

IN THE CIRCUIT COURT OF THE 16th JUDICIAL CIRCUIT OF
THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY,

APPELLATE DIVISION

Case No.: 24-CA-1074-K

PIRATES SAVING PARADISE, INC.,
and JULEE MARZELLA, in her personal capacity,

Petitioners,

v.

LITTLE PALM DOLPHIN RESORT
DEVELOPMENT, LLC, AND MONROE
COUNTY PLANNING COMMISSION,

Respondents.

ORDER ON PETITION FOR WRIT OF CERTIORARI

THIS CAUSE is before the Court on a Petition for Writ of Certiorari (the “Petition”), challenging Monroe County, Florida Planning Commission Resolution No. P01-24 which approved a variance request to reduce boat ramp parking on property owned by Little Palm Dolphin Resort Development, LLC (“Little Palm”). The Court, having considered the Petition, Little Palm’s Response in Opposition to the Petition, Monroe County’s Joinder in Little Palm’s Response in Opposition to Petition for Writ of Certiorari, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. Factual and Procedural Background

Little Palm owns the property located at 28550 Overseas Highway on Little Torch Key, Florida (the “Property”). The Property includes a private

boat ramp that is used by Little Palm Resort vessels to transport guests to and from the offshore Little Palm Dolphin Resort. (Pet. Ex. A.128).

Pursuant to the Monroe County Land Development Code (“LDC”) section 114-67(c), boat ramps must contain six (6) parking spaces per ramp to accommodate trailers and oversized vehicles. However, in redeveloping the Property, Little Palm submitted a site plan that maintained the boat ramp but proposed no boat trailer parking spaces. (Pet. Ex. A.2).

On December 5, 2023, the Monroe County Planning Commission, in Resolution No. P41-23, approved a Major Conditional Use Permit (“Development Order”) for the redevelopment of the Property with a hotel use consisting of thirty-eight hotel units and eight affordable employee housing dwelling units. (Pet. Ex. A.1). Section 6 of the Development Order imposed the following condition from the Planning Commission: “[t]he boat ramp is not permitted for use by guests and boat trailer parking is not permitted on-site as no area was approved for trailer parking or storage space.” (Pet. Ex. A.2).

On February 7, 2023, the Applicant filed a Variance Application on behalf of Little Palm to “[e]liminate boat ramp parking requirement due to private ramp use only. No public use allowed.” (Pet. Ex. A.119). Monroe County Planning and Environment Resources Department Staff reviewed the Variance Application and prepared a nine-page professional staff report (“Staff Report”) that considered the variance criteria set forth in the County’s code. The Staff Report found the Variance Application “in

compliance” with all the enumerated code standards and recommended approval of the Variance Application. (Pet. Ex. A.48).

On September 25, 2024, the Planning Commission held a hearing on the Variance Application. At the hearing, the Planning Commission considered evidence including sworn testimony from Emily Schemper, Senior Director of the Monroe County Planning & Environmental Resources Department, and Donald Craig, who the Planning Commission recognized as an expert in the field of planning. (Pet. Ex. A.4). The Planning Commission also considered sworn testimony of members of the public speaking in opposition to the Variance Application and argument from counsel on behalf of Petitioners in opposition to the Variance. (Pet. Ex. A.4). Ultimately, the Planning Commission voted to approve the Variance in a 4-1 vote. (Pet. Ex. A.6). The Planning Commission memorialized its approval of the Variance in Resolution No. P01-24. The Planning Commission accepted all findings of fact and conclusions of law from the Staff Report and adopted them as the Planning Commission’s own findings of fact and conclusions of law in the Resolution. (Pet. Ex. A.5).

On October 25, 2024, Petitioners filed this Petition seeking to quash Planning Commission Resolution No. P01-24.

II. Standard of Review

First-tier certiorari review is limited to reviewing whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment

are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

III. Discussion

A. Standing

Little Palm argues that Petitioners cannot demonstrate they are aggrieved or adversely affected by the Planning Commission's approval of the Variance Application and the Petition should be dismissed for lack of standing.

Standing is a threshold issue which must be resolved before reaching the merits of a case. *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015). When acting in its appellate capacity, a circuit court is prohibited from exercising jurisdiction over a petition for writ of certiorari if the petitioner lacks standing. *F&R Builders, Inc., v. Durant*, 390 So. 2d 784, 785-786 (Fla. 3d DCA 1980).

In land use cases, abutting homeowners ordinarily have standing by virtue of their proximity to the proposed area of rezoning. *Save Calusa, Inc. v. Miami Dade County*, 335 So. 3d 534, 540 (Fla. 3d DCA 2023). "Such proximity generally establishes that the homeowners have an interest greater than 'the general interest in community good share[d] in common with all citizens.'" *Id.* quoting *Renard v. Dade County*, 261 So. 2d 832, 837 (Fla. 1972). In this case, Petitioner Julee Marzella owns the property at 133 Blackbeard Road, Little Torch Key, FL, which is 55.5 feet from the Property separated by a canal. (Pet. Ex. A.35; A. 104). Marzella is a board member

of Pirates Saving Paradise, Inc., which is a Florida non-profit composed of property owners in the immediate neighborhood surrounding Little Palm Dolphin Resort in Little Torch Key. (Pet. Ex. A.102-103). At the hearing, counsel for Petitioners stated that Pirates Saving Paradise has standing to intervene in this matter because “they have a special injury above and beyond that of someone within Monroe County due to the direct proximity of this approval to their property that impacts the safety, recreation, access and compatibility.” (Tr. P. 28 15-19).

Monroe County Code Section 102-186(k) provides an opportunity for adversely affected property owners or residents of real property located in the County to request a public hearing on the application for a variance within 30 calendar days of posting written notice. On November 8, 2023, Julee Marzella filed a request for the Variance Application to go to the Monroe County Planning Commission for a public hearing and a decision by the Planning Commission. (Pet. Ex. A.3). The Planning Commission found that Ms. Marzella satisfied the option to request such hearing based on “her capacity as a putatively adversely affected owner of a non-homesteaded property in the County.” (Pet. Ex. A.3). Further, Respondent Monroe County, stipulated to Petitioners’ standing at the hearing. (“Notice of Monroe County’s Joinder in the Response in Opposition to Petition for Writ of Certiorari” P. 1).

The County Code allowed Petitioners to request the public hearing and to present their opposition to the Variance Application, and Monroe

County recognized Petitioners' right to request and participate in the hearing. Petitioners' proximity to the Property along with their participation in the proceedings below give Petitioners standing to participate in the appellate review of the Planning Commission's Resolution.

B. Procedural Due Process

"Generally, due process requirements are met in a quasi-judicial proceeding if the parties are provided notice of the hearing and an opportunity to be heard." *A & S Entm't, LLC v. Fla. Dep't of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019). Here, Petitioners claim that the Planning Commission violated procedural due process by 1) failing to comply with notice requirements for location of posting, size of signs, and visibility; 2) holding the public hearing during a tropical storm warning; and 3) failing to consider the Motion for Reconsideration.

Petitioners argue that the notice of the public hearing was inadequate because the notice signs were too small and not posted correctly. The Court finds that Little Palm properly noticed the Variance Hearing in Accordance with MCC Sections 102-187(c) and 110-5 which provide that notice be posted at the subject property with a waterproof sign(s) that is easily visible from all public streets and roads abutting the property. In this case, the County provided the signs, and Little Palm posted them in multiple locations on the Property and signed a notarized Notice Affidavit and provided photos demonstrating compliance. (Resp. Ex. 5-14). The Code does not contain a minimum size requirement for notice signs, and the

photos attached to the Notice Affidavit demonstrate that the signs were visible from the public streets. Finally, Petitioners saw the signs and attended the hearing so they are estopped from claiming that they received improper notice because they cannot demonstrate any prejudice. See *Schumacher v. Town of Jupiter*, 643 So. 2d 8, 9 (Fla. 4th DCA 1994) (holding that property owner waived statutory notice requirements where property owner, through counsel, had substantial and continuous knowledge of pending proceedings and appeared at final hearing on proposed ordinance and expressed his objections).

Petitioners argue the public hearing should have been rescheduled because the hearing occurred while Monroe County was under a tropical storm warning. The hearing was a hybrid hearing and members of the public could appear in person or via Zoom. Counsel for the Petitioners attended and spoke at the hearing via Zoom. (Pet. Appendix: Transcript). Petitioners have not demonstrated that a violation of due process occurred because a hybrid hearing was held during a tropical storm warning when counsel appeared and participated in the hearing.

Petitioners allege they were denied due process because County staff denied them the opportunity for the Planning Commission to review their Motion for Reconsideration. On October 9, 2024, Petitioners filed a Motion for Reconsideration of Planning Commission Resolution No. P01-24 alleging the following deficiencies: 1) improper notice of the public hearing; 2) improper finding of a hardship; and 3) improper finding that the boat ramp

was peculiar or unique. (Petition at P. 24-25). In response, on October 15, 2024, General Counsel to the Planning Commission sent a letter that denied the Motion for Reconsideration for failing to demonstrate legal error, the existence of new evidence, or a change in circumstances or the law that could affect the Planning Commission's decision. (Pet. Ex. A.58-60).

Monroe County Planning Commission Rule 4(f) lays out the procedure for motions for reconsideration and requires the motion to "exhaustively identify any and all alleged deficiencies and move for execution of a more complete resolution addressing the alleged deficiencies..." The Petitioners' Motion for Reconsideration did not move for "a more complete resolution"; it requested a different resolution. Petitioners have maintained their appellate rights which they were attempting to exercise in the Motion for Reconsideration and now challenge the Planning Commission's decision in this Petition before the Court.

C. Hardship

The crux of the matter is whether the failure to grant the request to reduce the required boat trailer parking spots would result in exceptional hardship to the Applicant. The Planning Commission answered this question in the affirmative, but its decision failed to comply with the essential requirements of law, and it was not supported by competent substantial evidence.

A circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with "observing the

essential requirements of law.” *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). Competent substantial evidence has been defined as “evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred, or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Duval Utility Co. v. Fla. Pub. Serv. Comm’n*, 380 So. 2d 1028, 1031 (Fla. 1980). The applicant has the burden of proof to introduce competent substantial evidence to prove all of the variance standards. *City of Satellite Beach v. Goersch*, 217 So. 3d 1143, 1145 (Fla. 5th DCA 2017).

LDC Section 102-187(d) provides the following eight (8) standards that must be met for variance approval by the Monroe County Planning Commission:

Standards. The Planning Commission has the authority to grant a variance to the standards described in (b)(1) through (6), with or without conditions, if and only if the applicant demonstrates that all of the following standards are met:

- (1) The applicant shall demonstrate a showing of good and sufficient cause;
- (2) Failure to grant the variance would result in exceptional hardship to the applicant;
- (3) Granting the variance will not result in increased public expenses, create a threat to public health and safety, create a public nuisance, or cause fraud or victimization of the public;
- (4) Property has unique or peculiar circumstances;
- (5) Granting the variance will not give the applicant any special privilege denied to another property owner in the immediate vicinity;
- (6) Granting the variance is not based on disabilities, handicaps or health of the applicant or members of his or her family;
- (7) Granting the variance is not based on the domestic difficulties of the applicant or his or her family; and
- (8) The variance is the minimum necessary to provide relief to the applicant.

LDC Section 101-1 defines “exceptional hardship” as “a burden on a property owner that substantially differs in kind or magnitude from the burden imposed on other similarly situated property owners. Financial difficulty/hardship does not qualify as exceptional hardship.”

In this case, the “exceptional hardship” has been described in different ways, but almost all the descriptions pertain to the owner’s alleged failure to be able to use the Property efficiently.

In the Variance Application, when explaining how the failure to grant the variance would result in exceptional hardship the Applicant stated the following:

Having to provide the required (6) 14’ x 55’ parking spaces for trailers on site would result in hardship by the need to redesign the site, eliminating units and thereby lessening the values of the property. The addition of these unusable spaces will also affect a part of the “Back of House” building which also contains employee housing. Trailer parking is not a need for this property and therefore will not be utilized. This prevents the owner from providing an efficient site plan with the best use of space.

(Pet. Ex. A.119)

At the hearing on the Variance Application, counsel for Little Palm told the Commission that “[t]he hardship is that the Code is requiring us to provide parking for a use that is no longer going to be on the property per other redevelopment.” (Tr. P. 56 11-14). Counsel went on to state, “...the hardship being that if required to provide these boat parking spaces, it will prevent the owner from efficiently using their project, using their space in accordance with the entitlements that the County has provided to them.” (Tr. P. 56 16-21).

The Planning Department Staff Report found the variance application to be “in compliance” with standard (2), “failure to grant the variance would result in exceptional hardship to the applicant.” The Staff Report states: “Likewise, as noted, boat trailers are not permitted on site; therefore, if still required, the six (6) boat trailer parking spaces would unreasonably take up a large area of the property and not allow for reasonably better utilization of the site.” (Pet. Ex. A.45).

The Staff Report goes on to state a different reason for granting the variance that is not included in the standards enumerated in LDC Section 102-187(d). It states, “In addition, the alternative of having the Applicant-property owner instead voluntarily fill in the existing boat ramp to eliminate the Code’s boat trailer parking requirements may result in unnecessary adverse impacts to nearshore waters and benthic habitat during such an alternative process to negate the subject boat ramp boat trailer parking requirement.” (Pet. Ex. A.45). This is a conclusory statement that is not supported by evidence in the record, and such concerns are not included in the standards enumerated in LDC Section 102-187(d) to be considered in reviewing a variance request.

After receiving testimony and evidence related to the alleged hardship, the Planning Commission concluded that the Applicant demonstrated that all the required standards set forth in the LDC, including exceptional hardship, had been met. The Planning Commission entered Resolution P01-24 which states that the Planning Commission concurs with

the documentary and testimonial contentions and legal argument of the applicant and its professional planning consultant and the Staff Report which is incorporated into the Resolution, and its analysis and determinations are accepted and adopted as the Planning Commission's own. (Pet. Ex. A.5).

In granting the Variance, the Planning Commission failed to consider the law on hardships which constitutes a departure from the essential requirements of the law, and its finding that the failure to grant the variance would result in exceptional hardship is not supported by competent substantial evidence.

"The necessity of proving unnecessary hardship in order to obtain a variance is well settled in Florida." *Thompson v. Planning Com'n of City of Jacksonville*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985). The requisite hardship may not be found unless there is a showing that under present zoning, no reasonable use can be made of the property. *Elwyn v. City of Miami*, 113 So. 2d 849, 852 (Fla. 3d DCA 1959). In seeking a variance on the grounds of hardship, a property owner cannot assert the benefit of a self-created hardship. *Clarke v. Morgan*, 327 So. 2d 769, 770 (Fla. 1975). Hardship must arise from circumstances peculiar to the realty alone, unrelated to the conduct or to the self-originated expectations of any of its owners or buyers. *Maturo v. City of Coral Gables*, 619 So. 2d 455, 456-57 (Fla. 3d DCA 1993). Economic disadvantage alone does not constitute a hardship sufficient to warrant the granting of a variance. *Burger King*

Corp. v. Metropolitan Dade County, 349 So. 2d 210, 212 (Fla. 3d DCA 1977).

Here, the evidence and testimony presented at the hearing establish that the claimed hardship is that if the owner is required to comply with the LDC parking requirements, the owner will not be able to efficiently use the property, which is not a hardship recognized in Florida law. Thus, the finding of hardship and the subsequent granting of the variance is not supported by substantial competent evidence.

The Staff Report states that, “pursuant to Section 6 of the Development Order, the Development Order prohibits use of the boat ramp by guests and prohibits boat trailer parking on the property.” (Pet. Ex.45). This statement would lead one to believe that the Planning Commission decided to eliminate the boat trailer parking, and that the Development Order actually prohibited trailer parking on the Property. However, in the record, Section 6 of the Development Order is quoted to say, “The boat ramp is not permitted for use by guests and boat trailer parking is not permitted on site *as no area was approved for trailer parking or storage space.*” (Emphasis added). No area was approved for trailer parking because the site plan, submitted by the owner, did not include trailer parking or storage space because the owner does not think there is a need for it because the boat ramp is only used by Little Palm Resort vessels and the trailers used to remove the vessels are stored off site. (Pet. Ex. A.119). As the Applicant stated, “trailer parking is not a need for this property” and

if the variance is not granted, it “would result in hardship by the need to redesign the site, eliminating units and thereby lessening the values of the property.” (Pet. Ex. A.119). The Applicant goes on to state, the “addition of these unusable spaces will also affect a part of the “Back of House” building which also contains employee housing.” (Pet. Ex. A.119). These statements make clear that units, including employee housing units, were included in the site plan in the boat trailer parking area. Thus, the Development Order was not prohibiting boat trailer parking on the Property, but rather, it was referencing an issue created by the site plan submitted by the Applicant and its failure to account for the LDC boat trailer parking requirement.

This is a self-created hardship because the owner was on notice as to the property size, the existence of the boat ramp, and the LDC parking requirement. The owner nonetheless developed a site plan that did not account for the required boat trailer parking spaces and then requested a variance after the fact. The facts are distinguishable from cases that hold that variances are necessary where no reasonable use can be made of the property. In this case, there are options: the owner can keep the code-required boat trailer parking spots and change the site plan, or the owner can fill in the boat ramp, so the boat trailer parking code provision no longer applies. The failure to consider the applicable legal principles related to establishing a hardship when assessing the variance request is a departure from the essential requirements of law.

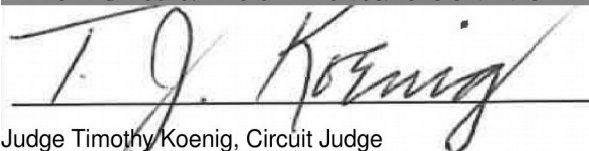
Since the Court has found that there is insufficient evidence to support the exceptional hardship standard and that the applicable law related to a finding of hardship was not properly applied here, the Court need not address the remaining standards in LDC 102-187(d) that must be met for variance approval by the Monroe County Planning Commission.

IV. Conclusion

The Court finds that while due process was accorded, there is not substantial competent evidence in the record to establish the exceptional hardship standard, and the Planning Commission departed from the essential requirements of the law in granting the variance. Therefore, the Petition for Writ of Certiorari is **GRANTED**, and Resolution No. P01-24 granting the variance is **QUASHED**.

DONE AND ORDERED at Key West, Monroe County, Florida this Monday, February 3, 2025

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A handwritten signature in black ink, appearing to read "T. J. Koenig", is written over a horizontal line.

Judge Timothy Koenig, Circuit Judge

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