over the objections to same raised by Pinellas County's Water & Navigation Division ("the County") and Petitioners.

Petitioners are the next-door neighbors to Respondent and owners of "Lot 20" with a mailing address of 104 Harbor Drive, Palm Harbor, Pinellas County, Florida 34683. Respondent lives to the immediate north and is the owner of "Lot 21" with a mailing address of 106 Harbor Drive, Palm Harbor, Pinellas County, Florida 34683. Both Lots 20 & 21 are on the western side of Harbor Drive, share a common boundary on the north side of Lot 20 and the south side of Lot 21, and each of their western boundaries are on the water with

views of the St. Joseph Sound, Intracoastal Waterway, and Gulf of Mexico. (Aerial Pictures Cite)

Petitioners would highlight that this action does not raise any issues or objections to Respondent's proposed dock, and that the only issues and objections raised by the County and Petitioners before the Board of Adjustment involve the location of Respondent's proposed boat lift. More specifically, the County recommended the proposed boat lift be relocated from the south side of the proposed dock to the north side, or in the alternative, that the existing boat lift could be reconstructed in the same location.

B. Respondent's Existing Dock & Boat Lift

Section 58-555, LDC, requires docks and boat lifts to be located inside the *Center 1/3* of the owner's waterfront boundary unless the owner *either*: (1) Obtains the neighboring owner's written consent to build a dock and boat lift built outside the *Center 1/3*; or (2) Obtains a variance to build a dock and boat lift outside the *Center 1/3* consistent with the requirements of the LDC and Florida law governing same. By way of explanation, if a property owner has 100' of waterfront boundary, under Section 58-555, LDC, the *Center 1/3*

to construct the dock would lay between 33.3 feet and 66.7 feet from either corner of the property.

In the instant case, Respondent's Counsel stated the existing dock was permitted and constructed by a previous owner in 2001 or 2002 (T. 31, ¶ 9; T. 32, ¶ 2), although Petitioners contend it was constructed in 1986. (T. 44, ¶ 7). Respondent's existing dock and boat lift are located almost entirely in the *Southern 1/3* of Respondent's waterfront boundary closest to Petitioners' property line as illustrated in the photographs and drawings in the Appendix. (PowerPoint 5-6)

Importantly, Respondent's existing boat lift previously held a *prior owner's boat* as evidenced by the photographs in the Appendix. (App. 22, 23, 24; PowerPoint 6, 7, 8) Currently, Respondent's existing boat lift holds a personal watercraft, more commonly known as a "jet-ski" or "waverunner." (PowerPoint 7, 8, 9)

C. Respondent's Proposed Dock & Boat Lift

Respondent's application for a variance seeks *to entirely reconstruct the existing dock and boat lift*, where the new dock would be built in the same location as the existing dock, and the new boat

lift would be built *six (6) feet west or seaward* from the existing boat lift. (PowerPoint 5) (T. 31, ¶¶ 1-6).

Construction of the proposed boat lift would place the southwest piling of the boat lift only 4.7 feet from Petitioners' property line, where the required setback would be 28.4 feet under the LDC, based on Respondent's 85 feet of waterfront boundary, as illustrated in the aerial photographs and drawings in the Appendix (PowerPoint 5-6; T. 29, ¶ 6);

In addition, Respondent's proposed boat lift would be designed to hold a boat of *unknown type, size, and length*,² as opposed to the existing dock which holds a personal watercraft, and previously held a prior owner's boat. (T. 31, ¶ 1-6; App. 13, 22, 23, 24, 26; PowerPoint 5).

A review of the aerial photograph of the homes on both sides of Harbor Drive evidences that the docks and boat lifts are generally very well spaced from their neighbors. (App. 24) However, this photograph also evidences that Petitioners and Respondents docks and boat lifts, identified as "Lot 20" and "Lot 21," are atypically and

² The record is silent as to the type, size, and length of Respondent's boat.

exceptionally close. (App. 24) The import of the Board of Adjustment's decision would place Respondent's boat lift even closer to Petitioner's extended side property line. (App. 22-24; PowerPoint 5)

Again, *neither* the County nor Petitioners object to the location of the proposed dock, but *both* the County and Petitioners objected to the location of the proposed boat lift at the Board of Adjustment.

D. Board of Adjustment

1. The County's Position

In response to Respondent's application for a variance, the County, through its Water and Navigation Division, performed various tasks which included a review of the permitting history of the dock and boat lift, a seagrass study, measurements of water depth at various points around Respondent's existing dock and boat lift, and prepared its three (3) page "Worksheet and Recommendation" for the Board of Adjustment. (App. 1-3)

This includes the County's description of the case, the County's recommendations to *approve the proposed dock and deny the proposed boat lift, recommendation that the boat lift be relocated to the north side of the dock*, and recitation and analysis of the applicable

“Criteria for Granting Variances” under Section 138-231, LDC. It states in relevant parts as follows (App. 1-3):

CASE DESCRIPTION:

A variance to allow for the construction of a private residential dock extending a total length of 50.5 feet from the seawall, where only 42.7 feet is allowed absent both neighbors’ signatures of no objection, for the property located at 106 Harbor Drive, in unincorporated Palm Harbor.

A variance to allow for construction of a private residential boat lift with a **4.7 foot setback** from the south property line, **where 28.4 feet is required** absent the south neighbor’s signature of no objection, for the property located at 106 Harbor Drive, in Unincorporated Palm Harbor.

The subject property is a waterfront lot with an existing single-family home and a waterfront width of 85.4 feet. An existing dock and boat lift were constructed in 2001.

The existing dock and boat lift are 50.5 feet long, which requires signatures of no objection from both the north and south neighbors per County Code Section 58-555(b)(1); these signatures were obtained. However, the front of the existing dock includes an unauthorized 8’ by 14’ lower landing, which was installed by the previous owner around 2005.

The existing dock and boat lift are outside of the center 1/3rd of the property (or less than 28.4 feet from the south property line), which requires a signature of no objection from the south neighbor per County Code Section 58-555(b)(2); this signature was obtained.

Staff has no objection to the approval of the proposed residential private dock (the “Dock”), as it appears to meet the criteria in Section 138-231 of the Pinellas County Land Development

Code. Additionally, the Dock is in the same location as the existing dock with essentially the same dimensions.

However, Staff objects to the proposed installation of the boat lift (the “Boat Lift”), as it does not appear to meet the same variance criteria. In short, there are no special conditions or unnecessary hardships justifying the Boat Lift. Significantly, the Boat Lift can be placed on the north side of the Dock without the north neighbor’s signature of no objection (or a variance to this signature requirement). Additionally, placing the Boat Lift on the north side of the Dock presents minimum impacts to seagrass.

Significantly, no variance for the Dock would be required if the applicant obtained signatures of no objection from the north and south neighbors per County Code Section 58-555(b)(1). However, the applicant failed to obtain these signatures. It follows that the variance sought for the Dock is technically a waiver from the requirement to obtain both neighbors’ signatures.

Likewise, no variance for the Boat Lift would be required if the applicant obtained signatures of no objection from the south neighbor per County Code Section 58-555(b)(2). However, the applicant failed to obtain this signature. It follows that the variance sought for the Boat Lift is technically a waiver from the requirement to obtain the south neighbor’s signature.

Staff recommends approval of the Dock subject to the following conditions:

1. Applicant must obtain all required permits – most notably a County Water and Navigation Permit – and pay all applicable fees.
2. Any conditions in any such permits must be adhered to.

Staff recommends denial of the Boat Lift. (All emphasis and underlines added).

The County's Worksheet and Recommendation further addressed the Section 138-231, LDC, which articulates the eight (8) "Criteria for Granting Variances," *where all eight (8) criteria must be satisfied for any variance to be granted*, and the County found that four (4) criteria were not satisfied as follows:

Criteria for Granting Variances

Pinellas County Land Development Code Section 138-231

a. Special conditions. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved:

Staff response:

Regarding the Dock: *Because the Dock is in the same location of the existing dock, Staff has no objection.*

Regarding the Boat Lift: *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). Although there is seagrass on the north side of the Dock (which again, closely mirrors the footprint of the existing dock), the shading from the Dock makes it harder for seagrass to grow – hence why seagrass is sparse here. The south side of the Dock provides much better habitat for seagrass to prosper, as this side receives an abundance of sunlight with little to no shading from the Dock.*

b. Unnecessary hardship. That literal interpretation of the provisions of the 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:

Staff response:

Regarding the Dock: *Because the Dock is in the same location of the existing dock, Staff has no objection.*

Regarding the Boat Lift: *There is no unnecessary hardship justifying the Boat Lift; other homes in the neighborhood have the same length and setback restrictions for docks and boat lifts. Property owners in the neighborhood that built docks or boat lifts obtained signatures from impacted neighbors where required. Moreover, as established above, the applicant can still enjoy a boat lift on the north side of the Dock.*

c. Minimum code deviation necessary. That the granting of the request is the minimal code deviation that will make possible the reasonable use of the land, building or structure:

Staff response:

Regarding the Dock: *Because the Dock extends just as far as the existing dock, Staff has no objection.*

Regarding the Boat Lift: *No deviation is necessary for the Boat Lift. As established above, the applicant can still enjoy a boat lift on the north side of the Dock.*

d. Consistency with the Land Development Code. That the granting of the request will be in harmony with the general intent, purpose and spirit of the Code:

Staff response:

Pertaining to the dock length: the request is consistent with Section 138-3311(a) pertaining to the construction of docks and piers.

Pertaining to the boat lift: the request is inconsistent with Section 138-3311(a) pertaining to the construction of docks and piers. (All italics not added; All bold and underline added).

In summary, the County found that Respondent's *application failed to satisfy* four (4) of the eight (8) required criteria for the variance as to the boat lift.

2. Public Hearing before Board of Adjustment and Appeals

The public hearing on Respondent's application for the Variance was held on May 5, 2021, before the Board of Adjustment. Present for the County, Water & Navigation Division, was Julee Sims, and Brendan Mackesey, Esq., Assistant County Attorney, as counsel for the Water & Navigation Division. (T. 28-46) Present for Respondent was his counsel, Katie Cole, Esq., and consultant, Terri Skapik. (T. 28-46) Present for Petitioners was Brian Myrback, *pro se*. (T. 28-46)

3. The County's and Petitioner, Brian Myrback's, Presentations

The County's presentation by Ms. Sims began with the application including variances for both the length of the dock and side setbacks for the boat lift, the permitting history - including both permitted and unpermitted improvements, operation of the LDC, and

failure of Respondent to obtain the written consents from *either* Petitioners and his other neighbor to the north. (T. 29-31)

Ms. Sims further testified regarding a previously approved permit in 2001 which addresses various items including a personal watercraft lift which encroached upon the boundary of Petitioners side lot lines and was “to be removed,” and then there as an unpermitted expansion of the dock in 2005 or 2006 by a previous owner where the original wet slip with tie poles was unlawfully filled in with decking and extended by eight (8) feet. (T. 28, ¶¶ 6-7) (App. 27).

Ms. Sims also testified regarding the County’s *seagrass survey* where “[n]o seagrass was found under the [existing boat lift due to] the shading from the existing dock,” and that little to no seagrass was found on the north side of the dock. (T. 29, ¶ 10; T. 30, ¶¶ 1-2; App. COUNTY SURVEY). With respect to the seagrass on the north side and recommended relocation of the boat lift, Ms. Sims concluded as follows,

This aerial clearly shows the shading, that's caused by the existing dock on that north side, we're requiring the boat lift to be flipped to the north side of the existing structure will only cause [de minimis] impacts to seagrass on that side. Due to the south side of the property receiving full

sun staff believes seagrass will fill in the area, the existing PWC lift is thus mitigating for any de minimis impacts on that north side. So it would literally just be flipped to that other side. (T. 30, ¶¶ 1-2; County Seagrass Survey).

Ms. Sims next described the adequacy of the water depth on the north side of the dock by cross-referencing the blue dotted lines on the County's "Seagrass Survey" with its "Field Report" measuring water depths from various points from the "L p/1," meaning the left property line and boundary with Petitioners. (T. 30, ¶ 5) (Field Report).

The County's Seagrass Survey read in conjunction with its Field Report further evidence that water depths where the *existing boat lift* is located "@16' from L p/1" (16 feet from left property line)) are virtually identical to where the County recommended new boat lift be constructed "@ 45' from L p/1" (45 feet from left property line. (Seagrass Survey and Field Report).

Petitioner, Brian Myrback, began his presentation by stating that he supports the County's objection to the proposed variance for the boat lift, and quoted an email from the Water & Navigation Division to Respondent's representative reading, "there is *no obvious*

hardship that requires your client to build the proposed design” under Section 138-231, LDC. (T. 38, ¶ 1) (Italics added).

Petitioner continued regarding his observations and knowledge of the seagrass survey and the absence of any environmental impacts if the boat lift were moved to the north side of the proposed dock, commented on the County’s water depth measurements, the operation of the LDC, permitting history, and his concern over the proposed boat lift’s proximity to his property line.³ (T. 38, ¶¶ 2-5; T. 39, ¶¶ 1-2; T. 40, ¶ 7).

Lastly, Petitioner also submitted into the record a letter of objection - which was also emailed to the County’s Zoning & Planning Department - to the variance from an “immediate neighbors,” Marc Sokol and Deirdra Sokol, who live two houses south of Petitioners at 100 Harbor Drive, Palm Harbor, Florida 34683. (App. 17; T. 39, ¶ 3).

That letter states in part as follows:

We feel very strongly that the Pinellas County Board of Adjustment and Appeals (BOA) should NOT grant this variance. ***Allowing this property owner to construct a***

³ The Transcript at Page 40, Paragraphs 2 & 4, reads that Petitioner stated that the proposed boat lift would be “4.7 inches” from his property line, but Petitioner recognizes this was a misstatement and that the proposed boat lift would be 4.7 feet from his extended side lot line.

dock so close to the neighbors' property line will set an unfair precedent and could allow other property owners to move their docks to locations that obscure the water view of their neighbors. (Emphasis added).

4. Respondent's Presentation

Respondent's presentation was by his Counsel and Consultant, and Respondent himself did not testify. (T. 31-37) Counsel began by discussing the permitting history, and importantly, that included an explanation of how County in the calculation of side setbacks for dock *previously* extended the side lot lines into the water *perpendicular to the seawall*, however "at some point" that was changed and the County currently extends the side lot lines into water in a straight line without regard to the seawall. (T. 31-32) The old and new methods of calculating side setbacks is illustrated by two (2) "Woods Consulting" aerial images which are identical, except that in the first image the side lot lines are extended perpendicular to the seawall, and in the second image the side lot lines are extended in a straight line.

This is significant because Respondent's counsel asserts that there is "no change" in the distance between the existing and proposed boat lifts from Petitioners' extended side lot line, but

directly contradicted by the submitted documentation. (T. 32, ¶ 5) Specifically, in the first image with the side lot lines extended perpendicular to the seawall, both the existing and proposed boat lift are 9 feet from Petitioners property line. However, in the second image with the side lot lines extended straight out, the existing boat lift is now only 6.2 feet from Petitioners property line when measured from the same point. And with respect to Respondent's proposed boat lift, the southwest piling would be only 4.7 feet from Petitioners property line. (IMAGE #2)

In other words, the further out Respondent builds his dock and boat lift, the closer they are to Petitioners extended side lot line, and to clarify Counsel's statements that there is "no change," that is correct under the County's previous method of measuring side setbacks for docks, but not under its current method of measuring side setbacks.⁴

⁴ Respondent's Consultant recognized this clarification in her presentation that there is a difference in the side setbacks between Respondent's boat lift and Petitioner's extended side lot line under the County's new method of measuring, but that the actual distance between Respondent's and Petitioners respective boat lifts remain unchanged. (T. 35, ¶ 4)

Next, Respondent's counsel introduced their dock consultant, Terri Skapik, with Wood Consulting, who began her presentation by discussing her credentials. (T. 33, ¶ 5)

The Consultant recognized, "*the existing and long-term use of a boat slip on a certain side of the dock*" in conjunction with her opinions regarding the long-term use of boat slip on the seagrass around Respondent's existing dock and boat lift. (T. 33, ¶ 6)

The Consultant was also critical of the County based on the time of year it performed its seagrass study stating it was not done within, "the approved seagrass survey season," which she asserts is during the warmer months of the year according to federal and state authorities. (T. 33, ¶ 7; T. 34, ¶¶ 1-2) Petitioner would note that Respondent submitted its application for a variance on or about November 9, 2020, and after the asserted "approved seagrass survey season," and the County performed its seagrass survey *six (6) weeks* later on or about December 23, 2020. (App. 14; Field Report). There was no discussion of the County's position regarding the asserted, "approved seagrass survey season."

The Consultant's conclusion regarding the seagrass was her opinion that the proposed boat lift should remain on the south side of the dock. (T. 34, ¶ 2-3)

Thereafter, the Consultant further discussed water depth issues for boats and stated, *inter alia*, that, "every inch counts" and that, "extra depth makes all the sense in the world" in support of her opinion that the boat lift should be moved six (6) feet west and seaward from its current location. (T. 34, ¶ 3)

The Consultant concluded by discussing dock lengths in the area which are much longer than Respondents, although neither the County nor Petitioners objected to the length of the proposed dock. (T. 35, ¶¶ 3-4)

5. Respondent's Application for Variance

Petitioner would also articulate information included on Respondent's application for the variance with respect to the proposed boat dock relevant to this case. First, in the "Project Narrative" it states, without elaboration or supporting information, that, "To deny the Applicant the requested relief from Section 58-555(b) would be to deny the Applicant rights afforded to the vast majority of other property owners in the surrounding area." The

Project Narrative further states that, “To avoid impacts to this vegetation, *and to allow a functional boat lift* and boat ingress/egress, the dock and boat lift *must remain sited southward of this vegetated area.*” (App. 10) And in the application’s variance’s “Record Details,” Respondent states that the proposed variance, “*meets the navigational standards of the applicant.*” (App. 7)

6. Closing Arguments

Closing arguments were made by Brendan Mackesey, Esq., as counsel to the Water & Navigation Division, and Respondent’s Counsel. The County’s counsel stated as follows,

County staff has no objection to the boat lift remaining in its current position. In fact, you heard Miss Cole allude to the possibility of a repair permit being issued for that lift earlier staff does not object to a repair permit being applied for and ultimately submitted so long as the lift is reconstructed in the exact same footprint, it is today. (T.41, ¶ 9) (Emphasis added).

So really I think the question for this board is, is there special conditions present on the land that warrant moving that lift, six feet out water[ward] in its current location, and I just don’t think we’ve heard those today. ***As far as the undue hardship is concerned. Staff isn’t telling the applicant he can’t have a lift. Again, you know, I think the argument might be a little bit stronger if we, if he was being told that he can’t have a lift, but again, its true, other people along in that neighborhood along the waterway there do enjoy a boat lift, but the applicant here has two avenues to***

enjoy a boat lift. He can leave the lift where it currently is. Or he can even move it to the north side. And finally, to the extent that the applicant is claiming that the seagrass on the north side of the dock presents special conditions warranting the variance that would allow moving the lift, six feet water[ward] on the south side again, you heard from Ms. Sims earlier, staff strongly objected to those contentions. (T. 42, ¶ 2) (Emphasis added).

While Respondent's Counsel addressed a variety of matters in her closing argument, most relevant to this Petition are her statements about her client's position should the boat lift variance *not* be granted by the Board of Adjustment, and stated as follows:

So, with that we will conclude I do want to reiterate procedurally, that in conferring with Staff and Mr. Mackesey reiterated this, that the applicant can rebuild its dock as it is so if this board chose not to allow this boat lift to move seaward. ***That is what Dr Donovan and his wife would choose to do because of the importance of both the depth, the navigational patterns, and the seagrass situation.*** (T. 43, ¶ 4).

A review of the transcript further reveals two (2) other occasions where Respondent's Counsel made similar statements:

There is a repair and reconstruction provision in the code that allows an owner to rebuild exactly what was previously permitted. So, Dr. Donovan could build exactly what was previously permitted (T. 32, ¶ 1) (Emphasis added).

If this board did not want to approve the relocation of the boat lift seaward by any amount, then I believe that Dr.

Donovan would prefer just to withdraw that request and ***we'll leave the boat lift exactly where it is still located on the south side*** for all the reasons that Ms. Skapik already opined to. (T.36, ¶ 2) (Emphasis added).

7. Questions, Discussion, and Decision by Board of Adjustment

Finally, there was brief questioning and discussion among the members of the Board of Adjustment prior to it making a decision. (T. 43-46) One was the comments by Board Member Bomstein, who in summarizing that Respondent would like to move the boat lift seaward and the County would like to move it to the other side of the dock, stated that, *“The neighbor who is here in opposition [Petitioner, Brian Myrback] basically seems in opposition to pretty much all of it.”* (T. 44, ¶ 1). However, Petitioner had no objections to the proposed dock and concurred with the County’s recommendation for the boat lift and stated as follows,

I would state that the county's findings were accurate, that there was no environmental impact or would be no environmental impact to the grass. If this dock per the county's recommendation, ***were moved to the right or north side of the dock.*** (T. 38, ¶ 3) (Emphasis added).

Thereafter, members of the Board of Adjustment made a variety of other comments including Board Member Cocks, who as to the proposed boat lift stated, *“its going a little further away”* (T. 45, ¶ 1);

Board Member Gephart who stated as to water depth that, “*one inch really does matter*” (T. 45, ¶ 2); and Board Member Doran who stated as to water depth that, “*I’m not a boater but I accept the premise that deeper is better for boaters.*” (T. 45, ¶ 7).

Finally, a Motion was made by Board Member Doran and the Board of Adjustment granted Respondent’s variances as to both the dock length and side setbacks for the proposed boat lift 4.7 feet from Petitioners’ property line. (T. 46, ¶ 3). The County reduced the decision to writing, and Petitioners would note that it contains an obvious error and states that the variances were “conditionally approved based on the Board’s concurrence with staff’s findings and recommendation,” when in fact the County’s findings and recommendations were unequivocally to *deny* the variance for the boat lift. (App. DECISION)

This Petition for Writ of Certiorari timely followed.

III. STANDARD OF REVIEW

The standard of review of a quasi-judicial decision by a local administrative body is by certiorari in the Circuit Court, where it must determine whether the administrative body: (1) Accorded due process of law; (2) Observed the essential requirements of law; *and*

(3) Supported its findings with competent substantial evidence. *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838 (Fla. 2001); *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000); *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995)

In addition, Section 58-536(d), Pinellas County Land Development Code, states as follows,

Appeals of variances granted or denied by the board or board of adjustment and appeals may be made to the Circuit Court for the Sixth Judicial Circuit of the State in and for the county. Requests for appeal shall be filed within 30 days after the public hearing date from which the decision to grant or deny the variance was made.

IV. NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this Petition is a Writ of Certiorari quashing the Board of Adjustment decision issued on May 5, 2021 as to the variance for the proposed boat lift where the record categorically fails to demonstrate a legally cognizable “unnecessary hardship” under Florida law, and consequently, the Board of Adjustment failed to both observe the essential requirements of law and have competent substantial evidence to support its decision.

V. ARGUMENT

ISSUE I

THE BOARD OF ADJUSTMENT’S DEPARTED FROM THE ESSENTIAL REQUIREMENT OF LAW BY FAILING TO APPLY THE CRITERIA IN SECTION 138-231, LDC, WHICH DEFINES AN “UNNECESSARY HARDSHIP” REQUIRED TO GRANT THE VARIANCE FOR THE BOAT LIFT.

Although this is a fact intensive case, its legal analysis is fairly simple. The pith of this case is that despite all of the information presented to the Board of Adjustment regarding lot lines, seagrass, water depth, Petitioners’ dock, etc., the Board of Adjustment failed to apply the correct legal standard and definition of “unnecessary hardship” set forth in Section 138-231, LDC, governing “Criteria for granting variances,” which is mandatory requirement to grant the variance for the proposed boat lift. Therefore, in granting the variance for the boat lift without applying the correct law, the Board of Adjustment departed from the essential requirements of law and its decision should be quashed.

Effectively, the Board of Adjustment ignored the controlling ordinance and created its *own test* that it thought the proposed boat lift was “better” than the existing boat lift or County’s recommended boat lift on the north side of the dock, and then granted the variance

for that reason. This is demonstrated by the Board members quotes that the boat lift is “*going a little further away*” (T. 45, ¶ 1), that as to water depth “*one inch really does matter*” (T. 45, ¶ 2); and that “*I’m not a boater but I accept the premise that deeper is better for boaters.*”

Although Respondent’s proposed boat lift may or may not be “better” than the other two alternatives, property owners seeking a boat lift are not entitled to their *most preferred location*, and most importantly, these are irrelevant considerations under the test for an “unnecessary hardship” under Section 138-231, LDC.

This analysis must begin with Section 138-231(b), LDC, which defines “Unnecessary hardship” as follows:

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 must not be self-imposed. (Emphasis added).

In the context of the instant case, and consistent with the case law cited below, in order to grant the variance for the boat lift, Section 138-231, LDC, required the Board of Adjustments to have found that *either*:

- (1) The County *denied* Respondent the ability to construct a boat lift where other properties in the same zoning district or area have them; *or*
- (2) The County made it *practically difficult* for Respondent to construct a boat lift commensurate with other boat lifts in the same zoning district or area.

Petitioner contends that a plain reading of the transcript and record demonstrates that neither of these tests were applied by the Board of Adjustments or satisfied.

Under the first test, the County did not deny Respondent a boat lift where other properties in the same zoning district or area have them. *To begin, Respondent already has a boat lift.* Respondent's Counsel stated that it was permitted and constructed in 2001 or 2002, has been in its present configuration for 19-20 years. The record is replete with photographs of Respondent's boat lift holding both his personal watercraft *and* a previous owner's boat. (App. 22, 23, 24, 26; PowerPoint 5, 7, 8, 9)

In addition, the County was not seeking to deny Respondent a boat lift before the Board of Adjustment, only that his proposed boat lift be moved from the south side of the dock to the north side of the dock, away from Petitioners' property line and more toward the *Center 1/3* of Respondent's waterfront boundary.

In its Worksheet and Recommendation as to Section 128-231, LDC, after reciting the above definition of “unnecessary hardship,” the County states:

Regarding the Boat Lift: There is no unnecessary hardship justifying the Boat Lift; other homes in the neighborhood have the same length and setback restrictions for docks and boat lifts. Property owners in the neighborhood that built docks or boat lifts obtained signatures from impacted neighbors where required. Moreover, as established above, the applicant can still enjoy a boat lift on the north side of the Dock. (App. 3) (Underline added).

Further, Respondent’s Counsel stated three different times that *if* the Board of Adjustment were to *deny* the variance to move the proposed boat lift seaward, her client would simply reconstruct the existing boat lift in its same location,⁵ and stated as follows:

So, with that we will conclude I do want to reiterate procedurally, that in conferring with **Staff and Mr. Mackesey reiterated this, that the applicant can rebuild its dock as it is so if this board chose not to allow this boat lift to move seaward. That is what Dr. Donovan and his wife would choose to do because of the importance of both the depth, the navigational patterns, and the seagrass situation.** (T. 43, ¶ 4).

If this board did not want to approve the relocation of the boat lift seaward by any amount, **then I believe that Dr. Donovan would prefer just to withdraw that request and we’ll leave the boat lift exactly where it is still**

⁵ Counsel appears to have referred to Section 58-544, LDC, governing “Dock repair and reconstruction.”

located on the south side for all the reasons that Ms. Skapik already opined to. (T.36, ¶ 2) (Emphasis added).

There is a repair and reconstruction provision in the code that allows an owner to rebuild exactly what was previously permitted. So, Dr. Donovan could build exactly what was previously permitted (T. 32, ¶ 1) (Emphasis added).

Consequently, it cannot be reasonably argued in the first test of an unnecessary hardship that County sought to deny Respondent a boat lift *could possibly* be satisfied where Respondent already has a boat lift and the County recommended it could be relocated to the north side of the dock.

Under the second test, the County did not make it practically difficult for Respondent to construct a boat lift commensurate with other boat lifts in the same zoning district or area. In the context involving a boat lift, this test involves the *functionality and reasonable use* of Respondent's existing boat lift or the County's recommended boat lift on the north side of the dock.

Respondent's Consultant expressly recognized that Respondent and previous owners had, "existing and long-term use" of the boat lift "on the left side or south side" of the dock. (T. 33, ¶ 6).

And again, Respondent's Counsel stated three (3) times that if the Board of Adjustment were to deny the variance to move the proposed boat lift seaward, that Respondent would simply rebuild the dock in its existing location. In addition to all of the photographs of Respondent's boat lift holding both his personal watercraft and a previous owner's boat, and that it has been used for at least 19-20 years.

Counsel's repeated statements of her client's position is an *unambiguous concession* that the existing boat lift is functional and provides reasonable use. Otherwise, Respondent would not incur the expense to reconstruct a non-functional boat lift.

The Appendix contains several photographs of docks and boat lifts along both sides of Harbor Drive. These include Respondent's boat lift holding his personal watercraft and a previous owner's boat. (App. 22, 23, 24, 26; PowerPoint 5, 7, 8, 9) However, the Board of Adjustment did not consider the functionality and reasonable use of Respondent's boat lift relative to other boat lifts along Harbor Drive or elsewhere in the same zoning district.

At the hearing before the Board of Adjustment, only Mr. Mackesey, as counsel the Water & Navigation Division, zeroed in on

the definition of unnecessary hardship under Section 138-231, LDC, and stated as follows:

County staff has no objection to the boat lift remaining in its current position. In fact, you heard Miss Cole allude to the possibility of a repair permit being issued for that lift earlier staff does not object to a repair permit being applied for and ultimately submitted so long as the lift is reconstructed in the exact same footprint, it is today. (T. 41, ¶ 9) (Emphasis added).

As far as the undue hardship is concerned. Staff isn't telling the applicant he can't have a lift. Again, you know, I think the argument might be a little bit stronger if we, if he was being told that he can't have a lift, but again, its true, **other people along in that neighborhood along the waterway there do enjoy a boat lift, but the applicant here has two avenues to enjoy a boat lift. He can leave the lift where it currently is. Or he can even move it to the north side.** (T. 42, ¶ 2)

Florida's appellate courts have quashed variances where there was no legally cognizable "unnecessary hardship" in cases involving language similar to Section 138-231, LDC.

Auerbach v. City of Miami, 929 So.2d 693, 694 (Fla. 3d DCA 2006), involved a setback case like the instant case on second tier review where the City granted a variance for setback requirements. An "aggrieved neighbor" sought certiorari review at the Circuit Court which affirmed, and Third District ultimately quashed the variance where the Court found there was *no legal hardship*. The Third District

cited to *Maturo v. City of Coral Gables*, 619 So. 2d 455, 456 (Fla. 3d DCA 1993) for the proposition that,

Florida courts have held that a *legal hardship* will be found to exist *only* in those cases *where the property is virtually unusable or incapable of yielding a reasonable return* when used pursuant to the applicable zoning regulations. (String citation omitted) (Italics added).

In *Auerbach*, the Third District found it highly persuasive that the developer's original plan for development did *not* include the variance. It found that conclusively demonstrated, "an indispensable requirement of the hardship variance, that no reasonable use of the property could be made without it, *does not exist.*" *Auerbach*, 929 So. 2d at 694. (Italics added). Consequently, the Third District quashed the variance and held that the Circuit Court failed "to apply the correct law" in affirmative the City's granting of the variance. *Id.* at 695.

Although *Auerbach* involved the proposed development of raw land and the instant case involves the reconstruction of an existing dock and boat lift, the test for an unnecessary hardship remains the same. In other words, where *Auerbach* asks whether a reasonable use of the property can be made compared to similarly situated properties, Section 138-231 asks whether the County made it

practically difficult to have a boat lift commensurate with similarly situated properties. At the end of the day, the issue in both is whether there is a reasonable use without the requested variance.

Most pertinent to the instant case, the Third District in *Auerbach* found that because the developer's original plan did not include the variance, the property could be developed without it, and therefore the most basic requirement for a hardship could not be satisfied.

This is literally identical to Respondent's existing boat lift which his Counsel said would be reconstructed if the variance to move it seaward was denied, which the Board of Adjustment also failed to consider in reaching its decision.

Auerbach is also insightful as to the comments made by the Board of Adjustment's members in reaching its decision. These include that the boat lift is "*going a little further away*" (T. 45, ¶ 1); that as to water depth "*one inch really does matter*" (T. 45, ¶ 2); and that "*I'm not a boater but I accept the premise that deeper is better for boaters.*" (T. 45, ¶ 7)

These comments are also identical to the developer in *Auerbach's* asserted justification for its hardship which include: (a)

the City of Miami “thought that the variance was generally a good idea”; (b) the setback violation “in the broad scheme of things was too minor to warrant [the Court’s] attention” (Parenthetical added); and “the variance would make the project more aesthetically pleasing. *Id.* at 695 n.3.

The Third District completely rejected all of these arguments and did so “without ‘weighing’ or ‘evaluating’ the non-existent evidence of a hardship.” *Id.* In no uncertain terms, the Third District held that the ruling to affirm the City’s granting of the variance on first tier review was “an unjustified approval of the obvious failure of the circuit court to apply the correct law.” *Id.*

Viewed from a different perspective, Respondent’s application for the variance for the boat lift and the Board of Adjustment’s granting same were not based on “unnecessary hardship” under Section 138-231, LDC. Rather, the Board of Adjustment approved the variance for the proposed boat lift based on Respondent’s *preference* for a boat lift located only 4.7 feet from Petitioners’ property line, where 28.4 feet is required under Section 58-555, LDC, and the Board of Adjustment agreeing that would be “better.”

Making a reasonable inference from the evidence in the record, Respondent's manifest intent to keep the boat lift on the south side of the dock is not due to concerns over seagrass or water depth, but to preserve his open water view of St. Joseph Sound and the Intracoastal Waterway. Of course, the corollary is that one person's gain is another person's loss, where sustaining the variance would push Respondent's boat lift even further into his *Southern 1/3*, and with a boat of undisclosed type, size, and length. Obviously, this is adverse to Petitioners' water view as described in the letter of objection from Mr. & Mrs. Sokol (App. 17), and is further demonstrated in aerial photograph looking back at these two homes from the water demonstrating where the homes are situated relative to their docks and their respective water views. (PowerPoint 3)

To be clear, Petitioners do not make this argument to reweigh the evidence before the Board of Adjustment, but to underscore that Respondent's application for variance for the proposed boat lift reflects his *preference to preserve his view*, and not the existence of a bonafide "*unnecessary hardship*" under 138-231, LDC.

In conclusion, for the foregoing reasons and under the foregoing authority, the Board of Adjustment failed to apply the criteria in

Section 138-231, LDC, and in so doing, departed from the essential elements of law.

ISSUE II

THE BOARD OF ADJUSTMENT’S DECISION TO GRANT THE VARIANCE FOR THE BOAT LIFT IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE EVEN IF IT HAD APPLIED THE CRITERIA IN SECTION 138-231, LDC, DEFINES AN “UNNECESSARY HARDSHIP” REQUIRED TO GRANT THE VARIANCE FOR THE BOAT LIFT.

Where Issue I focuses on the Board of Adjustments failure to apply the controlling ordinance under Section 138-231, LDC, and departed from the essential requirements of law, Issue II focuses on the absence of competent substantial evidence in the record to support the decision even if it had applied the correct law under Section 138-231.

The seminal case defining “competent substantial evidence” is *De Groot v. Sheffield*, 95 So. 2d 912, 912 (Fla. 1957), where the Supreme Court of Florida explained:

We have used the term “competent substantial evidence” advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective “competent” to

modify the word “substantial,” we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *We are of the view, however, that evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.* (Italics added).

In the context of the instant case, and consistent with the case law cited herein, Respondent cannot demonstrate that there is competent substantial evidence in the record to support an “unnecessary hardship” under Section 138-231, LDC, that *either*:

- (1) The County *denied* Respondent the ability to construct a boat lift where other properties in the same zoning district or area have them; *or*
- (2) The County made it *practically difficult* for Respondent to construct a boat lift commensurate with other boat lifts in the same zoning district or area.

Petitioner contends that a plain reading of the transcript and record demonstrates that the Board of Adjustment’s decision is not supported by competent substantial evidence to satisfy either of these tests. More specifically, there is no competent substantial evidence in the record that Respondent’s existing boat lift and the County’s recommended boat lift on the north side of the dock are non-functional, not of reasonable use, or somehow more limited to

other boat lifts along Harbor Drive or elsewhere in the same zoning district. Therefore, the Board of Adjustment's decision lacks the required evidentiary basis and should be quashed by this Honorable Court.

Under the first test, there is no competent substantial evidence that the County denied Respondent a boat lift where other properties in the same zoning district or area have them.

As set forth in Issue I, it is undisputed that Respondent already has a boat lift, and Respondent's Counsel stated he has a right to reconstruct it in its present location. Further, the County and Petitioners did not have any objections to the proposed dock being constructed on the north side of the dock. Therefore, there can be no competent substantial evidence in the record under *De Groot* that Respondent does not have an existing boat lift, the right to seek reconstruction of the existing boat lift under Section 58-544, LDC, governing "Dock repair and reconstruction," and that Respondent cannot construct the boat lift on the north side of the dock in accordance with the County's recommendation.

Under the second test, there is no competent substantial evidence that the County made it practically difficult for

Respondent to construct a boat lift commensurate with other boat lifts in the same zoning district or area. As set forth in Issue I, in the context of a boat lift this test involves the *functionality and reasonable use* of Respondent’s existing boat lift or the County’s recommended boat lift on the north side of the dock.

As summarized above, there is no evidence that existing boat lift and the County’s recommended boat lift on the north side of the dock are non-functional or would not provide reasonable use to serve the property commensurate with others in area. *The record is silent regarding any types of restrictions or other limitations in comparison to similar situated property owners.*

Respondent only address this issue in his application for the variance in the “Project Narrative,” which at the bottom of the page asserts the mere conclusion that, “To deny the Applicant the requested relief from Section 58-555(b) would be to deny the Applicant rights afforded to the vast majority of other property owners in the surrounding area.” (App. 10)

In response, the County’s Worksheet and Recommendation as to an “unnecessary hardship” under Section 138-231, LDC, states:

Regarding the Boat Lift: There is no unnecessary hardship justifying the Boat Lift; other homes in the neighborhood have the same length and setback restrictions for docks and boat lifts. Property owners in the neighborhood that built docks or boat lifts obtained signatures from impacted neighbors where required. Moreover, as established above, the applicant can still enjoy a boat lift on the north side of the Dock. (App. 3) (Underline added).

The record reveals that the County's position is never refuted, as there is no evidence that: (a) Other waterfront owners are *not* subject to the same setback restrictions for docks and boat lifts; *and* (b) Other waterfront owners did not obtain County approved docks and boat lifts when building outside the Center 1/3 of their waterfront boundaries as required under Section 58-555(b), LDC, *without* the written consent from their neighbors.

Again, Respondent makes the bold statement that denying the variance would deny the "rights afforded to" similarly situated property owners, but provides absolutely no explanation as to how Respondent is being treated differently from these similarly situated property owners. All of them are subject to the same regulations.

Accordingly, Respondent's statement in his Project Narrative is a naked conclusion which is not supported by competent substantial evidence or entitled to any evidentiary value under *De Groot*.

Respondent's application also states that the proposed boat lift, "meets the navigational standards of the applicant." However, Respondent again is silent regarding the sufficiency of the existing boat lift and County's recommended boat lift on the north side of dock relative to his "navigational standards." And more fundamentally, Respondent never states what his "navigational standards" are. Again, this is another naked conclusion which does not merit any evidentiary value under *De Groot*.

We do know the Respondent would like to convert the existing boat lift which holds a personal water craft to hold a boat, but the record does not indicate the type, length or size of the boat. It may be the case that Respondent would like the proposed boat lift to hold a disproportionately large boat compared to similarly situated property, but again, the record is silent on the intended boat.

However, there are ample photographs and other evidence in the record that a previous owner used the existing boat lift for his boat, and even the Respondent's Consultant recognized the "long-term use" of that lift. Respondent's Counsel stated the existing boat lift has been there for 19-20, repeatedly stated that if the Board of Adjustment denied the variance to move the boat lift seaward,

Respondent would simply reconstruct the existing dock in its present configuration. Again, there is no evidence that the existing boat lift is non-functional or does not provide reasonable use.

Respondent's application for variance further states that, "To avoid impacts to this vegetation, and to allow a functional boat lift and boat ingress/egress, the dock and boat lift must remain sited southward of this vegetated area." However, a close review of the record indicates that these assertions are again mere conclusions which lack support by the testimony and lack competent substantial evidence under *De Groot*.

Finally, and returning to Mr. Mackesey in his closing argument, the County gave Respondent two options as follows:

County staff has no objection to the boat lift remaining in its current position. In fact, you heard Miss Cole allude to the possibility of a repair permit being issued for that lift earlier staff does not object to a repair permit being applied for and ultimately submitted so long as the lift is reconstructed in the exact same footprint, it is today. (T.41, ¶ 9) (Emphasis added).

As far as the undue hardship is concerned. Staff isn't telling the applicant he can't have a lift. Again, you know, I think the argument might be a little bit stronger if we, if he was being told that he can't have a lift, but again, its true, **other people along in that neighborhood along the waterway there do enjoy a boat lift, but the applicant here has two avenues to enjoy a boat lift.**

He can leave the lift where it currently is. Or he can even move it to the north side. (T. 42, ¶ 2)

However, and of course, neither the existing boat lift nor the County's recommended boat lift on the north side of the dock are in Respondent's *most preferred location* and he is entirely comfortable with placing this boat lift 4.7 feet from Petitioners' property line where 28.4 feet would be required under the LDC, and Respondent has 85 feet of waterfront boundary.

In conclusion, while the boat lift is already close to Petitioner's property line, there is no substantial competent evidence in the record to support the decision to further aggravate that condition and make it much closer at Petitioners sole expense. For this additional reason, the Board of Adjustments variance for the proposed boat lift should be quashed.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court:

- A. Accept jurisdiction to hear this case;
- B. Grant the Petitioners' Motion for Leave to Serve an Amended Petition for Writ of Certiorari and an Amended Appendix, filed correspondingly with this initial Petition;
- C. Issue an Order to Show Cause pursuant to Florida Rule of Appellate Procedure 9.100(h);
- D. Quash the May 5, 2021, decision of the Pinellas County Board of Adjustment and Appeals; and
- E. Grant such other relief as the Court deems just and appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 4, 2021, 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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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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