

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

JOHN STEWART JAKES,

Petitioner,

v.

**ORANGE COUNTY BOARD OF
COUNTY COMMISSIONERS,**

Respondent.

CASE NO.: 2010-CA-7716-O

WRIT NO.: 10-18

Petition for Writ of Certiorari.
Decision of the Orange County Board of
County Commissioners.

Robert L. Sirianni, Jr., Esquire,
for Petitioner.

John P. Lowndes, Assistant County Attorney
for Respondent.

Before T. TURNER, LATIMORE, GRINCEWICZ, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Johns Stewart Jakes (“Jakes”), seeks issuance of a writ of certiorari to quash Respondent, the Orange County Board of County Commissioners’ approval of the Orange County Environmental Protection Commission’s recommendation to uphold the determination of the Environmental Protection Officer’s denial of Petitioner’s application for a minor modification to his 1998 boat dock construction permit. The Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Summary of Facts and Procedural History

As gathered from the record, on August 10, 1998, Petitioner, John Stewart Jakes (“Jakes”), was issued a permit no. 98-146 from Orange County’s Environmental Protection Division (“EPD”) to construct a boat dock for his property located on Lake Tibet in the Butler chain of lakes in Orange County.¹ The permit was obtained pursuant to Chapter 15, Article IX, Section 15-341 of the 1988 Orange County Code (“1988 Code”).² The permit allowed for a maximum of 1,800 square feet total for the boat dock that included a terminal platform of 576 square feet.³ On October 16, 1998, the EPD approved plans for the building permit that allowed a maximum of 800 square feet for the terminal platform portion of the boat dock. Jakes constructed the dock in accordance with the permit and in full compliance with the 1988 Code. Subsequently, Jakes installed a jet ski platform. According to Jakes, it was sometime in the year 2000 when he installed the jet ski platform initially underneath the boat dock where it remained for a length of time. Jakes then moved the jet ski platform out from underneath the boat dock and tethered it to the ground adjacent to the dock where it then permanently remained on open water.

On March 2, 2007, an Environmental Protection Officer (“EPO”) observed that Jakes had added the jet ski platform to his boat dock. Thus, on June 20, 2007, a Non-Compliance Inquiry letter was sent to Jakes stating that he either remove the jet ski platform within 30 days or obtain

¹ The Court notes that a copy of permit no. 98-146 was not provided in the record for the Court’s review. Instead, the record includes a copy of the general permit that Jakes was issued by the Florida Department of Environmental Protection on October 5, 1998. However, the testimony and other documents provided in the record provide the Court with sufficient information for rendering a decision.

² The Petition refers to the ordinance as “the 1998 Code” as Jakes pulled his dock permit in 1998 based on the ordinance in effect at that time. The ordinance was originally adopted under the 1988 Code and remained the same until the Code was amended in 2004.

³ In the Petition and portions of the record, it is stated that the boat dock was permitted for a maximum total of 1,700 square feet, but at the February 23, 2010 hearing before the BCC, EPD Manager Lori Cunniff stated that upon her review of the permit, the boat dock was permitted for maximum total of 1,800 square feet.

an additional permit for the jet ski platform within thirty days. On August 4, 2008, an EPO observed that the jet ski platform was still in place and on September 3, 2008, EPD again notified Jakes of the alleged Code violations. Subsequently, on January 20, 2009, an EPO observed that the jet ski platform was still in place. Accordingly, on February 6, 2009, the EPD sent Jakes a Notice of Violations letter that assessed a \$2,000 penalty and included a proposed consent agreement under which Jakes would agree to remit payment of the penalty and, within 30 days of receipt, either remove the jet ski platform or submit an application to construct a dock as a means of obtaining an “after-the-fact” permit. On May 29, 2009 Jakes paid the \$2,000 penalty, but he did not execute the consent agreement nor did he remove the platform or seek the required permit.

On June 7, 2009, Jakes requested approval from the EPD for the jet ski platform to be considered a “minor modification” to the previously permitted boat dock. Jakes stated that, because the jet ski platform was uncovered, adjacent to the boat dock, and designated for mooring purposes, it did not increase the size of the boat dock and thus, did not require an additional permit. On July 6, 2009, the EPD denied Jakes’ request and responded that a new dock permit would be required for the jet ski platform citing Article IX section 15-346(f) of the Code which states “... any modification that increases the size of the terminal platform shall not be considered a minor modification.”

On July 15, 2009, Jakes sent the EPD a Written Notice of Appeal of Denial of Application for Minor Modification that was heard by the Orange County Environmental Protection Commission (“EPC”). At the first public hearing, on September 30, 2009, the EPC determined that the matter should be continued until it could conduct a survey of Jakes’ property. The hearing was re-set to October 28, 2009 and continued again to complete the survey and to

gather more information. Upon completion of the survey, the third hearing was held on December 16, 2009, where the EPC determined that a new boat dock permit must be obtained in order for the jet ski platform to remain in place.

Subsequently, Jakes submitted a Notice of Appeal and then an Amended Notice of Appeal on December 30, 2009 to the BCC appealing the EPC's final decision. In the Amended Notice of Appeal, Jakes raised numerous issues including whether the jet ski platform was grandfathered under the 1988 Code that was silent as to the definition of "terminal platform". The matter was heard by the Orange County Board of County Commissioners ("BCC") on February 23, 2010 whereupon the BCC affirmed the recommendation of the EPC. The BCC held that the 2004 Code was correctly applied, the jet ski platform was not a minor modification, and thus, Jakes must obtain a new boat dock permit from the EPD.

Arguments

Jakes argues that the BCC failed to provide him with procedural due process, departed from the essential requirements of the law, and failed to support its findings with competent substantial evidence when it: (1) determined that 2004 Code provisions applied to his jet ski platform that should have been grandfathered in pursuant to the 1988 Code; (2) improperly denied Jakes a waiver per Chapter 15, Article IX, Section 350 of the Code; and (3) determined that the jet ski platform increased the size of the boat dock's terminal platform in violation of the 2004 Code.

Conversely, the BCC argues that: (1) Jakes was afforded procedural due process; (2) The BCC observed the essential requirements of the law by applying the correct provisions of the 2004 Code; and (3) The BCC's decision was based on competent substantial evidence.

Standard of Review

Where a party is entitled to seek review in the circuit court from a quasi-judicial decision of local government, the circuit court is limited in its review to determining: (1) whether due process of law was accorded; (2) whether the essential requirements of law were observed; and (3) whether the decision is supported by competent substantial evidence. *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000); *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995); and *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982). The burden of proof is on the petitioner to show that a challenged decision of local government is illegal. *Phil's Yellow Taxi Cab Co. of Miami Springs v. Carter*, 134 So. 2d 230, 232 (Fla. 1961). In order to constitute a departure from the essential requirements of law, there must be a violation of a clearly established principle of law resulting in a miscarriage of justice. *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983). The BCC's interpretation and application of its own code is entitled to great deference by the reviewing court and the court will not depart from the contemporaneous construction of the code unless the construction is clearly erroneous. *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002).

Discussion

Due Process and Retroactive Application of the 2004 Code

First, the Court reviews whether Jakes was provided due process. From review of the record including the hearing transcripts and audio recording, it is clear that Jakes was provided ample notice and the opportunity to be heard on the decisions he challenged throughout the appeal process with the EPC and the BCC. *Jennings v. Dade County*, 589 So. 2d 1337, 1340-41 (Fla. 3d DCA 1991). Jakes specifically argues that he was denied due process because the 2004 Code was applied to him retroactively and thus, deprived him of a vested right. This argument

appears to be based on a premise that Jakes has a perpetual right under his original permit to make changes to his dock and/or to build additional structures to his lakefront property without obtaining a new permit and a premise that because he installed his jet ski platform in 2000, he is exempt from the provisions in the 2004 Code.

At the February 23, 2010 hearing, Jakes stated that he installed the jet ski platform initially underneath the existing boat dock sometime in 2000 until it was subsequently moved to its current location adjacent to the dock. On the other hand, the aerial photographs viewed at the hearing did not reveal the existence of the platform until 2006. The Court acknowledges that because the jet ski platform was a floating tethered platform that may have bobbed up and down under the water depending on the varying water levels over the years, the appearance of the jet ski platform may have been blocked from view in earlier photographs. Thus, the evidence is questionable as to when the jet ski was installed and when it was removed from underneath the boat dock and placed on open water.

However, even if the jet ski platform was placed on open water prior to the 2004 Code amendments, Jakes' argument lacks merit for the following reasons:

(1) The addition of the jet ski platform was outside of what the original permit allowed which was only the boat dock with a maximum of 800 square feet for the terminal platform portion of the dock. There was no provision in the permit that allowed a jet ski platform; and

(2) The 2004 Code has permissible retroactive effect, particularly against an unpermitted structure. "Retroactive application is constitutionally permissible if it does not violate due process by abrogating a vested right." *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479, 485 (Fla. 5th DCA 2004)(citations omitted). Because the jet ski platform was not part of the original permit nor was it permitted subsequently, Jakes fails to

show that he was had a vested right to install the platform over open water regardless of its size and notwithstanding the amendments to the Code. Further, it is reasonable to interpret that the 2004 amendments to the Code have retroactive application because the amendments contained “grandfather” provisions in Section 15-346(d) for the repair and maintenance of docks unpermitted and built prior to 1988 when the County first adopted the Code. Therefore, Jakes has no vested right to exceed the limits of his 1998 dock permit or to ignore the 1988 Code and its amendments. *Lakeland Regional Medical Center v. Agency for Health Care Administration, et al.*, 917 So. 2d 1024, 1032 (Fla. 1st DCA 2006) (holding that a vested right must be more than an expectation of continued existing law). Accordingly, the Court finds that Jakes was accorded due process by the BCC and the EPC and it was proper to apply the 2004 Code to the issues pertaining to the jet ski platform.

Application for a Waiver

Jakes’ argument that the BCC improperly denied him a waiver per Chapter 15, Article IX, Section 350 of the Code, is without merit as the Court finds nothing in the record showing that Jakes applied for a waiver that was that then denied by the EPD, the EPC, or the BCC. Instead, the record reflects that the EPD, the EPC, and the BCC supported the option for Jakes to apply for a waiver and variances to resolve the matter and these efforts were reiterated at the February 23, 2010 hearing.

Terminal Platform under the 2004 Code

Jakes argues that even if the Court finds that the 2004 Code was correctly applied, his jet ski platform did not increase the size of the boat dock’s terminal platform. This argument centers around two sections of the 2004 code addressing the definition, modification, and size of the terminal platform portion of docks. Section 15-346(f) of the 2004 Code that states: “Any

modification that increases the size of the terminal platform shall not be considered a minor modification.” Section 15-323 provides:

Terminal platform means that portion of a dock beginning at the terminal end of the access walkway. The terminal platform shall be designed for the mooring and launching of vessels or other water-dependent activities. The size calculation for the terminal platform does not include any uncovered area adjacent to the dock designated for mooring purposes.

Jakes argues that based on the last sentence of Section 15-323, his jet ski platform did not increase the size of his terminal platform because it is adjacent to the dock, is uncovered because it has no roof, and is used for mooring purposes.

At the December 16, 2009 hearing, a lengthy debate ensued as to whether the jet ski platform was used for mooring purposes or for storage of the jet skis. At the February 23, 2010, the Environmental Protection Division Manager, Lori Cunniff, who was involved with drafting the 2004 Code, provided the BCC with a slide presentation wherein she informed the BCC that the intent of the language was to allow pilings to be installed adjacent to the terminal platform of a dock such that a floating vessel could be moored between the dock and the pilings. According to Ms. Cunniff, this open water area adjacent to the dock, between the dock and the pilings, was what the BCC intended when it adopted Section 15-323 of the Code.

Discussion and testimony at the December 16, 2009 hearing also addressed what the word “uncovered” meant per the Code. From the information provided by Ms. Cunniff and Section 15-322 of the Code addressing the purpose and the intent of the Code, among the reasons Orange County limits the size of dock platforms, floating platforms, or other structures is because they block sunlight from penetrating the water thus inhibiting the growth of plants underneath the water and the propagation of fish and other animals in the area. Accordingly, Ms. Cunniff explained that “uncovered” in the Code means that the mooring area was not shading the

bottom grasses which is why an uncovered, open water mooring area adjacent to a dock, is not counted in the terminal platform size. Therefore, from time to time, boats may be moored in such an area, but they would not block sunlight as much as a permanent platform would. Accordingly, water is covered by a platform as well as a dock or roof. While the Court's review would have been easier if the Code specifically defined the term "uncovered", the information provided by Ms. Cunniff in conjunction with the Code's intent provides sufficient support to find that the jet ski platform was not "uncovered" and thus, did not fall under the exception to the terminal platform size limit. So although the jet ski was adjacent to the dock and not connected to it and while it is possible to conclude that it was designed for mooring purposes as opposed to storage, it was not an "uncovered" area. Thus, it was not a minor modification or an exception to the size limit of the terminal platform. Once the jet ski was moved out from underneath the dock, it then increased the covered area of the lake thus subjecting it to the restrictions of the Code. Further, as gathered from the record, by adding the jet ski platform, the total terminal platform became 903.9 feet thus it exceeded the 800 square foot maximum per the original permit.

In light of the complicated issues debated at length addressing the jet ski platform in relation to the original permit, the BCC at the February 23, 2010 hearing unanimously voted in favor of the motion to uphold the position of the EPC and to require that Jakes apply for a new permit for the jet ski platform as a floating structure platform separate from the original permit for the boat dock in effort to facilitate a less complicated and quicker permitting process. The Court finds that whether a determination was made that the jet ski platform increased the terminal platform to where the size limit was exceeded or whether it was determined to be an additional separate dock, either way the end result requires that a new permit be obtained.

Conclusion

Based on the foregoing, this Court finds that: (1) Due process was accorded to Jakes throughout the hearing process and in compliance with the governing Code provisions; (2) The essential requirements of law were followed by the BCC including adherence to the governing Code provisions; and (3) The decision by the BCC was supported by competent substantial evidence, including testimony and documentation provided by the EPD staff at the hearings.

Therefore, it is hereby **ORDERED AND ADJUDGED** that Petitioner, John Stewart Jakes' Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
28th day of June, 2012.

/S/

THOMAS W. TURNER
Circuit Court Judge

/S/

ALICIA L. LATIMORE
Circuit Court Judge

/S/

DONALD E. GRINCEWICZ
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to: **Robert L. Sirianni, Jr., Esquire**, Stanton & Gasdick, P.A., 400 North New York Avenue, Suite 215, Winter Park, Florida 32789 and **John P. Lowndes, Assistant County Attorney**, Orange County Attorney's Office, 201 South Rosalind Avenue, 3rd Floor, Orlando, Florida 32801 on this 28th day of June, 2012.

/S/

Judicial Assistant