

**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION  
AND, IF FILED, DETERMINED**

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

**JAYNE SIDWELL, as Trustee of  
The Jayne Sidwell Trust,  
Petitioner,**

**Case No.: 19-000045AP-88A  
UCN: 522019AP000045XXXXCI**

**-vs-**

**PINELLAS COUNTY FLORIDA,  
Respondent.**

\_\_\_\_\_ /

Opinion Filed: \_\_\_\_\_

Petition for Writ of Certiorari  
from decision of Board of Adjustment,  
Pinellas County, Florida

David Smolker, Esq.  
Attorney for Petitioner

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Attorney for Respondent

**PER CURIUM**

Petitioner, Jayne Sidwell, as Trustee of The Jayne Sidwell Trust, seeks certiorari review of the decision of Respondent, Pinellas County Board of Adjustment's ("Board") denial of Petitioner's application for a Type 2 Use Application and two variances from the Pinellas County Land Development Code ("LDC"). Petitioner's application for the Type-2 Use and the two

variances from the (LDC) will be referred to as the “Application”. Upon review of the briefs, the record and appeal and the applicable law, this Court dispenses with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. For the reasons stated herein, the Petition for Writ of Certiorari is denied.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The property at issue is a home located at 2825 Pine Hill Road, Palm Harbor, Florida 34683 (the “Property”). The Property is a masonry single family residence built in 1978. The Property abuts Alderman Road, a four-lane arterial road to the south, vacant wooded land to the east, and large residential lots to the north and west. The Property has a land use designation of Residential Rural, a zoning designation of Residential Agriculture (R-A) and is located within the Alderman Residential Rural Community Overlay established by the Pinellas County Comprehensive Plan (“Plan”). Properties in the Alderman overlay are regulated by the Pinellas County Comprehensive Plan (“Plan”). Policy 1.174 provides that decision by Pinellas County and its representatives will take into consideration the need to preserve and support the Community’s rural character.

As originally platted, the Property was approximately 2.104 acres in size. On September 18, 1993, the Property was reduced to approximately

1.73 acres as a result of acquisition of the southern strip of the Property by the County Right of Way Division to widen Alderman Road. The structure on the Property is 46' from the northern property line. The structure meets the 15' setback requirement for residential structure in R-A zones.

Petitioner purchased the Property on March 28, 2012 with the intention of using the home as a shelter for small rescued dogs. To manage the adoption service and obtain funding for the shelter, Petitioner created a non-for-profit corporation, known as Canine Estate, Inc. Prior to March 28, 2012, Canine Estates, Inc. was not in existence. The Petitioner has never utilized the Property as her residence. Sybil Freeman, one of the primary Canine Estates members involved in day-to-day operations, testified that on December 1, 2018 she moved into the facility and at the time of the hearing utilized the Property as her residence. The Property is not currently homesteaded.

Shortly after the purchase of the property, Petitioner began utilizing the Property as a shelter to house dogs. Petitioner states that the number of dogs is limited to 25 and the size of each dog to 25 pounds. Common breed kept at the Property include Chihuahua, Dachshund and Maltese or mixtures thereof. The supporters of Canine Estates, Inc. refer to the site as an organization or facility, not as a residential home. Petitioner's land use

planner referred to the Property as a “facility” or “rescue center”. Petitioner states that the dogs are kept inside the structure at night and are let outside during the day in enclosed fenced-in play areas for limited periods of time to recreate and use the restroom. Canine Estates’ business and adoption activities occur at its office at 292 B U.S. Alternate 19 North, Palm Harbor, Florida, 34683. Petitioner states that no business or adoption activities occur at the the Property.

A kennel/pet care facility is defined by the Pinellas County Land Development Code (“LDC”) as “an establishment where domestic animals are bred, boarded, sold or treated for profit of public service, and housed. This includes personal service functions for pets.” LDC § 138-166. Kennels are classified a “commercial and office uses” in the LCD. LDC § 138-355. Indoor kennels are expressly allowed as of right in two of six office and commercial zoning districts (C-2 and CP) and two of four industrial districts (E-2 and IPD) and may potentially be permitted as a Type 2 use after a Type 2 review and approval in the remaining industrial districts , the mixed-use special district and the R-A district. Ind. Outdoor kennels are not allowed as of right in any zoning district, but may be permitted pursuant to a Type 2 review and approval in the four industrial districts and the R-A district. The R-A district is the only residential district allowing the possible establishment

of an indoor or outdoor kennel after a Type 2 review and approval. LDC § 138-155.

At the time of the purchase of the Property in 2012, the LDC did not allow the Property to be utilized for a kennel without review and approval by the Board of County Commissioners (“BCC”). Effective January 1, 2019, as a result of an update of the entire LDC, review and approval authority for such use was delegated to the Board of Adjustment and Appeals (“BAA”). (LDC § 138-66). In addition, the updated LDC included additional kennel-specific requirements, including but not limited to a minimum lot size of 2 acres in R-A zones, and the structure housing the dogs in R-A zones must be at least 50’ from all adjacent residential properties.

The County received numerous code violation complaints in 2015, 2018 and 2019 due to Petitioner’s unlawful use of the Property as a kennel. In late December, County Code Enforcement cited Petitioner for operating a dog sanctuary/kennel without obtaining a special use permit. County staff advised Petitioner that to proceed with the Type 2 Use Application, Petitioner would also need to submit variances for the two kennel criteria that they did not satisfy which were that (1) the structure housing dogs shall be setback at least 50 feet from any residential district; and (2) the site must be two acres

or more. Thereafter, Petitioner submitted the Application on April 10, 2019 to allow an after-the-fact kennel to remain on the Property.

The BAA held a hearing to consider the Application June 5, 2019. Petitioner raises no objection to the procedure employed for notice and conduct of the hearing. The required general criteria for a Type 2 use pursuant to LDC §138-124 and testimony and evidence entered into the record of the hearing as to each criteria is listed as follows:

**§ 138-124(a) Use is consistent with the Pinellas County Comprehensive Plan and purpose and intent of the applicable zoning district.**

Pinellas County professional planning staff testified that operating a kennel is a nonresidential use and is directly contrary with the purpose and intent of the Alderman Residential Rural Community Overlay that was put in place to further strengthen and preserve the rural and residential character of the surrounding community. Staff cited Plan Objective 1.17, which states “Pinellas County shall preserve and seek to enhance established community values, a community’s unique identity, and their social support structure, and will make decisions that are in concert with a community’s established vision for their future. Associated Plan Policy 1.172 prohibits Pinellas County from making decision that “detract from the established community identity and social support structure but, instead, serve to preserve and enhance that identity and structure.” Staff also testified that the Property is located within a scenic non-commercial corridor designated by the Plan and allowing non-residential uses in this corridor is contrary to the corridor’s intent. Respondent’s land use planning expert Robert Pergolizzi testified that Staff’s recommendation that the Property’s use as a kennel is inconsistent with the community’s residential identity. Petitioner’s land use planner expert, Cyndi Tarapani, testified that the Applications met the approval criteria. Ms. Tarapani testified that the scenic non-commercial corridor policy only applies when requesting a Comprehensive Plan amendment, which is not the case

here. Ms. Tarapani stated the Property is residential because no commercial activity occurs there. Finally, Ms. Tarapani testified that the limitation under the Alderman Overlay relates to discouraging increases in density and was not applicable. Mr. Pergolizzi agreed on that the density issue was not applicable.

Numerous nearby property owners testified to personal experiences and observations of activities at the Property that each felt were inconsistent with the community's identity and Overlay. Numerous witnesses testified in support of the use of the Property and their support of the Application.

**§ 138-241(b) Adequate separation of the proposed use and related structures from adjacent and nearby uses by screen devices, buffer area and /or other appropriate means.**

Staff testified that the proposed use has the potential to create noise and visual impacts on the surrounding residential uses and the variance was necessary because the structure on the Property does not meet the residential setback requirements. There was conflicting evidence presented to the BAA. An adjacent property owner testified that a fenced-in dog area was 10 feet from her property line. Ms. Tarapani testified the one residence is 189 feet away and another northern neighbor 600 feet away and that the area is separated by extensive vegetation and trees which serve as noise and visual buffers.

**§ 138-241(c) Adequate drives, walkways and parking are available so no vehicular circulation or parking problems are created.**

Staff and Ms. Tarapani testified that no impacts were anticipated. Neighboring landowners provided written statements that multiple vehicles parked in front of the property blocked them from turning west on Alderman Road.

**§ 138-241(d) The proposed use will not create excessive vehicular traffic or other traffic problems.**

Staff and Ms. Tarapani both testified no impacts were anticipated, although adjacent property owners disagreed with that assessment. Testimony from an adjacent landowner and written correspondence was that the use would create traffic problems.

**§ 138-241(e) Draining problems will not be created.**

Staff testified no impacts were anticipated

**§ 138-214(f) All provision and requirements of the applicable zoning district will be met, unless otherwise varied by the authorized reviewing body as authorized by this Code.**

Staff testified that the use does not meet the LDC kennel requirements because the Property is 1.73 acres and a 2 acre minimum is required and the structure housing the dogs is 46' from the northern property line where 50' is required, therefore a variance for each requirement is needed. Ms. Tarapani testified that the variance for the lot size should not be needed as the lot had been conforming but was made non-conforming by the County's exercise of eminent domain in 1993.

The hearing before the BAA then addressed each of the criteria required to grant a variance pursuant to LDC §§ 138-21:

**§ 138-231(a) Special Conditions-special conditions and circumstances exist which are peculiar to the land, structure or building.**

Staff testified that the eminent domain that reduced the size of the Property from 2 acres to 1.73 acres occurred prior to the purchase by Petitioner. Staff testified that after the County's purchase of the land and at the time of the hearing, the structure met the LDC's residential requirement, but not the requirements for a kennel. Ms. Tarapani disagreed stating that the reduction of the lot size was caused by the County and not Petitioner and therefore it was not a self-created hardship.

**§ 138-231(c) Unnecessary hardship 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 under the terms of this chapter. The hardship shall not be self-imposed.**

Staff testified that the existing single family structure and its sole use as a residence constitutes a reasonable use of the Property. Ms. Tarapani rebutted that there are many permitted allowable uses in the R-A district, one of which is a Type 2 use for a kennel. The Court notes that a variance would be needed to meet the requirements for the LCD.

**§138-231(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 this Coed.**



Staff testified that the kennel regulations requiring the lot size and setback are to mitigate the impacts they impose on surrounding properties and the variances requested by Petitioner are contrary to this purpose.

**§138-231(e) Consideration of rezoning. That a rezoning of the property has been considered and determined not to be appropriate and/or determined not to meet the objective of the request.**

Staff testified that rezoning from R-A to a commercial zone where kennels are allowed by right is not appropriate because the Property is located within the Alderman Residential Rural community Overlay and a scenic non-commercial corridor; both of which significantly limit establishing non-residential uses.

**§138-231(f) Consistency with Comprehensive Plan. That the granting of the request will be consistent with the intent and limits of the Comprehensive Plan.**

Staff testified that the kennel use was inconsistent with the Pinellas County Comprehensive Plan. Ms. Tarapani testified that the variances would not affect the density and a kennel is a Type 2 use allowed in the site's zoning district. Several residents within the Overlay testified that the kennel use was inconsistent with the area.

**§138-231(g) Detriment to public welfare. That such request will not be injurious to the area involved or otherwise detrimental to the public welfare.**

Staff testified that the specific use criteria, specifically setback requirements, have been put in place to mitigate the impacts kennels impose on the surrounding area and that variances to the kennel requirements are inconsistent with this intent. Neighboring landowners provided written objections based on their personal experiences regarding the noise from the incessant barking of the dogs as well as traffic issues. Ms. Tarapani presented evidence that the Property does not produce noise at levels in violation of the County's LDC. Ms. Tarapani also provide testimony and letters from the public that the use of the Property benefitted society because Petitioner rescues dogs that are in need.

**§ 138-231(h) Circumvent Board Approval. That the granting of the request does not circumvent a condition placed upon the subject property by the Board of Adjustment and Appeals and/or the Board of**

**County Commissioners. This shall not apply to new variances reviewed by the same board that originally placed the condition.**

Staff and Ms. Tarapani both testified that this criterion was not applicable.

The BAA hearing included testimony from members of the public and neighboring landowners, professional staff analysis and professional opinions both in support and opposition. Letters of support and of opposition were from both landowners near the Property and those that did not live in the area. After the submission and presentation of all the evidence, the BAA determined that operating a kennel is a non-residential use. The BAA determined that such non-residential use is inconsistent with the Plan and Overlay, which the BAA determined limited such non-residential uses. The vote denying the Application was unanimous. The BAA did not issue an order making any findings of fact or conclusions of law; the BAA issued a one-page letter dated June 5, 2019 stating “your request to allow for a Type 2 Use (Kennel/Pet Care Facility) and associated variances . . . was not approved. This was based on the Board’s determination that the request did not meet the criteria for granting of the Type 2 use and variances.”

### **STANDARD OF REVIEW**

This Court in its appellate capacity has jurisdiction to review this matter under Florida Rule of Appellate Procedure 9.100. The Court must decide (1)

whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent substantial evidence to support the administrative findings. See *Falk v. Scott*, 19 So. 3d 1103, 1104 (Fla. 2d DCA 2009). The appellate court is not "permitted to re-weigh conflicting evidence and is primarily relegated to assaying the record to determine whether the applicable law was applied in accordance with established procedure." *Dade County v. Gayer*, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980). "On first-tier certiorari review, the circuit court's task is to review the record for evidence that supports the agency's decision, not that rebuts it - for the court cannot reweigh the evidence." *Broward County v. G.B.V. Int'l*, 787 So. 2d 838, 846 (Fla. 2001). Petitioner does not argue that due process was accorded. The opinion is restricted to the whether the essential requirements of law were observed and whether there was competent substantial evidence to support the administrative findings.

### **DISCUSSION**

Petitioner's first argument is that BAA's requirement that Petitioner submit the Application failed to observe the essential requirements of law. "Whether the essential requirements of law were observed: means whether the correct law was applied. *Haines City Cmty. Dev. V. Heggs*, 658 So.2d

523, 530 (Fla. 1995). A departure from the essential requirement of the law necessary for the issuance of a writ of certiorari is something greater than simple legal error. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). Certiorari review should only be granted “only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *Id.* at 889. Even a misapplication of correct law does not constitute a departure from the essential requirements of law. *Stilson v. Allstate Insurance Co.*, 692 So. 2d 979, 982-82 (Fla. 2d DCA 1997). A departure from the essential requirements of law must be so egregious that it causes irreparable harm. *Novartis Pharm. Corp. v. Carnoto*, 782 So. 2d 22, 23 (Fla. 4th DCA 2001). “Clearly, established law can derive from a variety of sources, including ordinances”. *City of Tampa V. City Nat.’l Bank of Fla.*, 974 So. 2d 408, 410 (Fla. 2d DCA 2007).

Petitioner incorrectly argues that the variances from the Type 2 requirements regarding minimum lot size and structure setbacks were not required because the kennel setback requirement was not implemented until January 1, 2019 after the Petitioner began using the structure as a kennel and that the reduction in lot size below 2 acres was a result of a previous owner’s sale to Pinellas County. Petitioner’s position is that the lot, the structure thereon and the use of the Property are all legally nonconforming.

However, the use of the Property as a kennel was never legally established. Petitioner argues that once the lot was made nonconforming as a result of the eminent domain purchase, the later “shall be deemed to be deemed to be a conforming lot or parcel for all purposes without the necessity for a variance from any land development standard.” § 138-212, LDC. “Nonconforming means a use, structure, lot or parcel, or combination thereof, which was lawfully established according to the rules and regulations in force at the time of its establishment, but would be prohibited, restricted or further regulated under the terms of the current land development code.” LDC § 138-1. Nonconforming situations are categorized into three different groups in the LDC; (1) nonconforming lots/parcels (2) nonconforming structures and (3) nonconforming uses. LDC §§ 138-201-213. Each category of nonconformities are distinct, and a nonconformity as to one does not automatically create a nonconformity in another. Nonconformities “shall not be used as grounds for adding prohibited uses or structures on the site or in the area.” LDC §138-201(c). Nothing in the nonconformity regulations “shall be deemed to allow the use, change in use, repair, alteration, expansion, enlargement, or reconstruction of an illegal use or structure.” LDC § 138-201(f). “It is the general intent that

the new development, land usage, and lots/parcels conform to the Pinellas County Code.” LDC § 138-201(e).

Petitioner is correct that the Property became a nonconforming R-A lot as a result of the purchase by Pinellas County and under LDC § 138-212 Petitioner was not required to obtain a variance for “previously existing and legal uses of the property”. LDC § 38-212 is specific to nonconforming lots or parcels, not nonconforming structures or uses. LDC § 138-201(c) states the “the continuation of nonconformities shall not be used as grounds for adding other prohibited uses or structures”. LDC § 138-201(f) states that “the nonconforming regulations shall not be deemed to allow the use or change in use of an illegal use or structures. A nonconforming lot does not allow the conversion to a new property use without meeting the requirements to establish the new use. The Property lot’s existing and lawfully established 1.73 acre size does not allow the conversion to a brand new use without meeting the requirements existing at the time the new use is sought, absent a variance. LDC § 138-201(f). The structure on the Property was constructed as a residential home in 1978. From its original construction and even after the reduction of the lot’s size, the structure continued to conform to all rules and regulations applicable to residential structures, including but not limited to the 15’ setback requirements for residential structures in F-A

zones. The 50' setback requirement is specific to kennels. It was not until the use of the structure was unlawfully converted to a kennel that the 50' setback requirement became applicable to the structure. In order to establish a new Type 2 use, Petitioner had to apply for and obtain a variance.

Petitioner's second argument is that BAA's denial of the Applications were not supported by competent substantial evidence. Competent evidence must be credible, factually-based, must amount to more than bare allegations or conjecture, and must support a reasonable foundation for the conclusions reached. *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821, So. 2d 1084, 1086-87 (Fla. 1st DCA 2002). It is evidence which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So 2d 912, 916 (Fla. 1957). If any competent substantial evidence was presented, the decision must be upheld on appeal. *Martin v. First Apostolic Church*, 321 So. 2d 471 (Fla. 4th DCA 1975). A circuit court sitting in its appellate capacity is not permitted to reweight the factual evidence and testimony considered during the hearing. See, *Orange County v. Butler*, 877 So. 2d 810. "A local government's quasi-judicial decision must be upheld if there is any competent evidence support it." *Dorian v. Davis*, 874 So. 2d 661 (Fla 5th DCA 2005); *Eckler v. Orange County*, 763 So. 2d 545 (Fla. 5th DCA

2000). Here, Pinellas County professional planning staff report on the variance request analyzed all of the criteria required for a variance and recommended that the request be denied. The BAA reviewed and confirmed the recommendation. The record reflects competent substantial evidence to support the decision.

Petitioner's third argument is that the BAA failed to observe the essential requirements of law by not following the approval criteria set forth in County LDC. "Quasi-judicial boards cannot make decisions based on anything by the local criteria enacted to govern their actions. Quasi-judicial boards do not have the power to ignore, add to or detract from the legislated criteria they utilize in making their determinations." *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 376-77 (Fla. 3d DCA 2003). Petitioner cites to *City of Apopka v. Orange Cty*, 299 So. 2d 657, 659-60 (Fla. 4th DCA 1974). Quasi-judicial functions should not be controlled or even unduly influenced by opinions and desires expressed by interested persons at public hearings. Numerous objections by adjoining landowners may not properly be given even a cumulative effect. A mere poll of neighboring landowners does not serve to assist the local government in deciding a special exception application. *Id.*; see also *Conetta v. City of Sarasota*, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981). Petitioner states that 378 letters and



5,104 electronic petition signatures were submitted in favor of the Applications and 12 letter and 75 petition signatures were submitted in opposition. Clearly, the BAA was not assisted in its decision by the poll of neighboring landowners. A Type 2 process requires the board of adjustment and appeals to determine the appropriateness of certain applications/requests at specific locations within the county.” LDC § 138-82(1). The record of the BAA hearing contains expert testimony from land use planners both in support and opposition to the Application, which each included separate analyses on whether each relevant Application criterion was met based upon the facts presented at the hearing. The record also contains relevant and fact-based testimony from adjacent and nearby community members in opposition and relevant and fact based testimony from other Pinellas County residents in support of the Application. The record includes correspondence as to the violations on the Property, Property Appraiser records, photographs, and voluminous support and objection letters. All such evidence is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support a conclusion.” *DeGroot*, 95 So. 2d at 916. The BAA deliberation at the close of the public hearing was focused on applying the evidence presented to the relevant criteria, most notably the requirement that both the Type 2 use and variances

must be consistent with the Alderman Residential Rural Community Overlay and the Plan. The record reflects that the BAA relied on substantial competent evidence applied to each of the approval criteria set forth in the County LDC.

### **CONCLUSION**

This Court concludes based on the facts and analysis set forth above that procedural due process was accorded and the BAA's decision to deny Petitioner's application is supported by competent substantial evidence and the essential requirements of law have been observed. The Petition for Writ of Certiorari is denied.

**DONE AND ORDERED** in Chambers at Clearwater, Pinellas County, Florida this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

Original Order entered on October 21, 2022, by Circuit Judges Sherwood Coleman, Keith Meyer, and George M. Jirotko.

*Copies furnished to:*

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