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

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

Petitioners,

v.

CASE NO.: 21-000014-AP

L.T. Case No: VAR-21-15

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

Respondents.
_____/

RESPONDENT JAMES P. DONOVAN'S RESPONSE TO SECOND AMENDED PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

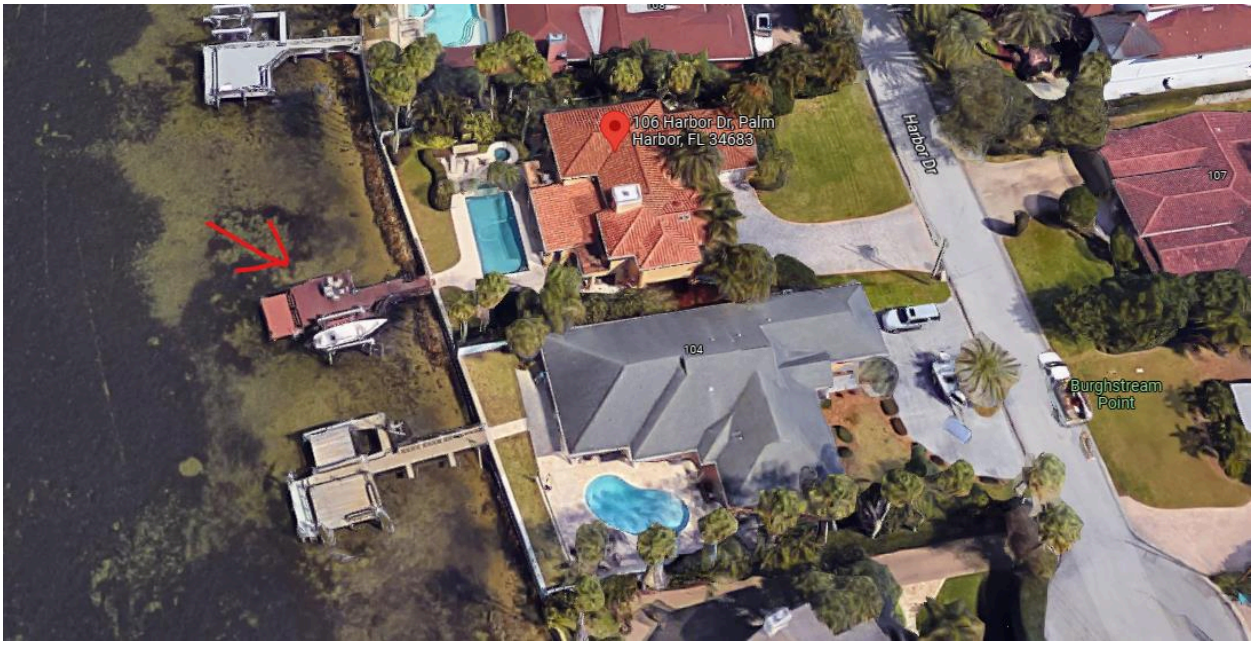
This case arises out of the Pinellas County Board of Adjustment's (the "Board") granting of a variance to Respondent James P. Donovan, M.D. concerning the renovation of a private residential dock and boat lift. After carefully considering the evidence, the Board granted Dr. Donovan the variance and authorized the proposed dock renovation and boat lift consistent with what the County previously approved *nearly 20 years ago*. That variance should be upheld.

The Property

Dr. Donovan lives at 106 Harbor Drive in unincorporated Palm Harbor, Florida (the "Property"). (App. 16).[1] He acquired the Property in July 2019. (App. 26-27). The Property is a residential waterfront lot with a single-family home. (App. 7). It sits near the southern end of Harbor Drive, bordering Harbor Drive to the east and the Saint Joseph Sound to the west. (App. 10, 12). The Property has an existing private dock extending into the Saint Joseph Sound with a boat lift

[1] Record citations are made to the Amended Appendix that Petitioners filed on September 23, 2021.

on the south side of the dock. (App. 36). The dock and boat lift are shown by the arrow in the image below:



(App. 36). Petitioners' property, located at 104 Harbor Drive, is south of the Property and is shown below the Property in the image above. (App. 36, 97).

Relevant Dock Regulations

The Pinellas County Land Development Code ("LDC") regulates the design criteria and permitting of docks located in unincorporated Pinellas County and within municipal limits. *See generally* LDC Art. XV (providing the County Water & Navigation department's regulations and criteria for docks). The County classifies docks in various ways. Relevant to this appeal are "private docks"—those

located on residentially zoned property for use by an individual property owner. LDC § 58-501.

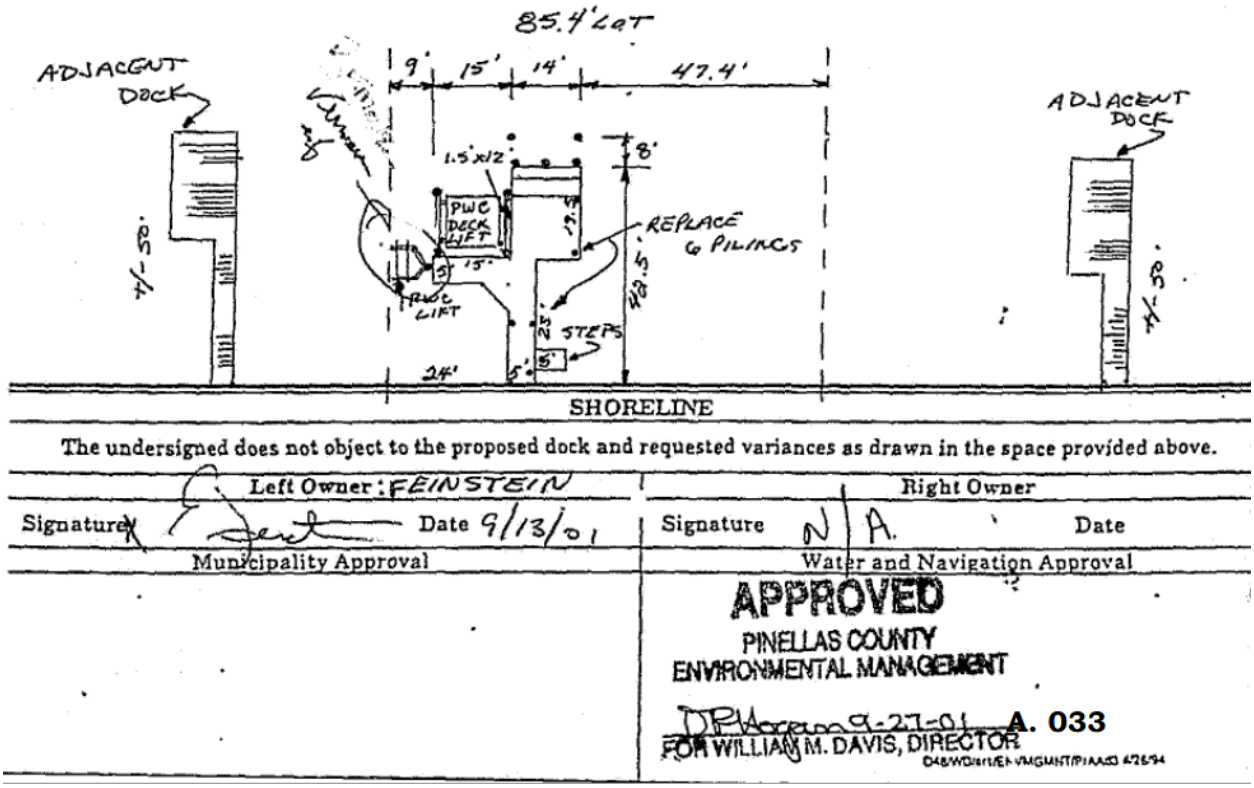
For private docks located in unincorporated Pinellas County, like Palm Harbor, landowners ordinarily must construct docks and boat lifts within the center one-third of the property. LDC § 58.555(b)(2). Purely for illustrational purposes, a proposed private dock on property with 90 feet between the property boundaries generally must be constructed within the center 30 feet of the property. Stated another way, the private dock in this hypothetical must have at least a 30-foot setback from the adjacent properties. To determine the location of the center 30-foot area as the dock extends out from the upland property over the water—and the required setbacks—requires a review of the property's riparian boundary lines extending out from the upland property.

The County can waive the requirement imposed by Section 58.555(b)(2) upon receipt of a signed statement of no objection from the adjacent neighbor. *Id.* For example, a landowner seeking to construct a private dock extending into the left one-third of his or her property (i.e., beyond the required setback) may do so if the neighbor to the left signs a statement of no objection. Absent a signed

statement of no objection from the neighbor, however, the County will not issue a permit for the proposed location of the dock without a variance application and approval by the Board. *See* LDC § 58-539(a) (authorizing the Board to grant variances from Section 58.555(b)(2)).

The 2001 Dock Permit/Variance

Approximately 20 years ago in 2001, the County issued a permit approving the Property's existing private dock and boat lift. (App. 33). A sketch of the dock and lift approved by the County is below:



(App. 33).

The sketch shows the Property's water frontage is 85.4 feet and depicts the riparian boundary lines through the two dotted lines drawn ***perpendicular*** from the shoreline. (App. 33). LDC § 58.555(b)(2) required the dock and boat lift to fit within the center one-third, or the center 28.4 feet of the Property (calculated by dividing 85.4 by 3). However, the sketch shows that the approved dock and "PWC Deck Lift" are only 9 feet from the southern riparian boundary line with Petitioners' property (to the left of the dock), nearly 20 feet into the southern one-third of the Property beyond the 28.4-foot setback. (App. 33).[2]

Notwithstanding, the County issued the 2001 permit for the Property and waived compliance with LDC § 58.555(b)(2) because, at that time, the owner of Petitioners' property signed a statement of no objection to the dock and boat lift extending nearly 20 feet into the setback to a point within 9 feet of the property line. (App. 33).

[2] The sketch also shows a second "PWC Lift" extending even further toward Petitioners' property, approximately 1-2 feet from the southern riparian boundary line. (App. 33). Although difficult to read the annotation, the County removed this second boat lift from the approved permit and it was never constructed. (App. 73-74). The County approved the remainder of the sketch, including the dock and the "PWC deck lift," with a 9-foot setback from Petitioners' property.

Petitioners are quite familiar with the process of constructing a dock and boat lifts outside the center-third of a property. Indeed, Petitioners have a dock and ***two*** boat lifts (one on each side of the dock), which are well outside the center one-third of their property, primarily in the northern portion of the property and close to Dr. Donovan's property. (App. 28, 101).

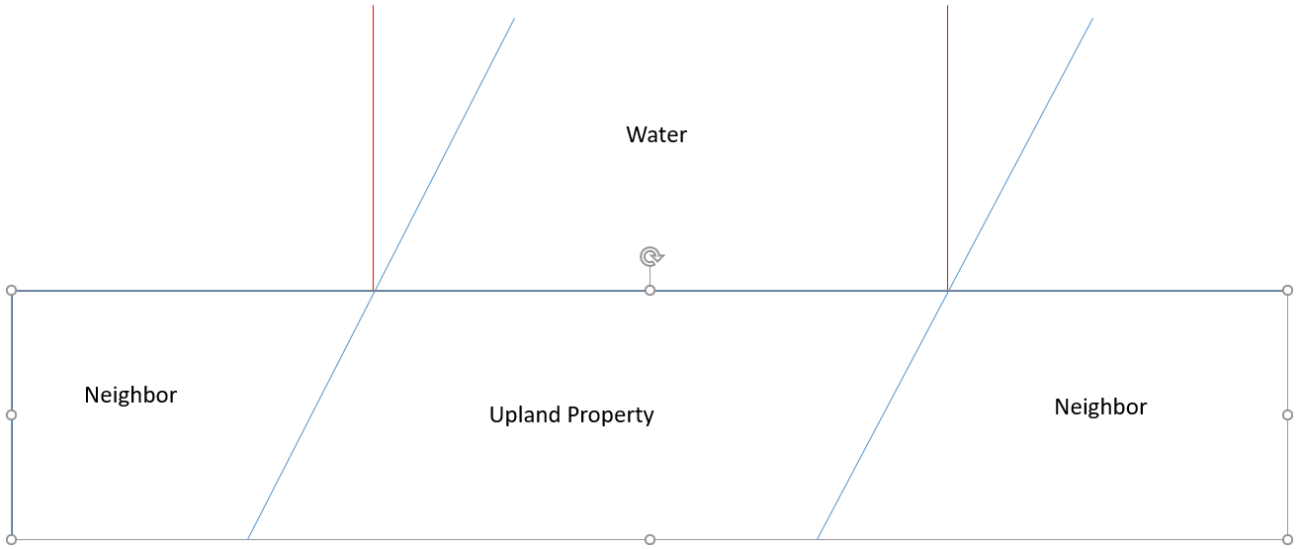
Dr. Donovan's Dock Permit Application Reveals the County's New Practice of Drawing Slanted Property Lines

Dr. Donovan sought to renovate the dock and boat lift after he purchased the Property in 2019, since it had been there for nearly 20 years. Dr. Donovan desired to rebuild the dock in its existing footprint and approved setbacks, and move the boat lift 6 feet seaward (i.e., west) from the existing lift's location. (App. 19). Dr. Donovan submitted a private dock permit application to the County for such work in November 2020. (App. 18-21).

By 2020, however, the County had changed how it defines riparian boundary lines on waterfront properties in reviewing dock permit applications. Instead of drawing straight lines ***perpendicular*** to the shoreline, as shown in the 2001 permit drawing above, the County began drawing riparian lines by extending the upland

property lines into the water at the same angle as the upland property lines. (App. 75, 83, 107-08).

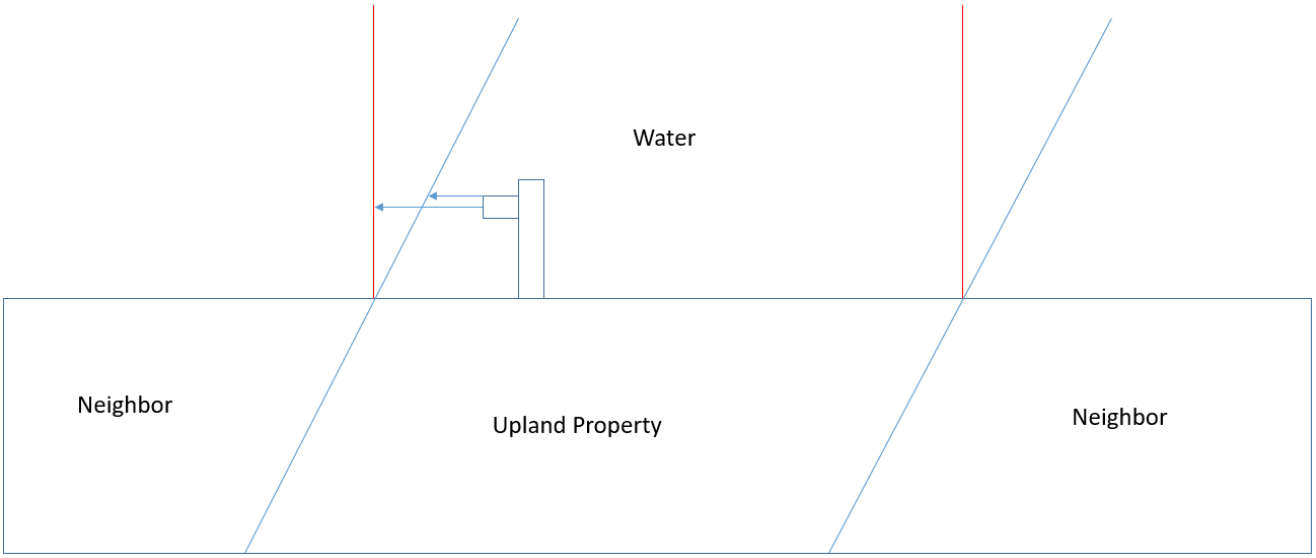
The County's new practice materially altered its review and analysis of dock permit applications. If a property's upland property lines are not perpendicular to the shoreline, the County's new practice results in riparian boundary lines drawn *slanted* or otherwise at an angle from the shoreline, continued at the same angle as the upland property line out over the water. (App. 54). An illustrational sketch is below:



In this illustration, the upland property lines are at an angle in blue. To determine the riparian boundaries, the County's new practice extends those lines out over the water at the same angle, or slant, as shown above. The County's practice used in the 2001

permit, however, drew the riparian lines perpendicular to the shoreline, as shown above in red.

The change in the County's practice is significant because the setback of a dock or boat lift may differ if measuring its distance to a slanted riparian boundary line. By slanting the riparian lines, the setback of a dock or boat lift may measure closer to the property's boundary line than if measuring the distance to a straight line perpendicular to the shoreline, even though the dock or boat lift physically remains in the same location. Another illustrational sketch is below:



Here, one can see that changing how the riparian boundary line is drawn affects the distance between the dock and the riparian boundary line. Even though the dock stays in the same physical

location, the left-most point of the dock is much closer to a slanted riparian boundary line as compared to a straight riparian boundary line perpendicular to the shoreline.

In light of discovering the County's changed practice, Dr. Donovan had the setback of the dock and boat lift under the proposed renovation measured using both straight riparian lines perpendicular to the shoreline and extended property lines at a slant. The below sketch depicts the straight riparian lines on each side in blue and the slanted riparian lines in yellow:

(App. 54). The cross-hatched blue area represents the renovated dock. (App. 54). The vertical blue lines to the left of the dock represent

the renovated boat lift. (App. 54). Under the proposed renovation, the existing dock area shown in yellow cross-hatch would be removed, and the existing boat lift shown in solid yellow would be removed. (App. 54).

Compared to the approved 2001 permit, the proposed renovated dock would actually remove the dock area closest to Petitioners' property. (App. 54). The boat lift would shift a few feet directly out from the shoreline (seaward), and slightly to the north—further away from Petitioners' property—because Dr. Donovan proposed to remove a small landing connecting the dock and the boat lift, thereby reducing the width of the boat lift. (App. 54, 94-95, 114).

But a review of the sketch shows the dock's setback from the southern boundary line is calculated differently depending upon the use of a straight line or the extended slanted property line. Using the County's new practice of extending the upland property lines, one can see the riparian lines are slanted. (App. 54). Using slanted lines, the southwest piling of both the existing and proposed boat lift is 4.79 feet from the riparian boundary line with the Petitioners' property. (App. 54). Using straight lines perpendicular to the shoreline, the setback of both the existing and proposed boat lift from

any point remains at least 9 feet—if not more—from the perpendicular riparian boundary line with the Petitioners' property. (App. 54).

Therefore, Dr. Donovan's application did not propose going any further toward Petitioners' property than what the County approved in 2001 and, in fact, the proposed dock and boat lift are physically moved further away compared to the existing dock and lift. Likewise, under Dr. Donovan's application, ***the southwest piling of both the existing and proposed boat lift is 4.79 feet from the riparian boundary line, exactly the same***. (App. 54). The only difference in 2020 was the County's new practice in how it interpreted the setbacks based on its new application of riparian lines. The County interpreted its previously approved setback at 9 feet based on the perpendicular lines, compared to 4.79 feet applying the slanted riparian lines.

The County Requires Dr. Donovan to Either Obtain His Neighbor's Consent or a Variance

LDC § 58-544 provides for dock repair and reconstruction where, as here, the County previously permitted a dock with non-conformities. Section 58-544 allows a landowner who previously

obtained approval for a dock with LDC nonconformities to repair or reconstruct the dock without having to repeat the process of obtaining necessary approvals or variances to maintain those nonconformities. In other words, a landowner only has to obtain approval for a given LDC nonconformity one time. If the prior permit does not conform with the setback requirements under section 58-555(b)(2) and the dock is reconstructed such that no new structures are beyond the applicable setback limits, then the landowner can repair or reconstruct the dock without the need to obtain another variance for the setback nonconformity. *Id.* § 58-544(a)(2)(e).

A variance is what authorizes a landowner to deviate from any of the applicable permitting criteria, even if the deviation is *de minimis*. *See* LDC § 58-539. As an example, if a landowner proposed to build a dock 15.5 feet wide but County regulations limited dock widths to 15 feet, the landowner would need to obtain a variance from the County to build the dock an extra 0.5 feet wide. If granted, a variance remains in effect in ***perpetuity*** unless the dock is removed from the property. LDC § 130-230(f).

The County's administrative staff would not permit Dr. Donovan's renovation under LDC § 58.544 allowing for

reconstruction of a previously approved nonconforming dock/lift, instead requiring a variance. Because the County now draws riparian lines differently, the County's administrative staff viewed Dr. Donovan's proposed boat lift as going further into the setback than what it approved in 2001. (App 75-76). In reality, the setback as between the existing and proposed boat lift was exactly the same even taking into consideration the slanted riparian lines (4.79 feet), and the proposed boat lift was not physically moving any closer to Petitioners' property, but rather was moving slightly further away from Petitioners' property. (App. 54, 94-95, 114). Nevertheless, the County required Dr. Donovan to obtain a signature of no objection from Petitioners pursuant to LDC § 58.555(b)(2). (App. 76).

Although the owner of Petitioners' property provided signed consent to the setback in 2001, and even though the proposed boat lift has the same setback and is physically moving further away from Petitioners' property, the Petitioners—who since acquired the adjacent property—refused to give their consent. (App. 76, 97). The County would not permit Dr. Donovan's proposed renovation without Petitioners' signature of no objection. Absent Petitioners' signed consent, the County required Dr. Donovan to obtain a variance from

LDC § 58.555(b)(2) because it perceived the boat lift as extending beyond the required setback.[3] (App. 72-73, 76). Effectively, therefore, Dr. Donovan was forced to seek a variance approving a dock and lift with the same setback as what the County approved—and the Petitioners' property owner consented to—20 years ago.

The Variance Hearing

Seeking to accommodate the County's desires, Dr. Donovan presented his permit application and request for a variance at a May 5, 2021 hearing before the Board. (App. 70). In relevant part, Dr. Donovan requested a variance from the requirements of LDC § 58.555(b)(2) concerning the setback of the proposed boat lift and the need to obtain Petitioners' signed statement of no objection—even though the proposed boat lift did not go beyond the 9-foot setback the County approved in the 2001 permit with the owner of Petitioners' property's signed consent. (App. 16).

[3] Petitioners have not challenged the Board's approval of the dock in their Petition and, therefore, waived appellate review as to the location of the dock. *See Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (reasoning that the failure to fully brief and argue issues constitutes a waiver of those claims). Dr. Donovan therefore focuses discussion only on the boat lift throughout the remainder of this response.

At the hearing, County staff explained to the Board the nature of Dr. Donovan's request, the previously approved permit from 2001, that the proposed setback was 4.7 feet based on the County's new slanted riparian lines, and that it was County staff's recommendation that Dr. Donovan move the boat lift from the south side of the dock to the north side. (App. 73-80).

Counsel for Dr. Donovan spoke next. Counsel also referenced the dock's construction in 2001 pursuant to the County permit, which included signed consent from the owner of Petitioners' property. (App. 80-81). She made clear Dr. Donovan was *not* requesting a change to the previously approved setback. (App. 83). Rather, counsel explained that the County previously permitted the 9-foot setback based on straight riparian boundary lines, whereas the County now viewed the setback as 4.7 feet based on its use of extended property lines at a slant. (App. 83). Indeed, counsel explained that Dr. Donovan was requesting the same setback as the County approved in 2001, since if the slanted property lines are applied to the existing boat lift approved in 2001 the setback is also 4.7 feet. (App. 83).

Terri Skapik then also spoke as to the proposed location and setback of the boat lift. (App. 84). Ms. Skapik has over 20 years of experience with dock construction and permitting, and she is the president and owner of Woods Consulting, a firm specializing in marine design, engineering, and permitting. (App. 65, 85). The Board properly recognized her as an expert with regard to seagrasses, navigation, water depths, and dock construction and permitting. (App. 84-85).

Ms. Skapik initially addressed two reasons why the boat lift could not be moved to the north side of dock, as suggested by the County. First, she informed the Board that moving the boat lift to the north side of the dock would destroy seagrass beds. (App. 85-87, 96). She explained the boat lift had always been located on the south side of the dock, and such long-term use of a lift on one side of a dock impacts the environmental condition of the area. (App. 85-86). She referenced a seagrass survey she conducted at the Property in August 2020, which demonstrated that no seagrass existed on the south side of the dock given the existing lift's long-term location there. (App. 56, 86). However, robust seagrass beds have developed over the last 20 years on the north side of the dock. (App. 56). She provided her expert

opinion that moving the boat lift to the north side of the dock would destroy these seagrass beds. (App. 87, 96).

Second, Ms. Skapik discussed the surrounding water depths, which necessitate leaving the boat lift on the south side of the dock and moving it six feet seaward. (App. 87-88). She referred to the County's water depth exhibit, explaining the proposed boat lift would enjoy water depth of 2.1 feet if it remained on the south side of the dock and moved seaward, but would only have about 1.5 feet of water depth if left in its existing location or moved to the north side. (App. 88). Because the absolute minimum depth to permit a boat lift is 1.5 feet, Ms. Skapik gave her expert opinion that it is impractical to leave the boat lift in its existing location or to move the boat lift to the more shallow north side of the dock. (App. 87-88, 96). She explained that leaving the boat lift on the south side and pushing it six feet seaward is "for the boat to come up on top of [the lift and] to be able to be lifted out of the water." (App. 88). As Dr. Donovan's counsel later summarized, "[h]aving a lift at a deeper area is important to be able to get a boat on a lift." (App. 109).

Lastly, Ms. Skapik discussed the setbacks. She reiterated that, for the last 20 years, the County's file depicted the side setbacks for

Dr. Donovan's dock measured as straight riparian lines perpendicular to the shoreline. (App. 88). The County's file even measured setbacks for the Petitioners' dock using straight riparian lines. (App. 88). Ms. Skapik confirmed that whether one uses straight or slanted riparian lines, the setback has not changed. (App. 88). Ms. Skapik summed up the setback issue succinctly, as follows:

> You know, going back to what the County said, well, because it changed from nine feet from a straight line to 4.7 feet to a slanted line, that just by that instance alone we were having to request a variance. Even though in the real world, it was still the same distance.

(App. 90-91). Dr. Donovan's counsel then again confirmed "there is no proposed change to the side setbacks," and the new boat lift would be "within the previously approved side setback." (App. 92, 95).

Following the presentation on behalf of Dr. Donovan, Petitioner Brian Myrback spoke in opposition. (App. 97). He referred to the County's hearing worksheet and speculated that moving the boat lift to the north side of Dr. Donovan's dock would not cause environmental impacts. (App. 97-99). He also speculated that, over time, the water depth on the north side of Dr. Donovan's dock would deepen if the boat lift were moved there. (App. 99). Mr. Myrback had nothing to say concerning the County's changed practice in how it

draws riparian lines, other than he had "never seen" the use of perpendicular lines before. (App. 100). Mr. Myrback made this assertion despite the fact that the permit *for his own dock* shows the County used perpendicular lines. (Supp. App. 10). In asking questions of Mr. Myrback, Board member Vincent Cocks skeptically asked him: "If I'm not mistaken here, that the lift is actually going away from you. The new lift is going away from you; is that not correct?" (App. 102). Mr. Myrback incorrectly responded that was "not correct." (App. 103).

After Mr. Myrback, assistant County attorney Brendan Mackesey spoke. (App. 105). Mr. Mackesey informed the Board that County staff had no objection to the boat lift remaining in its current position—even though the proposed lift remained in the existing approved 9-foot setback ***and is 4.79 feet from the slanted riparian line***. (App. 54, 105). Mr. Mackesey further stated he had no reason to believe Dr. Donovan's counsel was incorrect about past County permits using straight riparian lines perpendicular to the shoreline, but he stated that today the County treats the Property's riparian lines as slanted. (App. 107-08).

Finally, Dr. Donovan's counsel spoke in rebuttal on behalf of Dr. Donovan. (App. 108). She again confirmed "there is no change in the distance between the previously approved side setback and the proposed side setback"—the only change is how the County now draws riparian lines. (App. 109). She also confirmed the "lift is getting more narrow" which, in turn, moves the lift further away from Petitioners' property. (App. 109). She reiterated that Ms. Skapik—a seasoned veteran in her field—provided expert testimony and opinion that the seagrass beds and water depths constituted sufficient hardships and conditions to preclude moving the boat lift to the north side of the dock. (App. 109-110). She concluded by, yet again, stating: "[t]here is no request to modify the side setback from what was previously approved in 2001." (App. 110).

The Board Grants the Variance

Moving to Board discussion, Board member John Doran found the testimony and evidence presented concerning the seagrass beds and water depths constituted sufficient hardships and special conditions that warranted keeping the boat on the south side of the dock and moving it six feet seaward. (App. 112-13). He further

referenced the evidence presented that leaving the boat lift on the south side of the dock would not impact the seagrass. (App. 113).

Board member Vincent Cocks agreed with Mr. Doran, properly noting in the evidence presented that the boat lift is "not being pushed any closer to the other property" and, to the contrary, is "going a little further away." (App. 113-14). Board vice-chairman Cliff Gephart also recognized the significance of the water depths in voicing his support for the variance. (App. 114). Board members Joe Burdette and Deborah White agreed. (App. 115). Board chair Alan Bomstein wrapped up Board discussion by noting the request is "de minimis" and recognizing that the evidence presented did not show the variance would be an impact to the ecosystem or the neighbors, like Petitioners. (App. 115).

Mr. Doran then made a motion for conditional approval of the variance for the proposed dock and boat lift. (App. 115-16). The Board approved the motion by unanimous vote and conditionally approved the variance. (App. 116). Later that day, the Board transmitted a letter confirming that it conditionally approved the variance request. (App. 5-6). The Board conditioned the variance upon Dr. Donovan obtaining all required permits (to include a County

Water and Navigation Permit), to comply with all permit conditions, and to pay all applicable fees. (App. 5).

Therefore, despite Petitioners' objection, the Board properly authorized Dr. Donovan to reconstruct the boat lift within the *same* setback the County previously approved in 2001. Petitioners' certiorari petition timely followed.

ARGUMENT

Petitioners seek a writ of certiorari quashing the Board's variance from LDC § 58-555(b)(2) granted to Dr. Donovan as to the proposed boat lift only.[4] As the Board sat in a quasi-judicial capacity, this Court's review is limited to the following narrow grounds:

> (1) whether procedural due process is accorded,
>
> (2) whether the essential requirements of the law have been observed, and
>
> (3) whether the administrative findings and judgment are supported by competent, substantial evidence.

[4] Because Petitioners do not challenge the Board's variance as to the length of the dock, as mentioned in footnote 3, the Board's decision in that respect must stand. *Coolen*, 696 So. 2d at 742 n.2.

Broward Cnty. v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001) (quoting *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).

Petitioners argue that the Court should grant certiorari relief because the Board purportedly failed to observe the essential requirements of law, and because competent substantial evidence allegedly does not support the Board's decision to grant a variance as to Dr. Donovan's proposed boat lift. As analyzed below, Petitioners are wholly incorrect, and the Court must therefore deny the Petition.

I. The Court Should Deny the Petition Because Petitioners are Precluded as a Matter of Law from Challenging the Same Setback their Predecessor Consented to, and the County Approved, Nearly 20 Years Ago.

Before turning to the two arguments raised in the Petition, it is important to understand and highlight the inherent flaw in Petitioners' argument: *Petitioners complain about the location of a boat lift that is not physically moving <u>any</u> closer to their property*. (App. 91). Indeed, the entire premise of the Petition is that Dr. Donovan seeks a boat lift moving closer toward Petitioners' property with a setback of 4.7 feet. (Pet. at 2). But (1) applying the slanted riparian lines, the existing boat lift and the proposed boat lift are both at the same

setback of 4.79 feet; (2) applying the exact same standards the County did in 2001 in using perpendicular riparian lines, the boat lift remains within the previously approved 9-foot setback; and (3) the boat lift is actually moving slightly away from Petitioners' property. (App. 54, 90-91, 114). The Petition paints an inaccurate view of the Board's decision and reveals the Petitioners' attempt to unjustly capitalize on the County's changed practice.

Fortunately, the law precludes Petitioners from doing so. The prior owner of Petitioners' property consented to the setback of the boat lift in 2001 which, as described above, is not changing. (App. 33, 54, 90-91). As the successor in title, Petitioners "stand in the shoes" of the prior owner and are bound by the written consent to the setback. *See, e.g.*, *Poinciana Properties, Ltd. v. Englander Triangle, Inc.*, 437 So. 2d 214, 216 (Fla. 4th DCA 1983) (holding a successor in title to real property "stands in the shoes of his predecessor" and was therefore "bound by his agreements and obligations"); *Jones v. U.S. Steel Credit Corp.*, 382 So. 2d 48, 49 (Fla. 2d DCA 1979) (holding a successor in title to real property "stands in the shoes" of the prior owner). The court in *Poinciana Properties*, for example, held that a successor owner of the subject property was bound to an agreement

made by the prior owner with a tenant concerning tenancy rights. *Id.* at 216. The court reasoned that not enforcing the agreement would permit the perpetration of a fraud upon the tenant. *Id.*

The Board's decision does not allow Dr. Donovan to construct a boat lift encroaching any further upon Petitioners' property than what their predecessor consented to in 2001. (App. 54, 83, 88, 90-91). The Board merely authorized Dr. Donovan to maintain the same setback the County approved nearly 20 years ago. Ms. Skapik highlighted the technicality in the County's changed practice of drawing riparian lines, noting that "in the real world" the setback is still "the same distance." (App. 90-91). Petitioners now seek to renege on the prior owner's consent, rendering it highly unfair and inequitable to provide Petitioners with the relief they seek. The Court should deny the Petition.

II. The Court Should Deny the Petition Because the Board Observed the Essential Requirements of Law by Applying the Governing Variance Criteria in the LDC.

A local government body observes the essential requirements of law so long as it "applie[s] the correct law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). Applying the correct law simply means the local government body identifies the governing

standard or criteria and then renders its decision based on that governing standard or criteria. *See, e.g.*, *State v. Veilleux*, 859 So. 2d 1224, 1226-28 (Fla. 2d DCA 2003) (holding the trial court applied the correct law by identifying the controlling case law precedent and granting the defendant's motion in limine based on that precedent).

By contrast, mere disagreement with *how* a local government applies the correct law does *not* constitute a failure to observe the essential requirements of law. *See Dep't of Highway Safety & Motor Vehicles v. Robinson*, 93 So. 3d 1090, 1092 (Fla. 2d DCA 2012) ("Applying the correct law incorrectly does not warrant certiorari review."); *Stranahan House, Inc. v. City of Fort Lauderdal*e, 967 So. 2d 1121, 1125 (Fla. 4th DCA 2007) (same). 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 its conclusion as applied to the facts, is not an illegal or irregular act or proceeding remedial by certiorari." *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000) (quoting *Heggs*, 658 So. 2d at 525); *see also Fassy v. Crowley*, 884 So. 2d 359, 364 (Fla. 2d DCA 2004) (reasoning a "misapplication of the correct law or an erroneous interpretation of a law does not rise to the necessary level").

Moreover, a certiorari petitioner must make an additional showing that a failure to apply the correct law, if that even occurred, is "something more than simple legal error." *Ivey*, 774 So. 2d at 682 (quoting *Stilson v. Allstate Ins. Co.*, 692 So. 2d 979, 982-83 (Fla. 2d DCA 1997)). Rather, courts must examine the seriousness of the alleged error and use their discretion to correct any such error "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Id.* For this reason, courts "should be primarily concerned with the seriousness of the error, not the mere existence of error." *Id.* (citing *Combs v. State*, 436 So. 2d 93, 95 (Fla. 1983)).

Here, the record squarely contradicts Petitioners' argument that the Board failed to apply the correct law. Specifically, Petitioners contend the Board failed to apply one of the governing variance criteria of finding an "unnecessary hardship." (Pet. at 27-28). All can agree that LDC § 138-231 is the correct law setting forth the governing criteria for the variance at issue, including a criterion for "unnecessary hardship." Where the Petition falls short, however, is that the Board applied this criterion by specifically stating its finding at the variance hearing that Dr. Donovan presented sufficient

evidence to establish an unnecessary hardship without the variance. (App. 112-13). Mr. Doran stated "there is an undue hardship with respect to the boat lift," and that the evidenced persuaded him "there are hardships that would allow [him] to, at some point, make a motion to approve both the dock and the proposed boat lift." (App. 112-13). Mr. Doran then made a motion to approve the variance, which the Board unanimously approved. (App. 115-16). The inquiry ends there. It is without dispute the Board applied the correct law because it considered, discussed, and found an unnecessary hardship.

A careful review of the Petition makes clear that what Petitioners take issue with is not whether the Board applied the correct law but, rather, their perceived incorrectness of *how* the Board applied the correct law. Indeed, the Petition's entire argument as to the Board's alleged failure to observe the essential requirements of law merely consists of the Petitioners applying the facts to the law and arguing the Board came to the wrong conclusion. (Pet. at 30-36, 43-45). But whether the Board observed the essential requirements of law does not turn on the correctness or incorrectness of its decision. Time after time, Florida courts have made clear that a local government

observes the essential requirements of law when it identifies and applies the correct law, regardless of whether its conclusion is correct or incorrect. *Ivey*, 774 So. 2d at 682; *Heggs*, 658 So. 2d at 525; *Stranahan House*, 967 So. 2d at 1125.

Because Petitioners take issue with the facts as applied to the law, the true essence of their arguments is whether any competent substantial evidence supports the Board's decision—a separate ground for certiorari review. This flaw is further demonstrated by Petitioners' own citation to authority. Petitioners cite to *Bernard v. Town Council of Town of Palm Beach*, 569 So. 2d 853 (Fla. 4th DCA 1990), in which the Fourth District granted certiorari due to the circuit court applying the "fairly debatable test" as opposed to the correct law of whether competent substantial evidence supported the variance. *Id.* at 854-55. The Fourth District remanded to the circuit court with direction to evaluate whether competent substantial evidence supported the variance—and *not* on the ground that there was a failure to observe the essential requirements of law. *Id.* at 855. Petitioners also cite to *City of Coral Gables v. Geary*, 383 So. 2d 1127 (Fla. 3d DCA 1980), which involved appellate review of a final judgment, not certiorari review, and the Third District affirmed four

variances because the facts as applied to the law supported the variance. Lastly, the cited decision of *Auerbach v. City of Miami*, 929 So. 2d 693 (Fla. 3d DCA 2006) provides no discussion or indication whatsoever that the city discussed or considered the "hardship" criterion, unlike the Board in this case. These cases show that when challenging whether the facts support a government's decision to grant a variance, the appropriate review is analyzing whether competent substantial evidence supported the decision, and *not* whether the government observed the essential requirements of law.

What follows is the inescapable conclusion that the Board applied the correct law, and therefore observed the essential requirements of law, because it identified, discussed, and followed the governing variance criteria. *Heggs*, 658 So. 2d at 530; *Ivey*, 774 So. 2d at 682; *Veilleux*, 859 So. 2d 1224, 1226-28. Petitioners merely quibble with *how* the Board applied the correct law and the resulting correctness of its conclusion, which does not suffice for certiorari review, and is more accurately characterized as a competent substantial evidence argument.

But even if the Court could properly characterize Petitioners' arguments as an alleged failure of the Board to observe the essential

requirements of law, they still fail to demonstrate entitlement to certiorari relief because they identify no error egregious enough to result in a miscarriage of justice. *Ivey*, 774 So. 2d at 682. Petitioners seek to unjustly capitalize on the fact that the County changed how it draws riparian lines, which re-characterizes the approved 9-foot setback as 4.79 feet. The proposed boat lift is not moving any closer to Petitioners' property, and actually is moving slightly further away. (App. 54, 90-91, 114). Applying the slanted riparian lines to the existing boat lift and the proposed boat lift, the proposed lift is maintaining the *same* setback from Petitioners' property as the County approved and permitted nearly 20 years ago. (App. 54, 83, 88). The only miscarriage of justice would be for the Court to entertain Petitioners' arguments. The Court should deny the Petition.

III. The Court Should Deny the Petition Because Competent Substantial Evidence Supports the Board's Variance as to the Boat Lift, Including Expert Opinion and Testimony.

A local government's decision "must be upheld if there is *any* competent, substantial evidence supporting it." *Orange Cnty. v. Butler*, 877 So. 2d 810, 813 (Fla. 5th DCA 2004) (emphasis in original). Accordingly, the "sole starting (and ending) point is a search of the record for competent substantial evidence *supporting* the

decision." *Dep't of Highway Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) (emphasis in original). It does not matter whether the government expressly referred to or relied on certain evidence, as long as competent substantial evidence supporting the decision exists in the record. *See Dep't of Highway Safety & Motor Vehicles v. Porter*, 791 So. 2d 32, 25 (Fla. 2d DCA 2001) ("In its certiorari review of the suspension the circuit court was not called upon to assess whether the wording of a particular finding supported the result. Rather, as mentioned, the court was required to determine whether the hearing officer's findings and judgment were supported by competent substantial evidence."). Put simply, therefore, if the Court locates *any* evidence in the record supporting the decision, it must withstand certiorari review. *Butler*, 877 So. 2d at 813; *see, e.g.*, *Miami-Dade Cnty. v. Torbert*, 69 So. 3d 970, 974 (Fla. 3d DCA 2011) (holding that a single piece of evidence "alone was substantial and competent to support the Board's determination" and thus "the circuit court was compelled to affirm").

Equally important is the distinction that the standard is *not* to determine if any evidence rebuts the government's decision or supports some other result; it is only to determine if *any* evidence

supports the decision. *Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) ("Evidence contrary to the agency's decision is outside the scope of the inquiry . . . .") (quoting *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1275 (Fla. 2001)).

For this reason, it is beyond the scope of certiorari review for a court to reweigh the pros and cons of conflicting evidence and substitute its judgment for the local government. *Dusseau*, 794 So. 2d at 1275. The standard is highly deferential and, in fact, "requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters." *Id.* at 1276. Whether the government's decision is the best decision, the right decision, or even a wise decision is irrelevant. *Id.* "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Id.*

Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The record need only contain evidence supporting a "reasonable foundation for the conclusion reached."

Dep't of Highway Safety & Motor Vehicles v. Trimble, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002). Where, as here, expert witnesses provide relevant evidence supporting the government's conclusion, courts are particularly inclined to let the conclusion stand. *See, e.g.*, *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857, So. 2d 202, 204-05 (Fla. 3d DCA 2003) (citing "fact-based, relevant and material evidence" from expert witnesses as competent substantial evidence supporting the government's conclusion).

Here, Petitioners raise limited arguments targeting only the variance criteria of unnecessary hardship and special conditions under LDC § 138-231(a) and (b) as to the proposed boat lift. (Pet. at 46). To obtain a variance, Section 138-231(a) requires that "special conditions and circumstances exist which are peculiar to the land, structure, or building involved." Section 138-231(b) requires a hardship for the applicant absent the requested variance, specifically defined in the LDC as follows: "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 under the terms of this chapter." Petitioners' arguments that there is

no competent substantial evidence to support the Board's findings under Sections 138-231(a) and (b) are without merit and misconstrue the record.

1. The County's changed interpretation of riparian boundary lines, and its application to Dr. Donovan's Property and boat lift, is a special condition that re-characterized the setback of the boat lift, and created an unnecessary hardship for Dr. Donovan.

Competent substantial evidence shows that the County's changed interpretation of riparian lines, and how that applies to Dr. Donovan's Property and boat lift, is a special condition and created an unnecessary hardship for Dr. Donovan. Because competent substantial evidence supports the Board's findings, this Court must deny the Petition. *Butler*, 877 So. 2d at 813.

The relevant competent substantial evidence includes testimony, surveys, and dock drawings presented by Dr. Donovan's counsel and expert witness Ms. Skapik. The evidence shows the County approved the existing lift at the Property in 2001, which goes beyond the center one-third of the Property and has a 9-foot setback from Petitioners' property using perpendicular riparian lines. (App. 33). The evidence shows the County now interprets and draws riparian lines differently than it did in 2001. (App. 54, 75, 83, 88).

The County now extends the upland property lines at a slant for the riparian lines, as opposed to drawing riparian lines perpendicular to the shoreline.[5] (App. 83). The County even conceded at the variance hearing that it treats property lines differently today. (App. 107-08).

Using slanted riparian lines under this new interpretation, the County re-characterized the lift's setback from 9 feet to 4.79 feet, even though the lift would not physically move any closer to Petitioners' property, and even though the existing lift's setback would also be 4.79 feet based on this new riparian line application. (App. 54). Because the County now interprets the riparian lines and the setback differently, the County required—for the second time—signed consent from the owner of Petitioners' property pursuant to LDC § 58-555(b)(2). Although the owner consented in 2001, Petitioners refused to consent. (App. 76, 97).

[5] Under Florida law, neither strict application of perpendicular lines nor extending the upland property lines is appropriate. Rather, riparian boundary lines are to be established by equitably apportioning the waterfront property between the neighboring parties. *See Hayes v. Bowman*, 91 So.2d 795 (Fla. 1957); *Lake Conway Shores Homeowners Association v. Driscoll*, 476 So. 2d 1306 (5th DCA 1985); *Gillian v. Knighton*, 420 So. 2d 924 (Fla. 2d DCA); *Johnson v. McCowen,* 347 So. 2d 357 (Fla. 1st DCA 1977).

The foregoing competent substantial evidence of the change in interpreting riparian lines, and how that change applies to Dr. Donovan's existing and proposed setbacks, is sufficiently relevant and material evidence to support the Board's conclusion as to special conditions and unnecessary hardship. *De Groot*, 95 So. 2d at 916. The County's change in application of riparian lines and how that change applies to the interpretation of Dr. Donovan's setbacks is particular to both the Property and the boat lift. While the change in application of riparian lines conceptually reduces the 9-foot approved setback to 4.79 feet, the lift is not physically moving closer to Petitioners' property. (App. 90-91). Comparatively, because of the slant of the riparian lines, applying the new riparian lines to Petitioners' dock would yield the opposite result—the setback would be interpreted as having increased despite Petitioners not even moving their dock. Further, if the slanted riparian lines are applied to Dr. Donovan's existing boat lift, the setback is 4.79 feet. (App. 54). So the proposed boat lift with a setback of 4.79 feet does not even change what is currently existing, which is a special and peculiar circumstance unique to Dr. Donovan's boat lift.

These unique circumstances also created an unnecessary hardship for Dr. Donovan. Under a literal interpretation of the LDC, *as the County interprets and applies it today*, the County created a scenario where, absent a variance, Dr. Donovan was unable to rebuild the lift with the same setback the County approved 20 years ago. Therefore, such a literal interpretation of the LDC would have deprived Dr. Donovan of development rights for the location of the boat lift *that he already possessed* based on the County's previously issued permit in 2001.

Further, all residents of Pinellas County are entitled—as a matter of law—to the application of the LDC to them in a fair and consistent manner. *See Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973) (holding local ordinances are subject to statutory construction and must be construed in favor of the property owner); *Childers v. Cape Canaveral Hosp., Inc.*, 898 So. 2d 973, 975 (Fla. 5th DCA 2005) ("A literal interpretation of the statutory language used is not required when to do so would lead to an unreasonable conclusion, defeat legislative intent or result in a manifest incongruity."). To deprive Dr. Donovan 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 (all Pinellas County residents with prior approvals under the LDC) and thereby constitutes an unnecessary hardship.

Petitioners take the position that Dr. Donovan could rebuild the lift in its existing location pursuant to LDC § 58-544. (Pet. at 47). This is a significant concession because the lift's existing location has the same setback from Petitioners' property as the proposed boat lift. (App. 54). Petitioners therefore implicitly concede Dr. Donovan's entitlement to the setback of the proposed boat lift.

Because there is competent substantial evidence supporting the Board's findings of an unnecessary hardship and special conditions. "the court's job is ended." *Dusseau*, 794 So. 2d at 1276. The existence of such evidence compels the Court to deny the Petition. *Butler*, 877 So. 2d at 813.

2. Special environmental conditions are competent substantial evidence of special condition and unnecessary hardship, inhibiting the only proffered alternative to move the boat lift to the north side of the dock.

Equally supporting the Board's variance approval is competent substantial evidence of special environmental conditions demonstrating that the only proffered alternative to Dr. Donovan's

proposed boat lift, moving it to the north side of the dock, was impractical. Because competent substantial evidence supports the Board's findings, this Court must deny the Petition. *Butler*, 877 So. 2d at 813.

The relevant competent substantial evidence includes testimony, surveys, and studies from expert witness Ms. Skapik. First, she testified in her expert opinion that the proposed boat lift needed to remain on the south side of the dock because that was the location with greater water depths for the boat lift to function properly. (App. 87-88, 96). Ms. Skapik testified and referred to water depth measurements taken by her and the County. (App. 42, 61, 87-88). Those measurements revealed the north side of the dock was too shallow for the boat lift, whereas the south side of the dock was a more depressed area with sufficient water depth for a boat lift. (App. 87-88). She explained that the proposed location of the boat lift is necessary "for the boat to come up on top of [the lift and] to be able to be lifted out of the water." (App. 88). As Dr. Donovan's counsel summarized, "[h]aving a lift at a deeper area is important to be able to get a boat on a lift." (App. 109).

Second, Ms. Skapik testified about an August 2020 survey she conducted at the Property revealing dense seagrass beds on the north side of the dock. (App. 56, 85-86). The south side, however, had "very sparse" seagrass beds due to the shading created by the existing boat lift. (App. 56). Ms. Skapik explained it was nonsensical to move the boat lift to the north side, which would kill the seagrass beds (App. 87). The County has also declared it unlawful to cause any damage to seagrass. LDC § 58-402(b). Moreover, a proposal resulting in damage to seagrass beds would have actually encouraged the Board to deny the variance—the LDC prohibits dock permits that have a material adverse effect on marine life. LDC § 58-530(b)(6); *see also* LDC § 138-231 (requiring variance applications to be consistent with the LDC).

The Board determined these environmental conditions supported the variance, and the foregoing competent substantial evidence is sufficiently relevant and material to support the Board's conclusion. *De Groot*, 95 So. 2d at 916. Nearly every property owner in Dr. Donovan's neighborhood enjoys use of a boat lift, including the Petitioners. (App. 36, 58). Absent the variance allowing the boat lift to remain on the south side of the dock, competent substantial

evidence demonstrated it would be practically difficult for Dr. Donovan to use a boat lift just like every other nearby property owner.

Petitioners again invite the Court to exceed certiorari review and err—this time by re-weighing conflicting evidence to come to a different result. This the Court cannot do. *Dusseau*, 794 So. 2d at 1275; *Wiggins*, 151 So. 3d 457, 464. The Petition merely re-weighs and compares Dr. Donovan's evidence with the County's evidence, suggesting the County's evidence was better. Indeed, Petitioners compare Dr. Donovan's project narrative with the County's worksheet as to the variance criteria, and then proceed to argue the County's "position is never refuted on these matters." (Pet. at 49-51). The Court's task is not to compare the conflicting evidence and determine whether Dr. Donovan refuted evidence offered in opposition to the variance request. The Court is to review the record and determine whether any evidence supports the *Board's decision* to grant the variance. *Butler*, 877 So. 2d at 813; *Wiggins*, 151 So. 3d at 464. The Court should not accept Petitioners' invitation to apply the wrong standard.

Dr. Donovan recognizes the Board received evidence from various sources both in support of, and in opposition to, the variance.

Ultimately, however, the Board relied upon the competent substantial evidence presented on Dr. Donovan's behalf in support of the variance, including expert testimony and reports from Ms. Skapik. Regardless of whether the Court, or Petitioners, agree or disagree with the Board's conclusion, the Board's conclusion must stand given that competent substantial evidence supports it. *Dusseau*, 794 So. 2d at 1275-76. The Petition should be denied.

CONCLUSION

While the Petitioners are unhappy with the Board's decision, such emotion does not render the Board's decision unlawful. The Board carefully considered the evidence from all parties, applied the governing variance criteria, and granted Dr. Donovan the variance as to the boat lift. The Board applied the correct law (the applicable section of the LDC), and competent substantial evidence supports its decision, including expert testimony and reports. The *only* reason this case exists is due to the County's changed practice in drawing riparian lines. The Board recognized that technicality, and merely reaffirmed the same setback the County approved nearly 20 years ago with signed consent from the owner of Petitioners' property. The Court should not permit Petitioners to unjustly capitalize on this

technicality—particularly given that the boat lift is not physically moving any closer to their property—and should therefore deny the Petition.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, I electronically filed the foregoing with the Clerk of Court by utilizing the Florida Courts E-Filing Portal, which will send a notice of electronic filing to all counsel of record.

/s/ Shane T. Costello
Shane T. Costello

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the font requirements of Rule 9.045(b), as a computer-generated document drafted in Microsoft Word using Bookman Old Style 14-point font.

I FURTHER CERTIFY that the foregoing document complies with the word limit of Rule 9.100(j). Using Microsoft Word's word count function, this response contains 8,414 words, excluding those portions of the response authorized by Rule 9.045(e).

/s/ Shane T. Costello
Shane T. Costello