

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED**

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

**JONATHON G. TILL and
KATHLEEN A. TILL,
Petitioner,**

**REF: 21-000005AP-88A
UCN: 522021CA000005XXXXCI**

-vs-

**CITY OF DUNEDIN, FLORIDA,
Respondent.**

_____ /

Opinion Filed: _____

Petition for Writ of Certiorari of Board of
Adjustment and Appeal, City of Dunedin's
Findings of Fact, Conclusions of Law and Order

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PER CURIAM

Petitioners, Jonathon and Kathleen Till, seek certiorari review of the decision the Findings of Fact, Conclusion of Law and Order of Respondent, Board of Adjustment and Appeal of the City of Dunedin (“Board”) in denying the variance sought for construction of a new dock. For the reasons set forth below, the Petition is denied.

Statement of Facts

Petitioners own waterfront property on Curlew Creek located at 563 Baywood Drive South, Dunedin, FL (“Property”). The Property is zoned Single Family Residential (R-60) and Marine Park (MP) and is developed with a single family home and a dock. Petitioners are seeking construction of a new dock that would extend 35 feet from the seawall. Currently, a “viewing platform” is in place where Petitioners seek to build the dock, however there was testimony that Petitioners do moor a boat to the viewing platform.

The City has enacted the Land Development Code of the City of Dunedin (“Land Development Code”) which provides:

“Private docks to be constructed in the Waters of the County shall be constructed so that the length of the dock shall not extend from the mean high water line or seawall of the property further than one-half the width of the property at waterfront.”

DUNEDIN, FLA., LAND DEVELOPMENT CODE § 103-23.3.6.3(a)(9).

Under the above section of the Land Development Code, Petitioners could build a 25 foot-long-dock. Petitioners have applied for a variance to construct a 35-foot-long dock, to allow them to reach navigable waters from the Property. A variance is necessary as the proposed dock extends more than 50 percent of the waterfront width of the Property by 9.54 feet and Petitioners were unable to obtain consent of the adjacent landowner. Had both adjacent landowners consented to the proposed dock, a variance could have been approved at the administrative level. There are docks in the canal that extend past 35 feet, however, those variances were granted at the administrative level as the adjacent landowners to those docks did not object.

On January 20, 2021, Petitioners' variance request to build a 35-foot-long dock was brought before the City's Board of Adjustment and Appeal ("Board") for a quasi-judicial evidentiary hearing. Petitioners were represented by counsel and testified as to the need for the variance. The City's assistant director of community development, Mr. Dipasqua, presented the Staff Report to the Board. Mr. Dipasqua testified that the existing dock was built in 1998 inside the center one-

third of the waterfront property and did not project out more than 50 percent. The proposed dock consists of a 5 ½ foot by 11-foot wide angled walkout to a 5 ½ foot wide by 24 foot straight platform. On the left side of the straight platform, Petitioners propose a boat lift with a roof. The dimensions of the roof are 14 feet wide by 26 ½ feet long and the boat would be moored perpendicular to the seawall rather than parallel. Petitioners argue that in order for them to have reasonable access to the navigable waters, the proposed dock needs to extend 35 feet from the seawall. The Pinellas County Water and Navigation Control Authority Regulations, Section 58-543 (f)-Dock permit requirements and restrictions provides that

“in tidal waters, all docks shall have at least 18 inches of water depth at the slip at mean low tide and shall have a continuous channel with a minimum of 18 inches of water depth at mean low tide to allow access to the structure from open waters.”

Mr. Dipasqua testified that based upon a hydrographic survey by George F. Young, Inc., a professional surveyor and mapping firm, commissioned by Petitioners, at 28.9 feet from the seawall the 18 inches of water depth is achieved, which would be the minimum necessary to put a vessel in water deep enough to moor a vessel.

(Transcript page 19). The Staff Report recommendation was to approve the application with the conditions described below:

“The new private dock shall not extend further than 29 feet or approximately 57percent of the waterfront width of the property from the seawall and shall be permitted to be located outside the center one-third of the width of the property at the waterfront to the west a maximum of 2 feet but not to the east. And the roof structure over the boat slip shall not be permitted.”

Petitioners’ main concern is that they will not have sufficient access to navigable waters if the dock is restricted to 29 feet rather than 35 feet, notwithstanding that the survey of the channel states that the depth of 18 inches at mean low tide is at 28.9 feet, due to the collection of silt in the channel.

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*, 10 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). This Court cannot grant Petitioners’ request for remand with directions to grant the requested 35 foot variance. In an appeal by petition for writ of certiorari, a court has only two options; it may either (1) deny the petition or (2) grant it and quash the order at which the petition is directed. The court may not enter any judgment on the merits of the underlying controversy, or direct the lower tribunal to enter any particular order. *Clay Cty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1180-1181 (Fla. 1st DCA 2007)

Discussion

Due Process

A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). The parties must be able to present evidence and cross-examine witnesses. Petitioners appeared at the variance hearing and were permitted to testify. There is no allegation by Petitioners that there was a due process violation; however, Appellants argue that they have “fundamental rights via the federal and state constitutional property rights” and the Order deprives them of substantive due process. “Fundamental

rights are those rights created by the Constitution.” *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 959 n. 6 (11th Cir.1997). “Property interests, of course, are not created by the Constitution[, but rather] , , , by existing rules or understandings that stem from an independent source such as state law.” *Board of Regents of State Colls. V. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).” *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir.2014). “As a result, there is generally no substantive due process protection for state-created property rights.” *Id.* at 1279. The Court finds that there has been no violation of substantive due process in this case.

Essential Requirements of Law

A variance must be the “minimum variance that will make possible the reasonable use of the property.” Dunedin Land Development Code § 104.22.7.5. If there are any other methods available to a property owner to make a reasonable use of their property without the need for a variance, or if an alternative variance is available which requires less deviation from the existing zoning regulations, then the requested variance is not the minimum necessary. See *Town of Indialantic v. Nance*, 485 So. 2d 1318 (Fla. 5th DCA 1986). The Pinellas County Water and Navigation Control Authority Regulations, Section 58-543 (f)-Dock permit requirements and restrictions

provides that “in tidal waters, all docks shall have at least 18 inches of water depth at the slip at mean low tide and shall have a continuous channel with a minimum of 18 inches of water depth at mean low tide to allow access to the structure from open waters.” Based on the hydrographic survey prepared by George F. Young, Inc., the minimum variance necessary for reasonable use of the Property was to permit a private dock that extended 28.9 feet from the seawall.

The Land Development Code establishes seven specific criteria for a variance to be granted. The Staff Report addresses each of the criteria:

104.22.7.1-Uniqueness: The need for the requested arises out of the physical surroundings, shape, topographical conditions, or other physical or environmental conditions that are unique to the specific property involved, and which do not apply generally to the property located in the same zoning district.

The Staff Report analysis found that the Property does not meet the requirement of uniqueness stating “The subject property is a typical waterfront residential lot in the area. . . Insufficient water depth outside of the Curlew Creek channel itself at mean low tide appears to be somewhat of a common condition for waterfront properties along this segment of Curlew Creek including this property. Curlew Creek is tidal so all waterfront properties should experience the same changes during normal tides but silt

and/or sedimentation levels may differ, which in turn can affect water depth in certain areas more than others.”

104.22.7.2-Tree Preservation: Preservation of a protected tree(s), but not an invasive tree(s), as defined in 1.5-42 Landscaping and 1.5-43 Trees of the LDC, may be considered as a relevant environmental condition under this subsection.

The Staff Report’s analysis is that there are no impacts to trees as a result of this request.

104.22.7.3-Historic Property: A property which meets all of the criteria in order to be listed in the National Register of Historic Places, but is not necessarily listed on the register, may be considered unique for the purpose of granting a variance.

The Staff Report’s analysis found that the subject property is not a historic property.

1.4-22.7.4-Self–Imposed Circumstances: Conditions or special circumstances peculiar to the property must not have been self-created or have resulted from an action by the applicant, or with prior knowledge of approval of the applicant. Specifically, no variance may be granted arising from the illegal construction of a structure or an illegal use of the premises which would have otherwise required a building permit or other specific approval to be issued, and which construction or which use was commenced

unlawfully. Under such conditions, the property owner shall have no legal right to apply for a variance and the Board will have no legal right to grant such a variance.

The Staff Report's analysis found that conditions or special circumstances peculiar to the property have not been self-created or have resulted from an action by the applicant. However, the applicant's proposed dock design to moor a vessel perpendicular to the seawall versus the existing parallel mooring configuration means that a vessel needs to navigate closer to the seawall where the water depths are shallower. Staff considers this to be a self-imposed circumstance created by the applicant.

104-22.7.5-Minimum Variance: The requested variance is the minimum variance that will make possible the reasonable use of the property.

The Staff Report's analysis found in pertinent part, "It is the staff's determination that the minimum variance necessary for reasonable use of the property is to permit a private dock that extends far enough from the seawall to reach adequate water depth for a vessel. The county's regulations, found in Sec. 58-543(f) of the County's code, which are adopted by reference in the city's code, provide that a minimum water depth of 18 inches (1.5 feet) at mean low tide is necessary for a boat slip. Based on the hydrographic survey supplied by the applicant and prepared by George F. Young, Inc. in July 2020 this can be achieved at 28.9 feet from the seawall."

The Staff Report's analysis also states "Finally, staff does not consider a roof structure over the boat slip to be the minimum necessary for reasonable use of the property, particularly if the roof extends further than 50 percent of the waterfront width of the property as proposed by the applicant's design."

104-22.7.6- Special Privilege: Granting the variance will not confer any special privilege that is not allowed for other lands, buildings or structures in the same zoning district; no variance will be granted that extends to the applicant a use of property that is not commonly enjoyed by other persons in similar circumstances.

The Staff Report's analysis states "granting the variance as conditioned and recommended by staff in Section IX below will not confer any special privilege."

104-22.7.7-Surrounding Property: Granting the variance will not substantially interfere with, or injure the rights of others whose property would be affected by approval of the variance, alter the essential character of the neighborhood, or create a nuisance.

The Staff Report's analysis states: "Granting the variance as conditioned and recommended by staff in Section IX below will not substantially interfere with, or injure the rights of others properties in the area."

At the variance hearing, the Staff Report addressing these factors was read into the record and Mr. Dipasqua, the assistant director of community development testified concerning the report. Appellants testified and the witnesses were subject to cross-examination. Upon review of the evidence and the testimony presented at the variance hearing, the Court concludes the Board complied with the essential requirements of law.

Competent Substantial Evidence

Competent substantial evidence has been defined as “such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.” *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). It has also been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Duval Utility Co. v. Fla. Public Serv. Commission*, 380 So. 2d 1028, 1031 (Fla. 1980). The circuit court is not to reweigh the evidence presented to the Board, but merely to determine if competent, substantial evidence supports its findings. *Dade County v. Gayer*, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980). Here, the Board determined the minimum variance necessary for reasonable use of the Property was to permit a private dock that extends far enough from the seawall to reach adequate water depth for a vessel under the county’s regulations and the City’s Land Development Code. Upon review of the

evidence and the testimony presented at the variance hearing, the Board complied with the essential requirements of law.

Petitioners argue that the Board's action denied them of their riparian rights. Petitioners cite *Hayes v. Carbonell*, 532 So. 2d 746 (Fla. 3d DCA 1988) for the definition of riparian rights as "legal rights incident to lands bounded by navigable waters and are derived from the common law as modified by statute." The word "riparian" technically refers "to land abutting non-tidal [sic] or navigable river waters whereas 'littoral' refers to the land abutting navigable oceans, sea, or lake waters." *Brannon v. Bolds*, 958 So. 2d 367, 372 n.3 (Fla. 2d DCA 2007). "Although the use of 'riparian' in this case is technically incorrect, it is consistent with the accepted usage in Florida cases." *5F, LLC v. Hawthorne*, 317 So. 3d 220, 224 n. 1 (Fla. 2d DCA 2021). Petitioners rely on *Hayes v. Bowman*, 91 So. 2d 795, 801 (Fla. 1957) wherein the Florida Supreme Court stated that "An upland owner must in all cases be permitted a direct, unobstructed view of the Channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the Channel. If the exercise of these rights is prevented the upland owner is entitled to relief." Petitioners argued that "The BAA's conditions to the reduced and conditioned Variance granted still preclude the Tills from exercising one of the most important of their special riparian rights,

i.e. access from the Property to the navigable waters.” Appellants Initial Brief, page 22.

The Findings of Fact, Conclusions of Law and Order of the Board does not infringe on the riparian rights of Appellants. The Board found that based on the hydrographic survey supplied by the applicant and prepared by George F. Young, Inc. in July 2020, the minimum water depth of 18 inches at mean low tide is necessary for a boat slip. The survey found that “this can be achieved at 28.9 feet from the seawall.” and the Board approved a variance for 29 feet.

Conclusion

Based upon the forgoing, the Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this 16th day of May, 2022.

TRUE COPY

Original Order entered on May 16, 2022, by Circuit Judges Sherwood Coleman, Keith Meyer, and George M. Jirotko.

Copies furnished to:

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