

June 16, 2026

RE: P&Z members' roles and responsibilities

Dear Planning and Zoning Chairman, and Commissioners,

In order to competently perform my duties as a member of the P&Z Board, it is necessary that I understand what my role is, and what my responsibilities are.

My understanding is that my role changes depending on the type of proceeding before us. My understanding is that there are two types of proceedings conducted by the P&Z – quasi-judicial, and legislative. *See Attachment, Appendix A.*

A Variance request is a quasi-judicial proceeding, whereas an ordinance change is a legislative proceeding. The difference is important because it determines which decision making process we *must* use, and the evidence required to be presented. Using the recent swimming pool variance request and ordinance change as an example demonstrates this difference:

Key Colony Beach has a rule requiring pools to be 10 feet from the canal. In the case of a variance request (Quasi-Judicial), the property owner asks "Please allow my pool to be 5 feet from the canal instead of 10 feet." The Board must decide: Is there a hardship? Is the lot unique? Would approval grant a special privilege? Is the request supported by competent substantial evidence? The Board is applying existing law to a specific property.

In a legislative process, a proposal is made that "The setback should be reduced from 10 feet to 5 feet for everyone." The Board is not deciding whether one owner deserves relief. Instead, the Board is asking: Is the current ordinance still appropriate? What are the community-wide impacts? Will the change affect neighboring properties? Will it protect public health, safety, and welfare? Is the change consistent with the Comprehensive Plan? The Board is making policy for the entire city.

You may already know all of this, I have so much to learn.

Cities and Counties have been sued over P&Z decisions, and lost. Monroe County lost a law suit in 2023 because the P&Z Board approved a variance that did not meet the variance criteria. *See Exhibit 1.*

The case involved a property variance (an exception to building rules). Property owners Michael and Susan Larson challenged a decision that allowed Grey Properties to build near their land. The dispute centers on whether Grey Properties met the specific rules for a variance under Monroe County Land Development Code Section 102-187(d), which requires an applicant to prove a "good and sufficient" hardship.

Previously, I worked at a law firm where I assisted in defending a City against lawsuits. In many instances, the City lost because they did not follow proper procedure, similar to the Monroe case, cited above.

Another consequence of not following proper procedure is that citizens lose trust in the system, and neighbors become adversarial because the rules are not equally applied. As an example, my neighbor suggested I was not a good Christian because of my strict application of the law, and a Commissioner suggested my conduct was improper.

For Variances, my understanding is that I am to follow the process outlined in Appendix C, D, and E. For ordinances, see Appendix F, and G. I also understand I may incur personal liability in some situations, see Appendix H.

If this Board does not wish me to follow the processes described in the Appendices, please let me know the decision-making process I am to follow, and my responsibilities.

Respectfully,

Lynne Benton
P&Z Board Member

Cc: Planning and Zoning Members

APPENDIX

June 17, 2026 P&Z Hearing (Lynne Benton submittal)

APPENDIX A. Types of Hearings	2
A.1. Quasi-Judicial Planning and Zoning Proceeding	2
A.1.1. What Is a Quasi-Judicial Proceeding?	2
A.1.1.1. Due Process Requirements	2
A.1.1.2. Decisions must be supported by substantial, competent evidence in the record pertinent to the proceeding.	2
A.1.2. Types of Quasi-Judicial Hearings	3
A.1.2.1. Variance Hearing	3
A.2. Legislative Proceeding	3
A.2.1. Changing A City Ordinance	3
4.3. Why the Difference Matters	4
Appendix B. Ex-Parte Communications - Planning and Zoning Agenda Packet (June 17, 2026)	5
Appendix C. VARIANCE HEARING PROCESS	6
Appendix D. VARIANCE HEARING CHECKLIST	7
Appendix E – VARIANCE HEARING – WRITTEN RECORD (Example)	8
Appendix F. ORDINANCE AMENDMENTS - Duty of a Planning & Zoning Board Member	10
Appendix G – ORDINANCE HEARING CHECKLIST	10
Appendix H. Situations That Could Create Personal Liability for a Volunteer Board or Committee Member.	11

APPENDIX A. Types of Hearings

Planning and Zoning Board members participate in two (2) different types of hearings, a quasi-judicial proceeding and a legislative proceeding.

A.1. Quasi-Judicial Planning and Zoning Proceeding

A.1.1. What Is a Quasi-Judicial Proceeding?

One of the most frequently cited definitions comes from the Florida Supreme Court in *Board of County Commissioners of Brevard County v. Snyder*. The Court explained that a quasi-judicial decision involves "the application of general rules or policies to specific individuals, interests, or situations." A quasi-judicial action is one in which a governmental body applies existing laws, ordinances, or regulations to a specific set of facts and a particular person or property, rather than creating new policy. If the Board is deciding whether a particular property owner gets an exception to existing rules, the proceeding is usually quasi-judicial.

Characteristics of a quasi-judicial proceeding:

- A hearing is held,
- Evidence and testimony are presented,
- Specific facts about a particular property or applicant are considered,
- Existing ordinances or regulations are applied,
- A decision is made affecting the rights of a specific person or property owner.

Examples include:

- Variances,
- Special exceptions,
- Conditional use permits,
- Appeals from administrative decisions, and
- Site-specific development approvals.

A.1.1.1. Due Process Requirements.

Land-use proceedings that are quasi-judicial in nature must provide procedural due process protections, including a fair hearing and the opportunity to challenge evidence presented to the decision-maker. A foundational Florida case is *Jennings v. Dade County*. While *Jennings* predates Florida Statute § 286.0115, the statute was enacted largely to address ex parte communications while preserving due process. *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991).

A.1.1.2. Decisions must be supported by substantial, competent evidence in the record pertinent to the proceeding.

Under Florida law, F.S. § 286.0115(2)(c), "all decisions of the decisionmaking body in a quasi-judicial proceeding on local government land use matters must be supported by substantial, competent evidence in the record pertinent to the proceeding."

A.1.2. Types of Quasi-Judicial Hearings

A.1.2.1. Variance Hearing

A variance hearing is a **quasi-judicial proceeding**. As such, the Board's role is not to determine whether members personally favor or oppose the proposed improvement. Rather, the Board must determine whether the applicant has demonstrated compliance with the variance criteria established by the City's code based upon competent evidence presented at the hearing. The decision must be guided by the applicable standards and the record before the Board, not by personal preference or policy considerations.

Throughout the hearing, Board members may ask questions of staff, the applicant, and members of the public to clarify facts and better understand the evidence presented.

Following deliberation, a Board member makes a motion to approve or deny the application. The motion should include findings that address the applicable variance criteria.

The Board's decision and supporting findings should be documented in the meeting minutes and, where required, incorporated into a written order.

A.2. Legislative Proceeding

A legislative action involves the formulation of policy applicable to the public generally. If the Board is deciding what the rules should be for everyone in the future, the proceeding is usually legislative. Examples include adopting or amending a zoning ordinance, amending land development regulations (adopting a new sign ordinance, revising setback requirements citywide, changing building height regulations), comprehensive plan amendments, and establishing city-wide policy.

The characteristics of a legislative action are that they establish policy for the community as a whole, affect all similarly situated properties, future-oriented, citizens may advocate for or against the proposal, and elected officials act as policymakers rather than judges.

A.2.1. Changing A City Ordinance

Ordinances are the rules by which citizens are governed and should therefore be carefully researched, thoughtfully drafted, and consistently applied. Every ordinance has consequences.

Ordinances affect the entire community and can have long-lasting consequences. What may seem beneficial in one situation can create unintended impacts for residents, property owners, businesses, public safety, the environment, or future development.

Before an ordinance is changed, the decision makers should understand the problem the change is attempting to solve, evaluate alternatives, consider long-term impacts, ensure consistency with the Comprehensive Plan, learn from the experiences of similar communities, and receive sufficient evidence to support a finding that the proposed change is the best solution to solving the problem. Careful analysis also promotes transparency, public confidence, and informed decision-making, and ensures that the ordinance serves the best interests of both current and future residents.

Well-crafted ordinances that reflect a community's vision, values, and long-term objectives, generally require fewer revisions because they are based on careful planning rather than individual circumstances.

Ordinances should not be changed simply because a particular rule creates an inconvenience in one or two situations. Before changing a community-wide regulation, the City should understand why the ordinance was adopted, whether the underlying purpose still exists, what unintended consequences may result from a change, and whether the amendment is consistent with the community's long-term vision.

Before approving a change to a city ordinance, a Planning and Zoning Board member should be satisfied that they understand both the proposal, why it is being proposed, and its potential consequences. See Appendix C.

4.3. Why the Difference Matters

Suppose Key Colony Beach has a rule requiring pools to be 10 feet from the canal. In the case of a variance request (Quasi-Judicial), the property owner asks "Please allow my pool to be 5 feet from the canal instead of 10 feet." The Board must decide: Is there a hardship? Is the lot unique? Would approval grant a special privilege? Is the request supported by competent substantial evidence? The Board is applying existing law to a specific property.

In a legislative process, a proposal is made that "The setback should be reduced from 10 feet to 5 feet for everyone." The Board is not deciding whether one owner deserves relief. Instead, the Board is asking: Is the current ordinance still appropriate? What are the community-wide impacts? Will the change affect neighboring properties? Will it protect public health, safety, and welfare? Is the change consistent with the Comprehensive Plan?

The Board is making policy for the entire city.

Appendix B. Ex-Parte Communications - Planning and Zoning Agenda Packet (June 17, 2026)

EX-PARTE COMMUNICATIONS

An ex-parte communication is defined as:

any contact, conversation, communication, writing, correspondence, memorandum or any other verbal or written communication that takes place outside a public hearing between a member of the public and a member of a quasi-judicial board, regarding matters which are to be heard and decided by said quasi-judicial board.

Site visits and expert opinions are also considered ex-parte communications.

In the event that someone contacts a Board Member about a quasi-judicial matter outside of a public meeting, at such time that particular issue is brought before the Board, the Board Member should state on the record:

- the existence of any ex-parte communication,
- the nature of the communication,
- the party who originated the ex-parte communication, and
- whether or not the ex-parte communication affects your ability to impartially consider the evidence presented.

Similarly, any correspondence received by a Board Member must be forwarded to the Board Clerk.

Note: The term “Board Member” would include all members of the Code Enforcement Board, the Planning & Zoning Committee, and the City Commission when they are acting in a quasi-judicial capacity (for example, but not limited to, code violation hearings and variance hearings).

Appendix C. VARIANCE HEARING PROCESS

Planning & Zoning Board (Quasi-Judicial Proceedings) June 2026 (draft)

A variance hearing begins with the Chair identifying the application and the subject property. Before testimony is received, Board members should disclose any ex parte communications, site visits, or information received outside the hearing. Interested parties should be given an opportunity to respond to any such disclosures.

Planning staff then presents the variance request, the applicable code provisions, relevant facts and analysis, and any staff recommendation. The applicant is given an opportunity to present evidence and testimony supporting the request and demonstrating compliance with the variance criteria. Interested parties may then provide testimony, evidence, or comments regarding the application. Throughout the hearing, Board members may ask questions of staff, the applicant, and members of the public to clarify facts and better understand the evidence presented.

Once all testimony and evidence have been received, the Chair closes the public hearing. The Board then deliberates and evaluates whether the applicant has satisfied the variance criteria established by the City's code. Typical considerations include whether unique circumstances or hardship affect the property, whether the hardship is self-created, whether the variance represents the minimum relief necessary, whether granting the variance would be consistent with the public interest, and whether the variance would avoid conferring a special privilege unavailable to similarly situated properties.

Following deliberation, a Board member makes a motion to approve or deny the application. The motion should include findings that address the applicable variance criteria. The Board then votes based upon the competent substantial evidence presented during the hearing and the requirements of the City's code.

The Board's decision and supporting findings should be documented in the meeting minutes and, where required, incorporated into a written order.

Because a variance hearing is a quasi-judicial proceeding, the Board's role is not to determine whether members personally favor or oppose the proposed improvement. Rather, the Board must determine whether the applicant has demonstrated compliance with the variance criteria established by the City's code based upon the evidence presented at the hearing. The decision should be guided by the applicable standards and the record before the Board, not by personal preference or policy considerations.

Appendix D. VARIANCE HEARING CHECKLIST

Opening the Hearing

- Chair identifies the application and subject property.
- Board members disclose ex parte communications, site visits, or information received outside the hearing.
- Interested parties are given an opportunity to respond to disclosed ex parte communications.

Presentation of Evidence

Staff presents:

- Variance request
- Applicable code provisions
- Relevant facts and analysis
- Staff recommendation

Applicant presents evidence and testimony supporting the request.

Public comments and testimony are received.

Board members ask questions of staff, the applicant, and interested parties.

Close the Public Hearing

- All testimony and evidence have been received.
- Public hearing is formally closed.

Board Deliberation

The Board evaluates whether the applicant has satisfied the variance criteria established by the City's code.

Typical findings Include

- Unique circumstances or hardship affecting the property.
- Hardship is not self-created.
- Variance is the minimum relief necessary.
- Granting the variance will not be contrary to the public interest.
- Granting the variance will not confer a special privilege unavailable to similarly situated properties.

Decision

- Motion to approve or deny.
- Motion includes findings related to the applicable variance criteria.
- Vote is based upon competent substantial evidence presented during the hearing and the requirements of the City Code.

Written Record

- Decision and findings are recorded in the minutes.
- Written order prepared if required.

Appendix E – VARIANCE HEARING – WRITTEN RECORD (Example)

ISSUE PRESENTED

Whether the proposed swimming pool to be installed 10 feet from the seawall, mean high water lever, complies with the City of Marathon Land Development Regulations, Monroe County regulations, and the Florida Building Code.

GOVERNING LAW (WITH CITATIONS)

City of Marathon Land Development Regulations:

- §107.62 – Shoreline Setback Requirements (Accessory structures permitted within setback subject to conditions).
- §107.63 – Shoreline Setback Area Standards.

Monroe County Code:

- §118-6 – Coastal Construction.
- §118-8 – Floodplain Management.

Florida Building Code:

- FBC R401.4 – Soil and lateral support.
- FBC 1807 – Retaining walls and foundation systems.

Florida Statutes:

- Chapter 515 – Residential Swimming Pool Safety Act.

FINDINGS OF FACT

- The subject property is a canal-front lot with an existing seawall (altered shoreline).
- The proposed pool is located approximately 10 feet from the seawall.
- The proposed pool is located in an environmentally sensitive area.
- The seawall serves as the shoreline stabilization structure.
- Engineering plans will confirm structural integrity and compliance.

CONCLUSIONS OF LAW

Pools are permitted accessory structures within shoreline setback areas under Marathon LDRs.

A 10-foot setback on an altered shoreline for an accessory structure is consistent with code and practice.

Compliance with the Florida Building Code ensures no loss of lateral support.

Approval is subject to engineering verification and environmental compliance.

CASE PRECEDENTS

- Pools located 10 feet from seawalls are routinely approved on altered shorelines.
- Greater setbacks are required for natural shorelines (20–25 feet).
- Approval decisions rely on engineering adequacy and environmental protection.

OPPOSITION REBUTTAL

Claim: Pool is too close to seawall.

Response: Engineering demonstrates no structural impact, complying with FBC requirements.

Claim: Environmental impact.

Response: Site is an altered shoreline where reduced setbacks of 10 feet are permitted. The 10 foot setback has been deemed sufficient, pursuant to Florida law, to ensure chlorine and other chemicals do not contaminate the canal waters.

Claim: Unsafe condition.

Response: Project includes all required safety barriers and code compliance.

VARIANCE (ALTERNATIVE REQUEST)

If strict compliance is deemed infeasible, a variance is requested based on:

- Unique waterfront lot conditions.
- Minimum necessary deviation.
- No adverse public impact.
- Consistency with surrounding approvals.

CONDITIONS OF APPROVAL

- Submission of sealed engineering plans.
- Verification of seawall condition.
- Drainage and hydrostatic protection measures.
- Compliance with all applicable codes and permits.

CONCLUSION

The proposed pool is legally supportable under Marathon regulations and precedent. Approval is justified based on compliance, engineering, and consistency with prior approvals.

Appendix F. ORDINANCE AMENDMENTS - Duty of a Planning & Zoning Board Member

Before recommending approval of a change to a city ordinance, a Planning and Zoning Board member should be satisfied that they understand both the proposal and its potential consequences.

Ordinances establish the rules that shape a community's growth, character, and quality of life, so they should be carefully researched and thoughtfully crafted. Because ordinance changes affect the entire community and can have long-lasting consequences, decision-makers should consider facts, citizen input, alternatives, long-term impacts, and the experiences of similar communities. Taking the time to fully evaluate proposed changes helps avoid unintended consequences, promotes fairness and consistency, and ensures ordinances reflect the community's vision and best interests. Careful analysis also promotes transparency, public confidence, and informed decision-making.

Appendix G – ORDINANCE HEARING CHECKLIST

1. **Read the proposed ordinance carefully** – Understand exactly what is changing and how the new language differs from the existing code.
2. **Review the purpose of the change** – Identify the problem the amendment is intended to solve and whether the proposed solution addresses that problem.
3. **Determine consistency with the Comprehensive Plan** – In Florida, land development regulations should be consistent with the community's adopted Comprehensive Plan.
4. **Review staff reports and supporting materials** – Consider the factual basis, data, studies, and recommendations provided by staff and consultants.
5. **Understand potential impacts** – Evaluate how the change may affect residents, businesses, property owners, infrastructure, public safety, environmental resources, community character, and future development.
6. **Consider alternatives** – Ask whether there are less restrictive or more effective ways to achieve the same objective.
7. **Research comparable communities** – Look at how similarly situated communities address the issue, particularly communities with similar geography, demographics, and development patterns.
8. **Seek public input** – Listen to residents, stakeholders, and affected property owners, especially those who may experience unintended consequences.
9. **Consider long-term effects** – Ask whether the change supports the community's long-range goals and whether future boards and commissions will be able to administer it consistently.
10. **Apply independent judgment** – While staff recommendations are valuable, board members have an independent responsibility to evaluate the evidence and make their own findings and recommendations.

Appendix H. Situations That Could Create Personal Liability for a Volunteer Board or Committee Member.

Board and Committee members are accountable for the quality of advice and expertise. Protection as a Volunteer may be lost if a member:

- Knowingly provides false information.
- Engages in fraud or corruption.
- Accepts bribes or has undisclosed conflicts of interest.
- **Acts outside the scope of their official duties.**
- Violates civil rights or other laws.

In those situations, liability arises from the misconduct itself, not from the recommendation.

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

MICHAEL LARSON and SUSAN
LARSON,

Petitioners,

Case No.: 21-AP-9-P

vs.

THE MONROE COUNTY PLANNING
COMMISSION and GREY PROPERTIES, LLC,

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 Resolutions No. P22-21 and P23-21 approving variances for two separate lots to allow construction of a house on each lot. After fully briefing the matter, the parties, through counsel, appeared before the Court for oral argument on December 1, 2022.

I. Factual and Procedural Background

Respondent Grey Properties (the “applicant”) owns two properties, Lot 12 and Lot 13 (“subject property”), located in Key Largo, Florida. Each subject property consists of a single platted lot that is approximately 2,500

square feet. (Petitioners' Exhibits F and G- Staff Report at P. 4). For each property the applicant requested a setback variance from Monroe County to build a separate house on each lot. On September 29, 2021, the Monroe County Planning Commission conducted a hearing on both applications. Petitioners, the Larsons, live at a house adjacent to the subject properties and appeared at the hearing to voice their objection to the requested variances. At the conclusion of the hearing, the Planning Commission approved both variance requests.

On October 1, 2021, the Monroe County Planning Commission adopted Resolution No. P22-21 granting a variance to Lot 13, and Resolution No. P23-21 granting a variance to Lot 12. On January 18, 2022, Petitioners filed their Petition for Writ of Certiorari seeking to have the court quash Planning Commission Resolutions No. P22-21 and P23-21.

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

As set forth in the Monroe County Land Development Code ("LDC") Section 131-1, in the subdivision where the subject property is located, the required primary front yard setback is 25 feet and the required rear yard

setback is 20 feet. The applicant requested approval for a variance of 9 feet from the required 25-foot primary front yard setback and a variance of 10 feet from the required 20-foot rear yard setback. 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.

In this case, the Planning Department staff report found the variance application to be “in compliance” with all eight of these standards.

(Petitioners’ Exhibits F and G-Staff Report). After reviewing the staff reports, the variance applications, and hearing from the applicant and members of the public, the Planning Commission concluded the applicant demonstrated that all the required standards set forth in the LDC had been met. (Petitioners’ Exhibits A and B-Resolutions P22-21 and P23-21).

Petitioners argue that Resolutions P22-21 and P23-21 are not supported by competent substantial evidence and that the Planning Commission misapplied LDC Section 102-187(d) which is a departure from the essential requirements of law. Petitioners also argue that the “Objectors” (the witnesses that testified in opposition to the application) were denied due process at the Planning Commission hearing.

A. Competent Substantial Evidence

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). Here, Petitioners contend that the record does not contain legally sufficient evidence to support a finding that the applicant satisfied each of the eight standards required by LDC Section 102-187(d), and thus, Resolutions P22-21 and P23-21 are not supported by competent substantial evidence. The Court agrees. There is insufficient evidence to support the following standards: standard (2) failure to grant the variance would result in exceptional hardship to the applicant; standard (4) property has unique or peculiar circumstances; and standard (8) the variance is the minimum necessary to provide relief to the applicant.

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) (citing *Bd. of Cty. Cmm'rs of Dade Cty. v. First Free Will Baptist Church*, 374 So. 2d 1055 (Fla. 3d DCA 1979)). In this case, the applicant attached a site plan to the application depicting an 840 square foot “footprint” of a proposed structure for each lot. When the applicant was asked in the application to describe how the variance standards in LDC Section 102-187 will be met, the applicant answered for the first standard: “without this variance lot will not have space for a SFR.” (Petitioners’ Exhibits C and D-application). For the remaining standards, the applicant simply wrote, “correct.” *Id.*

At the September 29, 2021 hearing on the application, the Planning Commission was presented with evidence including the variance application, the site plan, boundary surveys, the planning department’s staff reports, the oral presentations, and public comments.

i. Exceptional hardship/unique circumstances

In order to grant a variance, the applicant must demonstrate that failure to grant the variance would result in exceptional hardship to the applicant. LDC section 102-187(d)(2). The Monroe County Code 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 does not qualify as exceptional hardship.” LDC section 101-1. In this case, the applicant did not establish that its “burden” “substantially differs in kind or magnitude”

from the other ninety owners of 50x50 ft. lots in the Lazy Lagoon Subdivision.

When asked in the application to describe how the failure to grant the variance would result in exceptional hardship to the applicant, the applicant simply stated, “correct.” In the report submitted to the Monroe County Planning Commission (“Staff Report”), Devin Tolpin, Principal Planner, through Emily Schemper, Senior Director of Planning & Environmental Resources states that “[s]taff agrees that failure to grant the variance would result in an exceptional hardship to the applicant.” (Petitioners’ Exhibits F and G-Staff Report at P. 4.) Specifically, they note, “compliance with the required primary front yard setback would result in an available building depth of 5 feet.” *Id.* This is not the test for determining exceptional hardship nor is it evidence of exceptional hardship.

However, section (1) of the Staff Report also notes the following:

“The subject property consists of a single platted lot that is approximately 2,500 square feet. Many of the platted lots within the Lazy Lagoon Subdivision are similar in size. A large portion of single family residences constructed on only a single lot within this subdivision are situated within the setbacks as required pursuant to LDC Section 131-1...”
(Petitioners’ Exhibits F and G-Staff Report at P. 4)

This statement does inform the test for exceptional hardship and it directly contradicts the staff’s finding of an exceptional hardship because it establishes the burden of constructing a home on a small lot is shared by many other property owners in the subdivision. Thus, the applicant’s burden

does not “substantially differ in kind or magnitude” from the other nearby lot owners as required to find a hardship under LDC Section 102-187(d)(2).

For the same reasons the hardship finding is not supported by competent substantial evidence, the Court finds that the Planning Commission’s finding that the property has unique or peculiar circumstances, is not supported by competent substantial evidence. For LDC section 102-187(d), standard (4), the planning staff determined that “the subject property has a unique or peculiar circumstance that applies to this property but does not apply *to all other properties* within the IS zoning district.” (Petitioners’ Exhibits F and G-Staff Report at P. 5). However, the test is not whether the unique or peculiar circumstances apply to *all other properties* within the zoning district. Here, the size of the subject property is the same as or similar to other properties in the zoning district. The Staff Report admits that many other platted lots in the subdivision are similar in size but have accommodated single family residences on a single lot within the required setbacks thus disproving the contention that the subject property has unique or peculiar circumstances. There is no evidence in the record of unique or peculiar circumstances upon which a variance could be granted.

ii. Minimum necessary to provide relief

LDC section 102-187(d), standard (8) requires the variance to be the minimum necessary to provide relief to the applicant. In the application, when asked if the variance is the minimum necessary to provide relief to the

applicant, the applicant states, “correct.” (Petitioners’ Exhibits C and D-application). As noted, the applicant also attached a site plan depicting an 840 square foot footprint of a proposed structure for each lot. However, the site plan did not identify the size/placement of the house, including the number of levels or the square footage of the structure the applicant actually intends to build on each lot.

In reference to criteria (8), the Staff Report states, “staff confirms that the variance is the minimum necessary to provide relief to the applicant.” (Petitioners’ Exhibits F and G-Staff Report at P. 6). The Staff Report also notes that the variance “is necessary in order for the property owner to construct a single-family residence of the proposed footprint and size.” (Petitioners’ Exhibits F and G-Staff Report at P. 4).

At the hearing, Commissioner Wiatt asked Ms. Schemper if staff could “provide justification of approving 840 square feet of buildable area” stating, “I mean, was there any thought given to whether or not that was more than necessary, less than necessary?” (Tr. 41-42). Ms. Schemper responds that the proposed setback is based on the requested variance submitted by the applicant, and “considering the footprint of the area” it is a “reasonable setback.” (Tr. 42). She states, “minimum necessary, it is a little subjective. We look and we try to see if it seems like a reasonable approach by the person who’s proposing it.” (Tr. 43). Ms. Schemper goes on to state, “[t]his seems to be pretty in line, typical with what people are

trying to build as a modest-size house, you know, a typical-size house.” (Tr. 43-44).

Concerned neighbors submitted a Power Point Presentation showing that a smaller variance would result in a 700 square foot “minimum footprint” and allow the applicant to build a 1-bedroom/1-bath house or a 2-bedroom/2-bath house on grade. (Petitioners’ Exhibit H).

At the conclusion of the hearing, Commissioner Wiatt states the following: “So, again, my way of thinking, and trying to cut to the quick here a little bit would be, you know, we approve the variance based on the fact that it’s a buildable lot and cannot be built on without a variance, but the question then becomes how much of a variance. And without anything else to hang my hat on with respect to the size of the variance, I would yield to the staff and whether that’s a reasonable number.” (Tr. 51).

It is precisely the point that there is nothing on which to “hang a hat” which leads the Court to conclude there is no competent substantial evidence that the variance is the minimum necessary to provide relief to the applicant. There is no evidence in the record to establish that the variance is the minimum necessary to provide relief to the applicant, and there is evidence that it is not the minimum necessary.

B. Essential requirements of the law

“A ruling constitutes a departure from the essential requirements of law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice.” *Miami-Dade County v. Omnipoint*

Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003) (internal quotation and citation omitted). Thus, 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 Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).

Petitioners argue that the Planning Commission departed from the essential requirements of law by failing to apply the correct legal standard of “minimum relief” contained in LDC section 102-187(d)(8). As described *supra*, the planning staff and the Planning Commission focused on what they believed was “typical” “modest” and “reasonable” as opposed to the “minimum necessary to provide relief.” The Planning Commission departed from the essential requirements of law when it relied on these standards without a factual foundation to support the finding that the variance proposed was the minimum necessary. It appears that the Planning Commission simply adopted the Staff Report recommendation which was based on the applicant’s proposal without giving any consideration to the Objector’s presentation that provided evidence that the variance was not the minimum necessary to provide relief to the applicant. The planning staff and the Planning Commission adopted the variance proposed by the applicant which represents the amount necessary “in order for the property owner to construct a single-family residence for the proposed footprint and size” as opposed to the “minimum necessary to provide relief to the

applicant.” This is an incorrect application of the law which constitutes a departure from the essential requirements of the law.

C. Due Process

As adjacent landowners, Petitioners have standing to participate in the quasi-judicial Planning Commission hearing and have a constitutional right to present their case. *See Carillon v. Seminole County*, 45 So. 3d 7, 10 (Fla. 5th DCA 2010). “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 Entertainment, LLC v. Florida Department of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019). “The extent of procedural due process protection varies with the character of the interest and nature of the proceeding involved.” *Carillon*, 45 So. 3d at 9. Therefore, there is no single unchanging test which may be applied to determine whether the requirements of procedural due process have been met. *Id.* In this case, since the Court finds there is not substantial competent evidence in the record to support the Planning Commission’s Resolutions and that the Planning Commission departed from the essential requirements of the law, the Court need not undertake this analysis to address the Petitioner’s contention that they were denied due process in the hearing before the Planning Commission.

IV. Conclusion

Since the Court finds there is not substantial competent evidence in the record to support the Planning Commission’s decision to grant the

variances and that the Planning Commission departed from the essential requirements of the law, the Petition for Writ of Certiorari is **GRANTED**, and the Resolutions granting the variances (P22-21 and P23-21) are **QUASHED**.

DONE AND ORDERED at Key West, Monroe County, Florida this Thursday, March 2, 2023

44-2021-AP-000009-A0-01PK 03/02/2023 10:34:58 AM

Judge Timothy Koenig, Circuit Judge
44-2021-AP-000009-A0-01PK 03/02/2023 10:34:58 AM

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