CITY OF MARCO ISLAND, FLORIDA
CITY COUNCIL

In re: 986 Sundrop LLC Boat Dock Extension Application	)	Reference No. BD-21-000177

OPPOSITION TO APPEAL

Unsatisfied with the impartial and informed decision of the Marco Island Planning Board ("Board") on an issue where the Board has expertise and experience, 986 Sundrop, LLC ("Petitioner") now appeals, seeking full reversal of the decision below. The appeal lacks merit.

Gary and Lorraine McBride ("the McBrides"), property owners of 980 Sundrop Court, Marco Island, FL 34145, ask the City Council ("Council") to uphold the decision of the Board.

I. BACKGROUND

On July 14, 2021, Petitioner submitted an application seeking an exemption from the standard dimensional requirements regulating boat docking facilities in order to build a dock forty-two (42) feet from the property line that would shelter a 130-foot long, 26-foot wide superyacht[1] at 986 Sundrop Court, Marco Island, FL. Petitioner just recently purchased the subject property from John and Karen Packer.

On July 25, the McBrides, unable to physically attend the Board's quasi-judicial hearing on the application, submitted a written Letter of Objection and, on August 25, an Addendum with exhibits. On August 20, Rajani Thangavelu (the property owner of 983 Sundrop Court, Marco

[1] Superyachts are typically 78 feet and above. *See* Yacht Sizes, Types, Styles & Categories, *Van Isle Marina*, https://vanislemarina.com/when-is-a-boat-a-yacht/.

Island, FL 34145) filed a Letter of Objection. On August 27, Matthew and Vicki Bissell (property owners of 1264 and 1260 Laurel Court, Marco Island, FL 34145) filed an objection. On September 2, through an attorney, William and Stephanie Bowman (property owners of 1289 Orange Court, Marco Island, FL 34145) and Brett and Nicole Glass (property owners of 1295 Orange Court, Marco Island, FL 34145) filed an objection. All of the neighbors who filed objections (collectively, the "surrounding property owners") take exception at least in part because of the loss to their views facing the proposed waterway location of the proposed dock and superyacht and the effect granting this application would have on Marco Island's small-town character. No resident of Marco Island other than Petitioner or his agents has voiced support for the application.

On August 24, before hearing all the various perspectives from surrounding property owners, the City Staff issued their recommendation to approve the application.

On September 3, the Board convened to consider the application in a quasi-judicial hearing. The Board heard from the City Staff, the Petitioner, and testimony from surrounding property owners Matthew Bissell (via telephone), Rajani Thangavelu (via telephone), and Stephanie Bowman. After a two-hour meeting, and ensuring each interested party had the full opportunity to express his or her statements and opinions, the Board voted to deny the application. The Board agreed with the arguments of the surrounding property owners while applying the relevant framework and law. The Board found that the i) Petitioner did not carry his burden to demonstrate an exemption from the standard rule, ii) that the views of surrounding property owners would be adversely affected with the proposal, and iii) that the proposal did not meet the objective as contained in the City's Comprehensive Plan to promote development that is

consistent with the City's small town character. *See* Petitioner Ex. 6 (Planning Board Resolution 21-46, Section 1).

On September 23, Petitioner filed a notice of appeal and appeal with the city manager, seeking reversal by the Council.

II. RELEVANT LAW

Chapter 54 of the Marco Island Code of Ordinances regulates boat docking facilities on Marco Island ("the Code"). § 54-111 only permits boat docking facilities when the facilities comply with the standard dimensional criteria set forth in the statute. If a property owner seeks a boat dock extension, protrusion, or encroachment, he is not entitled to it unless he demonstrates special justification for such a request to the Planning Board. § 54-115(b)(1) demands the petitioner "demonstrate justification for extension, protrusion or encroachment into the riparian setback requested and/or special conditions relative to the subject property." § 54-100 informs the type of "special conditions" that may merit further inquiry: "It is recognized that specific waterway locations warrant special consideration due to severe access and navigational challenges, and community character and aesthetic impacts." In short, the exemption from the standard requirements in § 54-111 was meant as a failsafe in the event a particular lot had particularly severe access or navigational challenges that would merit an exemption from the general rule.

Even if special justification is presented, the Code provides that access issues or navigational challenges alone are not enough. The Planning Board is then to consider ten distinct factors in whether it should grant an application. Multiple factors relate to preservation of the view of the waterway enjoyed by surrounding property owners, making it expressly clear that views of affected neighbors is an interest the statute was designed to protect. *See* § 54-100.

The ten § 54-115(f) factors are as follows:

(1) Whether or not the proposed boat docking facility meets the other standards set forth in this article.
(2) Whether or not the water depth where the proposed vessel(s) is to be located is sufficient (as a general guide, four feet mean low water is deemed to be sufficient) to allow for safe mooring of the vessel, thereby necessitating the extension, protrusion, or encroachment requested.
(3) Whether there are special conditions related to the subject property or waterway which justify the proposed dimensions and location of the proposed boat docking facility.
(4) Whether or not the proposed boat docking facility and moored vessel(s) protrude greater than 25 percent of the width of the navigable waterway, and whether or not a minimum of 50 percent of the waterway width between boat docking facilities and moored vessel(s) on the opposite side of the waterway is maintained in order to ensure reasonable waterway width for navigation. This requirement shall only be applicable for extension or protrusion requests.
(5) Whether or not the proposed boat docking facility is of the minimum dimensions necessary in order to adequately secure the moored vessel while providing reasonable access to the boat for routine maintenance without the use of excessive deck area.
(6) Whether or not the proposed boat docking facility is of minimal dimensions and located to minimize the impact of view to the channel by surrounding property owners.
(7) Whether or not the proposed vessel(s) are in excess of 50 percent of the length of the water frontage on the subject property such that the extension of the boat docking facility may adversely impact the view to the channel by surrounding property owners. In the case of multifamily developments and public marinas, the 50 percent provision may be exceeded. This requirement shall only be applicable for extension or protrusion requests.
(8) Whether or not the proposed location and design of the boat docking facility and moored vessel(s) in combination is such that it may infringe upon the use of neighboring properties, including any existing boat docking facilities.
(9) Whether or not the seagrasses are located within 200 feet of the proposed boat docking facility.
(10) Whether or not the proposed dock is subject to the manatee protection requirements set forth in section 54-117.

Petitioner bears the burden of demonstrating special justification and bears the burden of proving that this application satisfies the § 54-115(f) statutory factors. *See Irvine v. Duval Planning Com'n,* 495 So.2d 167 (Fla. 1986) (Petitioner has the "initial burden of showing that his application [meets] the statutory criteria for granting such exception[]"). If Petitioner so

carries this burden, those opposed would then have the burden to prove the statutory standards were not met. *See id.*

In addition to satisfying the aforementioned standards, the application must be consistent with the objectives and policies of Marco Island's current Comprehensive Plan. *See* 163.3194(3), Florida Statutes; *U.S. Sugar Corp. v. 1000 Friends of Fla*., 134 So.3d 1052 (Fla. 4th DCA 2013) ("The burden is on the applicant to show that the development order conforms strictly to the comprehensive plan."). A goal of Marco Island's current Comprehensive Plan is "to enhance Marco Island's quality of life, environmental quality, and tropical *small town* and resort character..." 2009 Comprehensive Plan, Section I – Future Land Use Element (emphasis added).

III. STATUTORILY-BASED OBJECTIONS

The surrounding property owners principally object because: (1) petitioner has not carried his burden demonstrating a special justification for a boat dock extension, (2) the proposed boat docking facility and superyacht that it would host would adversely affect the views to the waterway of surrounding property owners, (3) permitting a superyacht in a residential area of Marco Island would be inconsistent with the Comprehensive Plan's goal of preservation of Marco Island's small-town character and other goals.[2]

A. Lack of special justification

§ 54-115(b)(1) requires the petitioner "demonstrate justification for extension, protrusion or encroachment into the riparian setback requested and/or special conditions relative to the subject property" for the Board to then proceed to the second step of the inquiry – whether it should

[2] There are other safety and environmental concerns the McBrides share, but as those are not directly contemplated by the governing law, they will not be given emphasis here.

grant an exemption upon weighing 10 separate factors. *See* § 54-115(f). The Code was designed so almost all requests proceeded under the standard dimensional requirements of § 54-111. The standard provisions of the Code contemplate various different situations, including whether the dock would be located at the end of canal on a body of water larger than 100 feet. *See* § 54-111(a)(1) (not providing a general exemption for boat docking facilities on ends of canals on large bodies of water). The City Council amended the 2000 code in 2003, 2009, and 2018 and, in so doing, contemplated many different scenarios and, in the event it failed to contemplate a scenario, § 54-100 states that "it is recognized that specific waterway locations warrant special consideration due to severe access and navigational challenges, and community character and aesthetic impacts." § 54-115 was designed as a failsafe in the event that there may be specific lots with severe challenges that would warrant special conditions relative to those lots. For lots such as end lots on larger bodies of water, the Board considered those and did not provide a general exemption for those types of lots, even though it could have. The City Council could have established an overlay zone for end lots on larger bodies of water if it wanted to let those property owners build docks any size they want. *See* § 54-100 ("City council may authorize the establishment of overlay districts, with district specific dimensional standards and regulations, to address boat docking facilities within the overlay area(s)"). The City Council currently has not decided to provided an exemption for end lots on larger bodies of water.

Here, petitioner has not carried his burden to demonstrate his lot is in any way unique to qualify for an exemption. A desire to have a dock to facilitate a superyacht is not a sufficient justification. If the statute allowed an exemption whenever a property owner had a large boat, the burden of the petitioner would always be met and this interpretation would render § 54-115(b)(1)'s special justification requirement futile, something the Council did not intend.

Importantly, the statute requires "special conditions related to the subject property." Petitioner has not identified any special condition of his property requiring such a dock that exceeds the standard riparian limit all property owners face.

Petitioner makes the argument that because the boat dock would be at the end of a 2000-foot channel (the Marco River), it should be able to build a dock for a superyacht. It claims this is a "special condition relative to the subject property" in line with § 54-115(b)(1). The problem with this argument is that it goes too far. This would allow any owner of a property at the end of a canal to build whatever kind of boat dock he or she pleases. When the Code was adopted, the canals and general topographical character of Marco Island existed, yet the City Council did not make any legislative exemption for lots at the end of canals. They enacted the dimensional requirements of § 54-111 for all proposed boat docks on the island. They provided a failsafe in § 54-115 if a specific lot had a strange or unique circumstance that required it to have an exemption. That petitioner has a property at the end of a canal is not the type of special condition relative to the subject property contemplated by the Code that can carry Petitioner's burden. If Petitioner thinks property owners at the end of canals on larger waterways should be allowed to build the docks of their choosing, Petitioner should suggest a legislative amendment to the Boat Docking Facilities Code.

In Petitioner's application, it was also claimed that the lot was special because it contained six lot lines rather than four.[3] However, this fact in itself does not explain why this is special to justify an extension that exceeds the standard limits in § 54-111. The fact that there are six lot lines rather than four may be a distinction, but it is a distinction without a difference. The fact that this is a peninsular lot with six lines may justify building a dock with a differently shaped

[3] Petitioner abandoned this argument before the Planning Board.

dock, but it does not justify an extension outward by 10 feet, which has no real bearing to the lot lines, and this extension request for a dock to shelter a superyacht would have been made regardless of the lot lines. *See* § 54-115(f)(3) (mandating, not just consideration of special conditions, but consideration of special conditions "which justify the proposed dimensions and location of the proposed boat docking facility").

B. Harm to view interests

The City Council enacted the Code in 2000 and amended it three times since, always making sure that, as factors to consider in whether to grant an exemption, the Board *must* consider the effect on the views of surrounding property owners due to a proposed dock and abnormally large vessel. *See* § 54-115(f)(6) (mandating the planning board consider "whether or not the proposed boat docking facility is of minimal dimensions and located to minimize the impact of view to the channel by surrounding property owners"); § 54-115(f)(7) (mandating the planning board consider the "adverse[] impact [to] the view to the channel by surrounding property owners" due to a proposed vessel that is in excess of 50 percent of the length of the water frontage); *see also* § 54-100 ("It is the intent and purpose of this article to provide for…the use and view of the waterway by surrounding property owners.").

Here, due to the abnormally large vessel that is in excess of 50-percent of the length of the water frontage at the subject property, the surrounding property owners testified before the Board that their views would be adversely affected.[4] *See* McBride Letter of Objection (discussing the substantial rightward loss of view of the waterway from both their house and dock and

[4] Waterway views would also be diminished because of the large 12-foot high pilings that would be used for the concrete floating dock to hold a superyacht. *See* Petitioner Ex. 7 at 98:9-21 (Mr. Rogers for Petitioner explaining that between six to eight pilings would be used that are typically 12 feet above the mean high water line).

discussing their reliance interests: "we have lived at this property for decades and bought the property in part because of its view of the Marco Island Bridge *and the associated waterways*.") (emphasis added)[5]; Thangavelu Letter of Objection (discussing how a dock with an associated superyacht would "significantly trample [her] view, especially the leftward view from [her] property, which looks out to the Marco River."); Bissell Objection (raising concerns that both of his properties at "1260 and 1264 Laurel Ct would have the views significantly impacted by this," that it would block most of the view of the Marco River from 1260 Laurel Court and the majority of the view up the Marco River at 1264 Laurel Court both from inside his home and from his outdoor living spaces); *Id.* (observing that permitting a superyacht would be the "literal equivalent of a floating 2 story condominium being added to the end of Sundrop Ct."); Petitioner Ex. 7 at 107:19-24 (Stephanie Bowman: "What's not fine is for me…to spend all of the money that we have saved our entire life for retirement, to retire somewhere where we felt the personal property was respected, [and] to have to look at the back end of somebody's boat").

In the context of these concerns, the City Staff and one dissenting Board member faulted the surrounding property owners for complaining about the superyacht, rather than solely the boat dock extension. They might have a point if the statute did not expressly provide for this type of scenario and heed the legitimate concern of surrounding property owners that an abnormally large vessel would obstruct their views, which should be protected. § 54-115(f)(7) provides that the Planning Board must consider if "the proposed vessel(s) are in excess of 50 percent of the length of the water frontage on the subject property such that the extension of the boat docking

[5] Emphasis is added because the petitioner has repeatedly made the red-herring argument that the McBrides and others claim only an interest to a view of the Bridge. The waterways under the Bridge, with all the associated maritime activity, are part of the channel, and important views objectively and subjectively.

facility may adversely impact the view to the channel by surrounding property owners." It goes undisputed that this is the case. The City Staff explain that the proposed dock and vessel will be: "well in excess of 50% of water frontage." Petitioner Ex. 3 (Staff Analysis). The City Staff admit that the surrounding property owners will lose some views but they seem to think those views are important only to those owners. This perspective fails to recognize the number of surrounding property owners objecting to view loss, the extent and character of view loss, and that views important to the property owners are significant. The statute does not mandate a total view loss before rights are respected. As diminished views affect property values, all property views matter. *See* McBride Addendum to Letter of Objection at 2 (citing studies that any view loss causes or has the potential to cause a reduction of property values); *see also* § 30-2 (explaining that the purpose of the land development code is to "respect [the] rights of private property owners"); § 54-115(j-k) (explaining that Chapter 54 should be read consistently with the standards in Chapter 30).

Rather than substantially dispute the diminishment of views of surrounding property owners, Petitioner asserts that the surrounding property owners have no rights to views except those extending directly outward from their property lines and neither the dock nor the superyacht would interfere with the view rights to the channel of any surrounding property owners. Petitioner is mistaken for at least three reasons.

First, the common law right of views for waterfront landowners is not artificially capped at the direction of their property lines extended out into the water. Petitioner cites to *Lee County v. Kiesel*, 705 So.2d 1013 (Fla. 2d DCA 1998), which upheld a circuit court inverse condemnation judgment because Lee County built a bridge that substantially and materially interfered with the Kiesel's riparian right of view "across the waters" of the Calooshatchee River. In fact, quoting

the Florida Supreme Court, *Kiesel* states quite the opposite from Petitioner's desired reading. *See,* 705 So.2d at 1015 (quoting *Hayes v. Bowman*, 91 So.2d 795, 801 (Fla. 1957)) (explaining "that the common law riparian rights to an unobstructed view and access to the Channel over the foreshore across the waters toward the Channel must be recognized over an area as near 'as practicable' in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the Channel. This rule means that each case necessarily must turn on the factual circumstances there presented and no geometric theorem can be formulated to govern all cases.").

Petitioner also cites to *Mickel v. Norton*, 69 So.3d 1081 (Fla. 2d DCA 2011), which held (1) that because the Nortons' property neither adjoined nor faced Alligator Bay, they did not have an appurtenant right of view to that body of water and (2) assuming there is a right of view across the property of another, there was no nuisance when the Mickels installed a fence where it served a useful purpose of privacy and keeping trespassers from entering their property. Like *Kiesel,* this case also does not hold that the right to an unobstructed water view extends only directly out from one's property lines.

The Florida Supreme Court rejected Petitioner's argument in *Hayes* because "seldom, if ever, is the thread of a channel exactly or even approximately parallel to the shoreline of the mainland." 91 So.2d at 801-802 (deciding not to limit view rights of affected property owners only to those views "at right angles with the shore line."); *see also Thiesen v. Gulf, F. & A. Ry. Co*, 78 So. 491 (Fla. 1917) (noting generally that at common law a riparian proprietor enjoys an unobstructed view over the waters). Applying the applicable and correct law, it is clear that the McBrides', Thangavelus', Bissells', and Glasses' appurtenant right to an unobstructed view of the Marco River from their respective properties, in the direction of the Marco River, extends to

the areas where the proposed dock and superyacht would be placed. *See* § 54-101 ("No boat docking facility shall be constructed so as to encroach upon the riparian rights of other property owners.").

Second, the Code does not contemplate Petitioner's proposed limited interpretation of "view to the channel." Appurtenant rights to a water view extend to the bodies of water that a lot faces. *See Hayes*, 91 So.2d at 801 (a property owners' riparian right of an "unobstructed view [extends]…across the waters *toward* the Channel") (emphasis added); *Mickel*, 69 So.3d at 1082 (Because "[t]he north side of the Nortons' lot faces the Sunrise Waterway," not Alligator Bay, their special riparian right to an unobstructed view only extended to Sunrise Waterway). Case law establishes that view rights to a body of water exist as long as the lot borders or faces the body of water. The McBrides, Thangavelus, Bissells, and Glasses all have tip lots which border and partly face the Marco River. Therefore, they have an appurtenant right to an unobstructed view of the Marco River. Without any support, Petitioner claims no property owner has a view right to the zone directly in front of Petitioner's lot because each of the surrounding property owners partly border a canal. However, just because the McBrides, Thangavelus, Bissells, and Glasses may have a view right to a canal on which their property sits, that does not limit their view right to the Marco River which they also border and face due to their tip lots.

Third, Petitioner is mistaken that there must be a common law riparian right to a view before the Board could statutorily consider whether surrounding property owners have interests to views of the Marco River. The Code, in § 54-115(f)(6) and (f)(7), mandates the Board consider all the adverse effects the proposed dock and abnormally large vessel have on the view of the channel for surrounding property owners. That consideration does not reference another portion of the

City Code related to riparian lines[6] or rights. It mandates the Board consider view loss of the channel from the properties[7] of surrounding property owners. When considering all views of the channel, in this case the Marco River, it is not statutorily required or necessary for each surrounding property owner to also have a riparian right before the Board can properly consider the effect of the proposal on their view loss to the channel. That some surrounding property owners may have a greater interest and would have a greater portion of their view to the Marco River blocked is a matter of weight for the Board to consider. *See, e.g.,* Petitioner Ex. 7: 81:24-25 & 82:1-5 (Matthew Bissell testifying that the proposed dock and superyacht would be directly outwards from his property: "my home literally faces up the diagonal seawall of the canal straight to where the tip of that yacht would be sticking out. So it definitely would reflect on my view without having to look across anybody's other property in order to do so.").

C. Inconsistency with Comprehensive Plan

The Board correctly recognized that, while managing growth, it was their very goal to ensure the small-town feel of Marco Island. The Council, in both the 2009 Comprehensive Plan (and proposed 2021 Comprehensive Plan)[8], has stated that it desires to maintain Marco Island's small-

[6] Riparian lines are mentioned in § 54-101 "to provide a point of reference from which to measure setbacks for docking facilities."

[7] Petitioner claims that the McBrides have no right to a view from their gazeebo dock. Petitioner is incorrect. The Code grants, as a right, a boat dock when complying with the standard dimensional requirements. Docks are accessory structures, constituting property from which there is a view interest. Regardless, the McBrides have view loss due to the proposed dock and superyacht from what they hope to assume is their undisputed property (the McBrides' house and surrounding lawn areas).

[8] The McBrides agree with Petitioner that only the current 2009 Comprehensive Plan can be considered until the 2021 Comprehensive Plan is formally adopted. It is not evident that the Planning Board rested its decision on the 2021 Comprehensive Plan. *See* Petitioner Ex. 6 (Planning Board Resolution 21-46, Section I). That one member made a cursory remark

town character. These words should not merely be adjectives in a dormant document, but should be brought into reality, here and now. Allowing a superyacht to be sheltered at private property rather than at a marina is the antithesis of a small-town feel. Marco Island is not the French Riviera and it should not so become. *See* Bissell Objection (noting Marco Island's waterways are not designed for such a vessel, much less it's lot layouts and home locations. You only have to visit Fort Lauderdale or Miami to see what Mega Yachts like this have done to the waterways and the views from land or from the water."). Petitioner does not attempt to argue that permitting a superyacht is consistent with Marco Island's vision of a small-town feel and the City Council should not create a precedent that departs from that goal.

Additionally, there is also an inconsistency with Section V (Conservation & Coastal Management Element), Goal 3, of the 2009 Comprehensive Plan. This section of the Comprehensive Plan protects against the risk of property loss from hurricanes. However, a large non-hurricane rated dock with sizeable pilings poses a risk to the property of the surrounding property owners because the pilings could become detached and strike another's property. Moreover, the superyacht itself poses a risk as Petitioner is not legally obliged to move the superyacht during a hurricane. *See* Petitioner Ex. 7 at 11:1-4 (Mary Holden replying to Member Fahringer that she "can't argue that" if a hurricane came through, "a boat of that size, tied to that dock, could become an issue as far as a destructive force.").

Petitioner has not shown "strict[]" compliance with the Comprehensive Plan. *See U.S. Sugar Corp.,* 134 So.3d at 1052.

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regarding the proposed 2021 Comprehensive Plan is not evidence that the Board, let alone this member, rested his decision on the 2021 Comprehensive Plan.

IV. THE PLANNING BOARD DID NOT ERR

A. The Board's decision

Petitioner asserts in his appeal that all the criteria and factors for granting the requested boat dock extension were satisfied, but the Planning Board, the entity statutorily-authorized to rule on the matter, came to the opposite conclusion after its own review. Appeal at 5. The Planning Board found there were "no special conditions related to the subject property or adjacent waterway that justify the proposed docking facility." Petitioner Ex. 6 (Planning Board Resolution 21-46, Section I). As a practical matter, the Board noted that the request would be convenient for the Petitioner, but was hardly necessary, especially as "other options [may be] available to adequately secure the vessel that may not require such an extension request." *Id.* As the Board acknowledged, there was no special condition *of the subject property* justifying an extension and there is no right to have a superyacht at one's residential property. *See* Petitioner Ex. 7 at 49:12-17 (Member Vergo: "a vessel like this, it is – it's just not fitting within the confines and they're asking us to extend those confines when, in reality, it really belongs in a marina or a yacht club or something of that nature").

Moreover, the Planning Board also found that waterway view interests of the surrounding property owners were implicated and the proposal would infringe and obstruct on the waterway views of surrounding property owners. *Id.*; Petitioner Ex. 7 at 30:20-23 (Member Vergo responding to Petitioner: "we do have to take into consideration infringing on neighboring areas' views and things you may consider inconsequential"). The Board also noted that the dock and superyacht at issue were inconsistent with the small-town charm designed to be protected by the current 2009 Comprehensive Plan. Petitioner Ex. 6 (Planning Board Resolution 21-46, Section I)*;* Petitioner Ex. 7 at 48:17-25 (Member Vergo: "we have no limitation of what vessel you can

put behind your house as long as it fits legally behind your house… so the limitations...is one of the things that we can do to limit the size of the vessels to keep it within some sort of reason for the small-town atmosphere of Marco Island").

The stated reasons of various Board Members[9] and the Board's written reasons for denying the application indicate that no improper factors were considered in the Board's decision. All of the reasons were statutorily-based on the relevant code provision or the current Comprehensive Plan.

The Council reviews the decision of the Board *de novo,* but in this review, it should accord weight to the Board's accurate reasoning and should not reverse the Board absent Petitioner demonstrating error. C.f. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla. 1979) ("In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error."); *Morris v. State,* 958 So.2d 598, 599 (Fla. 4th DCA 2007) (noting that even in *de novo* review in a criminal matter, a trial court's decision arrives with a presumption of correctness).

B. The Board utilized its expertise in reaching its decision

In reaching its decision, the Board utilized its expertise as the municipal planning commission. It considered the request as compared to other superyachts on the island, almost all

[9] Of the Board members in dissent, only one explained her rationale. Member Rivera explained that she would not punish Petitioner when Petitioner had been transparent with the city and she further said that the complaint about the superyacht, rather than the dock itself, was irrelevant. Respectfully, Member Rivera erred in her analysis. The Board is statutorily mandated to consider the proposed vessel that would be sheltered by the dock because the proposed vessel would be abnormally large. *See* § 54-115(f)(7). Moreover, while it is commendable that Petitioner was transparent with the city, it had a duty to be transparent because it was submitting an application that required an exemption from the city. Also, whether transparent or not, the dissenting member erred in considering transparency as that was not a factor for consideration in § 54-115(f) or the Comprehensive Plan.

of which are housed at a marina. *See* Petitioner Ex. 7 at 45-61 (discussing larger vessels at 849 Buttonwood Court and 855 Fairlawn Court); *id.* at 60:23-25 & 61:1 (Vice Chairman Honig: "these other boat owners did not have to come in to get a variance like the ones that you were showing on Buttonwood…maybe that discourages people from having very large vessels on their property because they have to come before this Board and maybe we will be skeptical because of the visual impact on the character of the community"). It also considered how this request varied from a previous request for extending a garage door height to house a motor home. *See* Petitioner Ex. 7 at 115-118 (Member Fahringer questioning City Attorney Tolces on a previous garage door height variance, with Attorney Tolces explaining that there was no consideration given for the size of the RV there whereas here, under the Code, there is consideration for the size of the proposed vessel). Additionally, during the Board's detailed review Chairman Bailey caught a technical error that both the City Staff and Petitioner had missed. *See* Petitioner Ex. 7 at 68-69 (Chairman Bailey explaining that under the Code, protrusions are measured from the property line, not the face of the seawall). In sum, the Board utilized its expertise and experience in the field of planning and zoning, and, for that reason, the Council should accord its judgment considerable persuasive force. C.f. *State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson,* 286 So.2d 529, 531 (Fla. 1973) (administrative judgments, where based on expertise, "should be accorded considerable persuasive force").

V. THE APPEAL LACKS MERIT

A. Impartiality

Petitioner impugns the impartiality of the Board because Vice Chairman Larry Honig presented his initial thoughts at the beginning of the quasi-judicial hearing that he was curious how the proposal could be consistent with the small-town charm of Marco Island (in addition to

asking the City Attorney legal questions). To the extent that there was prejudice (which there was not), it was cured as Petitioner was given a reasonable opportunity to refute the points raised by Vice Chairman Honig, Petitioner indeed attempted to refute the points, and Vice Chairman Honig presented his initial thoughts *in order to be* most fair to the Petitioner. Petitioner Ex. 7 at 13:1-4 (Vice Chairman Honig: "out of respect for the applicant and those who want to speak, I would like to get some points on the table for possible rebuttal by various parties"); *id.* at 17:15-25 (Vice Chairman Honig: "I have an open mind. I want to give the applicant a chance to react to it…I'm actually being more fair to the applicant in this regard"). If quasi-judicial bodies were not allowed to conduct hearings in this rebuttal-type manner because it violated due process rights, courts across the state have been engaging in due process violations for decades when they conduct status or evidentiary hearings in slightly non-traditional ways. In sum, the decision-making process of the Board was not tainted by the actions of Vice Chairman Honig (an honorable former city councilor) to render the Board's decision partial.

Petitioner preserved an objection to facts introduced by Board Members but did not object to the admission of any facts, and Petitioner cannot now object. *See Elwell v. State*, 954 So.2d 104, 106 (Fla. 2d DCA 2007) (Canady, J.) (explaining that preservation requires an objection be "*timely raised before, and ruled on by, the trial court*" so the trial court is able to correct any errors itself) (emphasis in original); *LeRetilley v. Harris,* 354 So.2d 1213, 1214 (Fla. 4th DCA 1978) ("[F]ailure to secure a ruling on an objection waives it, unless the court deliberately and patently refuses to so rule.). Here, Petitioner neither made an objection nor ensured it was ruled on by the Planning Board. Petitioner Ex. 7 at 24: 15-24 (Mr. Lombardo for Petitioner: "we are going to preserve an objection to any factual information provided [by] Board members that is not going to be provided by either the applicant or the objectors…we're just going to preserve

the objection, not asking it to be ruled on"). Therefore, with no objection raised or ruled on, Petitioner cannot now contest that the Board considered improper materials or otherwise behaved improperly.

Furthermore, Petitioner cites only one case for his alleged constitutional due process violation. While selectively quoting from *Cherry Communication, Inc. v. Deason*, 652 So.2d 803 (Fla. 1995), Petitioner misses the point of that decision. *Cherry Communications, Inc.* held that the prosecutor in an action could not also provide impartial advice to the quasi-judicial body because "the decisionmaker must not allow one side in the dispute to have a special advantage in influencing the decision." *Id.* at 805. Here, the surrounding property owners were neither given special advantage nor had "special access to the deliberations" because of Vice Chairman Honig's somewhat early discussion of his thoughts. *Id.* All deliberations took place in public at the hearing with adequate opportunities for responses. Due process is only violated where fundamental principles of fairness and impartiality are violated and none were violated in the quasi-judicial hearing here. *See also Hadley v. Department of Admin.,* 411 So.2d 184, 187 (Fla. 1982) ("[T]he formalities requisite in judicial proceedings are not necessary in order to meet due process requirements in the administrative process.")

B. Competence to testify of surrounding property owners

Amazingly, Petitioner claims that surrounding property owners are incompetent to testify on the loss of views that would befall their own property due to the proposed dock and superyacht.[10] In the State of Florida, as lay evidence is admissible in judicial proceedings, in the

[10] The McBrides note that Petitioner took a different position before the Planning Board. *See* Petitioner Ex. 7 at 24:18-19 (Mr. Lombardo for Petitioner: acknowledging that the Board can properly consider factual information "provided by either the applicant or the objectors"). Moreover, if the surrounding property owners are incompetent to testify on the loss of their own

context of this quasi-judicial proceeding on the subject related to their property view loss, the surrounding property owners lay testimony is surely competent and proper. *See* § 90.701, Florida Statutes; *Woodham v. Williams*, 207 So.2d 320, 323 (Fla. 1st DCA 1968) ("It is the settled law of this state that administrative hearings before state agencies are relatively informal in character and not controlled by strict or technical rules of evidence and procedure."). Binding case law establishes that the surrounding property owners are very much competent to testify in opposition to a boat dock extension on matters that do not require technical expertise. *See Board of County Com'rs of Pinellas County v. City of Clearwater,* 440 So.2d 497, 499 (Fla. 2d DCA 1983) ("The local, lay individuals with first-hand knowledge of the vicinity who were heard in opposition at the two public hearings were as qualified as 'expert witnesses' to offer views on the ethereal, factual matter of whether the City's proposed dock would materially impair the natural beauty and recreational advantages of the area."). Rather than the lay opinions of surrounding property owners being inadmissible, binding case law holds that the Board and Council are entitled to accord "great weight" to the cumulative objections of the surrounding property owners. *See id.* No special expertise is required to convey that a homeowner's view will be obstructed in these circumstances. This is not a case where it is unclear whether a shadow will be cast or particular design makes it unclear whether a view will be obstructed. The surrounding property owners were competent (and perhaps there is no better suited party) to submit factual evidence and informed opinion[11] regarding both the loss of their water views by the proposal and the inconsistency with the small-town character aspect of the Comprehensive Plan.

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property views, it is not clear what technical view expertise the City Staff or Petitioner has in order to carry its initial burden to show no view impairment under § 54-115(f).

[11] The Planning Board could also consider the pictures submitted as exhibits by the surrounding property owners as competent substantial evidence. That there would be a loss of

C. Considerations that affected the Board's decision

Petitioner takes issue that discussions occurred regarding the height of the superyacht. Appeal at 8. Despite the fact that Petitioner caused this discussion by failing to submit the height of the vessel in his application, the Board could consider height of the vessel to the extent that the height further diminished the views of surrounding property owners. In any event, the Board investigated whether there were limitations on heights of temporary structures. There is no evidence that this was a consideration relied upon in its decision. Further, Petitioner itself does not claim height was relied upon in the decision of this application. *See* Appeal at 8 (only asserting that "any use or application or consideration of building heights to the boat or vessel that would use the boat dock was improper and prejudicial," not that there actually *was* use of building heights). Merely inquiring whether the Board should consider the height of the vessel is distinct from considering that as part of its decision.[12] *See* Petitioner Ex. 7 at 10:1-4 (Member Fahringer asking the city staff: "Is there anything that—regarding height requirements on temporary structures on the beach or, in this case, this boat, in our ordinances?").

VI. CONCLUSION

The Board faithfully and impartially applied the facts to the applicable standards and, after thoroughly considering the matter, found Petitioner did not carry his burden for an exemption from the standard rule regulating boat docking facilities. In so doing, the Board committed no procedural or substantive error. The Council should not reverse the decision below. The

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waterway view from a massive superyacht, to be frank, is obvious and the Board could also take judicial notice of that fact.

[12] The same analysis applies to the "Strategic Plan" document that was merely mentioned quickly by a Planning Board member. There is no evidence the Board rested its conclusions on this document.

Council should heed the wise words of Member Vergo: "honestly, I'm probably the first person to fight for property owners as far as what you can do with your property, but sometimes we've just got to put the brakes on and use a little bit of common sense." Petitioner Ex. 7 at 50:6-10.

Date: September 29, 2021

Respectfully submitted,

/s/ *Mitchell McBride*
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Mlm428@cornell.edu

Attorney for McBride Appellees

NOTICE OF REPRESENTATION

October 24, 2021

To the City Council of Marco Island:

Let it be known that Mitchell McBride, Esq. is representing us in the appeal of the Planning Board's decision denying 986 Sundrop LLC's application for a boat dock extension (Reference No. BD-21-000177).

We yield our time to our attorney pursuant to the City Council Rules of Procedure, Section 2(f). If the Council intends to operate with time limits in this quasi-judicial proceeding, we respectfully request that the attorneys for the objecting surrounding property owners (who are parties to the proceeding) have equal time to the attorneys for the petitioner. *See* Rules of Procedure, Section I(e) (permitting a supermajority of the Council to temporarily allow variations of the operating procedures for a definite purpose).

Thank you,

Lorraine K. McBride

Gary L. McBride

NOTICE OF INTENT TO GIVE TESTIMONY

October 24, 2021

To the City Council of Marco Island:

Please be advised that the undersigned is an affected person who intends to give testimony to the City Council on December 6, 2021 regarding 986 Sundrop LLC's appeal of the Planning Board's denial of its boat dock extension request.

Pursuant to City of Marco Island Quasi-Judicial Proceedings, Sec. 3(c)(4):

(i) I, Lorraine McBride, am part owner of 980 Sundrop Court, Marco Island, FL 34145 (phone number is 814-282-0363) and I intend to give testimony and present evidence.

(ii) My attorney, Mitchell McBride, Esq., will present argument on my behalf. *See supra* Notice of Representation. I do not intend to employ consultants or experts.

(iii) Please see attached Exhibit A which includes pictures of the now-existing rightward view that will be adversely affected by the addition of a large superyacht at the subject property. Exhibit B is an affidavit containing the significant part of my testimony and shall be used in the event I am unable to be present. I do not intend refer to other documents, correspondence, or memoranda in my testimony.

(iv) I am against the petition and ask the Council to uphold the informed and impartial decision of the Planning Board on this matter.

(v) I am an affected person because my property at 980 Sundrop Court directly adjoins the subject property (986 Sundrop Court), and, therefore, as a natural person who owns property within 300 feet of the subject property, I am an affected person. *See* Sec. 2 (definition of affected person). With this notice, I am also now a party to this matter. *See id.* (definition of party).

I thank the City Council for its thoughtful review of the matter.

Lorraine K. McBride

CONSENT FOR SITE VISIT

October 24, 2021

To the City Council of Marco Island:

You may very well rely on our credible testimony and evidence regarding the loss of view to our property, but if you would like to conduct a site visit as permitted, *see* Quasi-Judicial Proceedings, Sec. 3(b) ("City Council members may conduct investigations and site visits" and "such activity shall not be presumed prejudicial to the action if the… site visit…is made a part of the record before final action on the matter"), you have our explicit permission to traverse our property at 980 Sundrop Court, Marco Island, FL 34145.

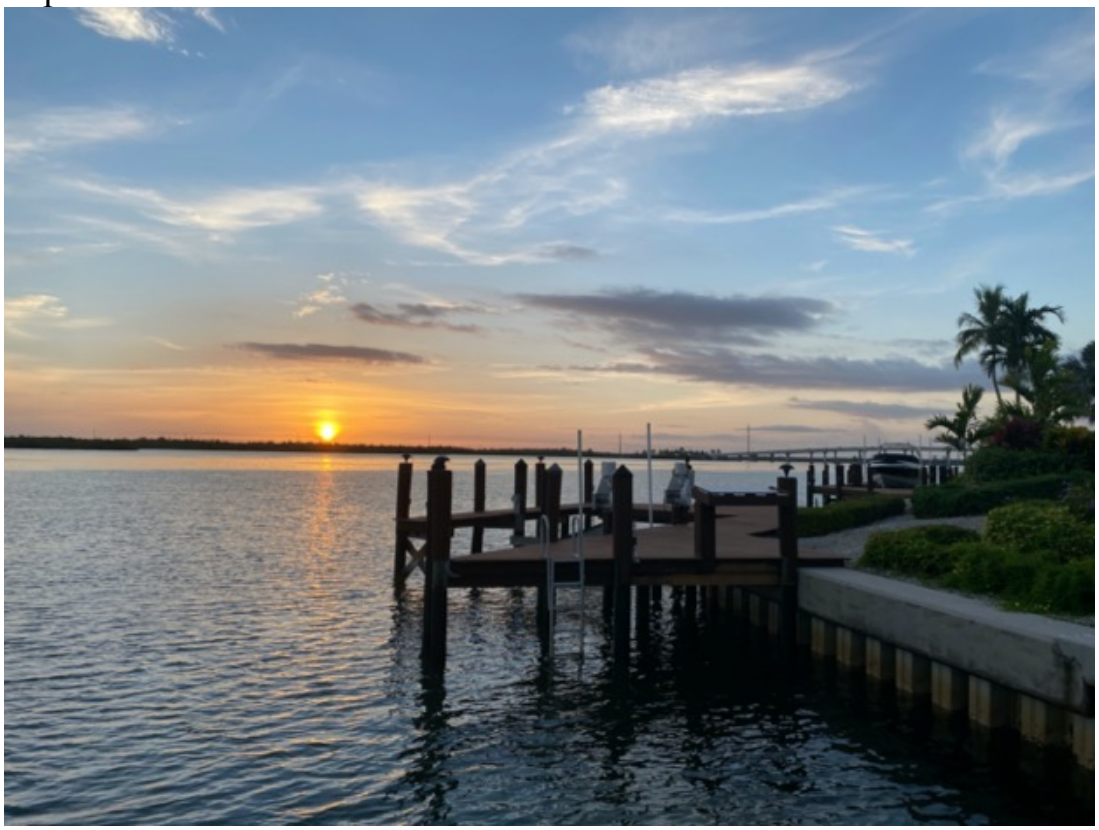
Thank you,

Lorraine K. McBride

Gary L. McBride

EXHIBIT A

Photograph 1: The view looking towards the Marco Bridge and surrounding waterways from 980 Sundrop Court. The proposed superyacht would adversely affect our view of the Bridge, the waterways under and near the Bridge, and may impair sunrise views.



Photograph 2: The current view from the pool deck. We see the current boat, but it does not significantly diminish our view. A superyacht would block a significant portion of our outward and rightward views of the Marco River.

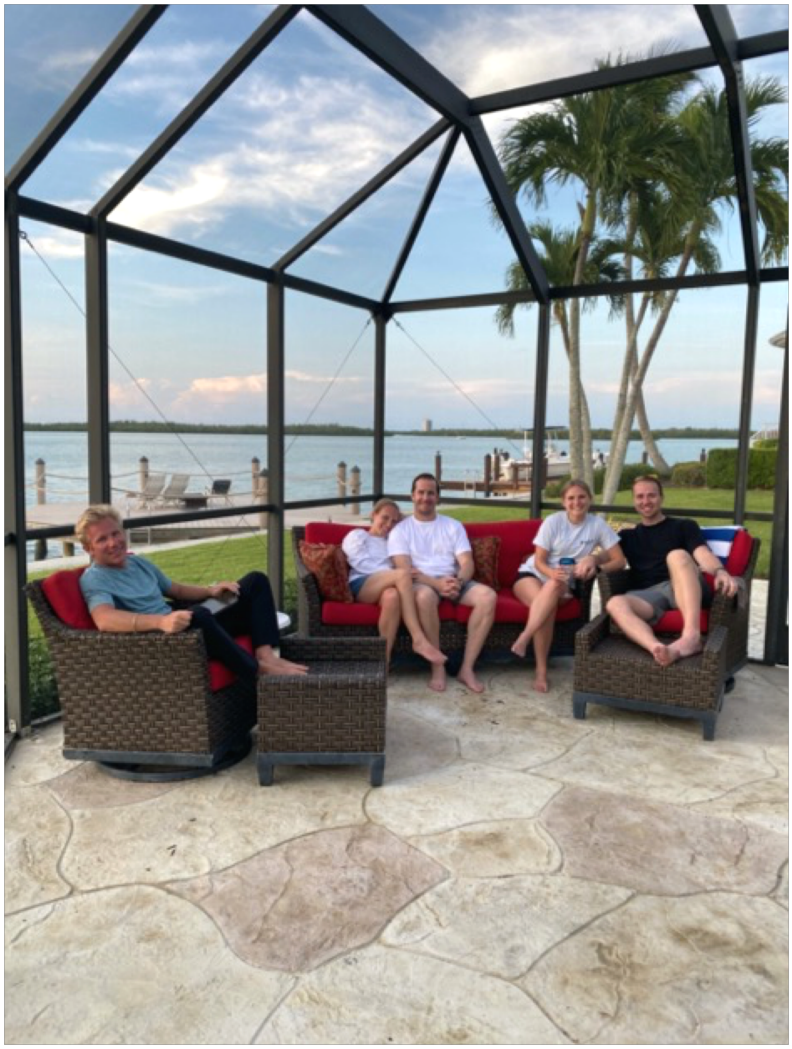


EXHIBIT B

AFFIDAVIT

I, Lorraine McBride, do hereby swear under oath that:

1. I own 980 Sundrop Court, Marco Island, FL 34145, the property directly neighboring 986 Sundrop Court, Marco Island, FL 34145.
2. I am familiar with the area surrounding 986 Sundrop LLC's proposed incursion into the Marco River.
3. The surrounding area is a residential neighborhood with a small-town feel where no other superyachts or similar vessels are located.
4. I will lose my rightward view of the Marco River from my property (including my patio, lawn, and dock) due to the incursion into the Marco River if the proposed activity is permitted.
5. I purchased the property in large part because of the view of the Marco River, which would be adversely affected by the superyacht.
6. Other surrounding property owners would lose their views of the Marco River if the proposed activity was permitted.
7. The proposed activity and use is not consistent with the cultural values of Marco Island, including its small-town character.
8. The Marco River is a natural beauty which should be maintained in its current form, where the public is able to use it for safe and fun recreation, and wildlife and their habitats are secure.
9. The proposed activity and use of the Marco River by 986 Sundrop LLC is contrary to the public interest.

Under penalty of perjury, I hereby declare and affirm that the above stated facts, to the best of my knowledge, are true and correct.

Dated this 6 day of October, 2021.

Lorraine K. McBride

STATE OF Virginia
COUNTY OF Spotsylvania

SWORN TO AND SUBSCRIBED before me this October 6, 2021 by Lorraine K. McBride, who ____ is personally known to me or ✓ produced FL Drivers License as identification and who took an oath.

(SEAL)

CHRISHAUN DEE'L OAKES
Commonwealth of Virginia
Notary Public
Commission No. 7677900
My Commission Expires 8/31/2024

Notary Public

Chrishaun Dee'l Oakes
Name