

**BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY**

In re: CITY OF TAMPA,

Petition for Varianc.
_____ /

Case No. 14-EPC-002

**FINAL ORDER
ON CITY OF TAMPA'S PETITION
FOR VARIANCE OF TAMPA PORT AUTHORITY RULE V.A.3.a.(3)**

BACKGROUND

On March 25, 2014, the City of Tampa (Petitioner) submitted a Petition for Variance to the Environmental Protection Commission of Hillsborough County (EPC), pursuant to Section 1-2.50, Rules of the EPC and Paragraph 5.b.2. of the Amended Interlocal Agreement between the Tampa Port Authority (TPA) and the EPC dated June 23, 2009, for a variance of the maximum structure extension requirement contained within Subsection V.A.3.a.(3), Submerged Lands Management Rules of the TPA regarding construction of a public dock on the Hillsborough River. Specifically, the Petitioner requests to increase the maximum structure extension allowance into the Hillsborough River from 25% to no more than 27.5%, as depicted in the current plans identified in the application on file with the EPC. The Petitioner requests a variance of the above rule section for the dock construction based on a hardship and asserts the underlying purpose of the rule is still achieved.

FINDINGS OF FACT

1. The Petitioner owns two adjacent parcels at 1812 North Highland Avenue and 202 West 7th Avenue in the City of Tampa, Folio #1924250000 in Hillsborough County. The parcels are located at the City of Tampa's Water Works Park which includes seawalled water frontage measuring approximately 800 feet on the Hillsborough River. The Petitioner also owns the submerged lands lying waterward from the seawall in this portion of the river.
2. In seeking to satisfy public demand for riverfront access in the Tampa Heights community, expand The Tampa Riverwalk, and avail themselves of the riparian rights to use the waterfront and property rights to use the submerged lands, the Petitioner began planning a public dock

and kayak launch for Water Works Park as early as 2006, as documented in The Tampa Riverwalk Master Plan prepared by EDAW, Inc.

3. Beginning January 2013, the Petitioner initiated research and conducted pre-application meetings with nine (9) regulatory agencies to evaluate siting and design options for a public dock structure and other waterward improvements. Agencies consulted included the Southwest Florida Water Management District (SWFWMD), Florida Department of Environmental Protections (FDEP), TPA, EPC, Hillsborough County City-County Planning Commission (TPC), Florida Fish and Wildlife Conservation Commission (FWC), the Florida Department of State – Division of Historical Resources (DHR), U.S Fish & Wildlife Service (USFWS), and U.S. Army Corps of Engineers (USACE).
4. In August 2013, permit applications were submitted to SWFWMD, USACE and TPA, including a request for authorization of an eight (8) slip dock, with additional temporary mooring space for a water taxi. The design and location of the public dock structure proposed in the applications were constrained by multiple site conditions, rules, and policies, and represented the best fit to address these constraints. Subsequently, the application was determined to qualify as a Minor Work Permit and was forwarded to the EPC for review on September 20, 2013.
5. Compliance with the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA) required the proposed dock footprint and configuration be engineered to meet the 20:1 slope requirement for the fixed portion of the dock approach. Compliance with this requirement and other constraints imposed by site conditions, regulatory rules and policies, and economic feasibility necessitated that a small portion of the dock structure, approximately 120 square feet, extending up to approximately 7.7 feet beyond TPA's maximum structure extension limit described in Subsection V.A.3.a.(3) of TPA's Submerged Lands Management Rules.
6. Following additional consultation with FWC and USFWS, the plans were modified. On December 27, 2013, these plans were submitted to the SWFWMD, USACE, and EPC showing a reduction of the proposed dock structure to three (3) slips to address secondary impacts that may be associated with imperiled species frequenting the adjacent Ulele Springs. The modified plan indicated a possible future expansion of the dock to the originally proposed footprint with nine (9) slips. The proposed maximum structure extension beyond the limit specified in Subsection V.A.3.a.(3) of TPA's Submerged Lands Management Rules remained as proposed in the August 2013 application.

7. In February 2014, revised plan sets were submitted to each permitting agency (SWFWMD, EPC, USACE) to remove and replace minor features unrelated to the overall dock structure and location.
8. On February 19, 2014, SWFWMD issued Environmental Resource Permit No. 43034702.003 (ERP) to the petitioner authorizing construction of the 3-slip public docking facility and kayak launch as proposed in the revised February 2014 plans submitted by the Petitioner.
9. The EPC and USACE applications are currently under review. The proposed dock extends approximately 109.9 feet into the Hillsborough River from the seawall. The total navigable width of the river at this location is approximately 408.7 feet, resulting in a proposed structure extension of approximately 27% of navigable river width or approximately 7.7 feet beyond the 25% distance.
10. The dock length is designed with the minimum length necessary to achieve its intended use, including provision of public river access to the Tampa Heights community and compliance with ADA/ABA regulations and numerous other agency rules and policies.
11. The Petitioner has expended substantial sums to research permitting requirements, prepare and revise permit applications, and engineer the dock structure in a good faith effort to comply with numerous agency rules and policies, including the Tampa Port Authority Submerged Lands Management Rules Section II.D.1.b. which states:

[t]he public interest determination requires an evaluation of the probable impacts of the proposed activity on Jurisdictional Lands and the associated waterbody. All direct and indirect impacts related to the proposed activity as well as the cumulative effects of those impacts shall be taken into consideration. Relevant factors to be considered include: conservation, general environmental and natural resource concerns, wetland values, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, aesthetics, economics, public health and safety, relative extent of the public need for the proposed use or activity, reasonable alternative locations and methods to accomplish the objective of the proposed use or activity, potential detrimental effects on the public uses to which the area is otherwise suited, the effect on cultural, scenic and recreational and the needs and welfare of the people.

12. The contractor in good faith seeks to build the dock according to the plans that have been approved by SWFWMD, and according to the construction schedule agreed to with the Petitioner.

13. The completion of the balance of the park construction is scheduled for June 2014. Additional costs would be expected to be incurred if the contractor is required to re-mobilize to the site to construct the dock beyond that date.
14. The dock cannot be constructed any further landward based on the applicable ADA slope requirements and the engineering requirements to approach the seawall at the specific height above the mean high water line.
15. The dock cannot be relocated further north, where the Hillsborough River is wider, due to FWC and USFWS concerns regarding proximity of the dock structure to the Ulele Springs restoration project and potential secondary impacts to imperiled species, i.e. the West Indian Manatee.
16. The dock, and its ultimate configuration, cannot be located further south because 1) the DHR concerns regarding proximity to a submerged cultural resource (e.g., Civil War-era shipwreck), and 2) the navigable width of the Hillsborough River decreases thereby resulting in a higher percentage of structural extension into the river to comply with ADA/ABA standards.
17. No further reduction in the length of the proposed dock or alternative location is feasible or practical since other design alternatives were evaluated and resulted in configurations which would encroach into other regulatory setbacks, over the living shoreline or create potential violations of the ADA.
18. Based on all the agency constraints, the location of this proposed dock is the only place available along the entire waterfront of the park. Any further restriction could prevent the petitioner from beneficial use of its waterfront.
19. Pursuant to Section 1-2.50(3), Rules of the EPC, the Petitioner published notice of the variance application and the April 2, 2014 public hearing in La Gaceta March 21, 2014.
20. Pursuant to Section 1-2.50(4), the Commissioners considered the application, the Executive Director's recommendation, and the comments of the public at a special meeting of the EPC on April 2, 2014.

CONCLUSIONS OF LAW

21. This variance is requested pursuant to Paragraph 5.b.2. of the Amended Interlocal Agreement between the Tampa Port Authority (TPA) and the EPC dated June 23, 2009 and Section 1-2.50, Rules of the EPC, which states as follows:

1-2.50 REQUEST FOR VARIANCE OR WAIVER

(a) Upon application, the Executive Director may recommend to the Commission that a variance or waiver be granted from the provisions of the rules adopted pursuant to Chapter 84-446, where the Petitioner demonstrates:

(1) A substantial hardship as defined by section 120.542, F.S., or that a violation of the principles of fairness as defined by section 120.542, F.S., would occur, and

(2) The purpose of the underlying rule can be, or has been, achieved by other means, and

(3) The provision from which the variance or waiver is being sought did not originate with the DEP where the variance must be considered by the DEP pursuant to section 403.201, F.S. or the variance or waiver must be considered by the DEP or the Southwest Florida Water Management District pursuant to Chapter 120, F.S. Additionally, the Commission does not process variances or waivers of state-delegated rules.

(b) The application must specify the rule for which the variance or waiver is requested, the type of action requested, the specific facts that would justify a variance or waiver, and the reasons why and the manner by which the purposes of the underlying rule would still be met.

(c) Notice of the application must be published by the Petitioner in a newspaper of general circulation summarizing the factual basis for the application, the date of the Commission hearing, and information regarding how interested persons can review the application and provide comment.

(d) The Commission will consider the application, the Executive Director's recommendation, and the comments of the public at a public hearing during a Commission meeting. The Commission shall grant, in whole or part, or deny the application by written decision supported by competent substantial evidence. The Commission may impose additional conditions in a variance or waiver.

22. The Petitioner demonstrated that strict imposition maximum structure extension of 25% into the Hillsborough River would result in an economic and legal hardship if it were not granted a variance in this specific situation. The Petitioner has demonstrated the underlying purpose of the rule will be achieved by the following:
- a. The width of the Hillsborough River at the proposed location is considerable, 408.7 feet, and there are no obstacles to visibility that might otherwise cause the dock to be a navigational hazard.
 - b. A light pole of sufficient height will be installed on the dock, and will be lit continuously from dusk to dawn to ensure that the structure is clearly visible to night-time boaters.
 - c. The Petitioner will install and maintain lighting on the distal ends of the structure. There shall be multiple white lights which will be readily visible from both the north and south directions of the river and shall light the dock to the extent the outline is clearly visible to boat traffic. No red, green, or yellow lights will be installed on the structure and no white lights will be placed above or below another white light.

- d. Dock reflectors will be installed on the northwest and southwest corners of the dock structure to further enhance visibility for night-time boaters.
 - e. The property on the opposite shoreline is currently owned by the School Board of Hillsborough County and is operated as a public school. On March 5, 2014 the Petitioner received verification from the General Manager of Construction of Hillsborough County Public Schools that based on the “Facilities Workplan for 2013-2017,” there are no current plans by the School Board to construct any structures in the submerged lands of the Hillsborough River across from the proposed project.
 - f. The SWFWMD has approved the ERP permit for the construction of the proposed structure and as part of their analysis the SWFWMD considered and balanced the criteria, in accordance with Section 373.414, Florida Statutes, regarding whether the structure will adversely affect navigation or the flow of water or cause harmful erosion or shoaling.
 - g. Within Twelve (12) months of the entry of this Final Order, the Petitioner shall process and submit for City Council approval an ordinance seeking to reduce the vessel speed limit on the Hillsborough River as an additional measure for public safety. The proposed restricted speed zone will be 100 meters upstream and downstream from the center line of the proposed structure at a minimum. The proposed speed restriction will be no greater than minimum wake speed as identified in Chapter 327, Florida Statutes and Chapter 68D-23, Florida Administrative Code.
23. This variance applies only to the Petitioner’s subject dock and is intended to increase the maximum extension of a structure into the Hillsborough River at the location of the proposed dock from 25% to no more than 27.5% as depicted in the application currently on file with the EPC.

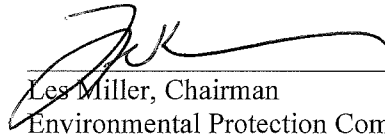
ORDER

24. For the foregoing reasons, the requested variance from Subsection V.A.3.a.(3), Submerged Lands Management Rules of the Tampa Port Authority requiring the maximum structure extension requirement of no more than 25% is granted and the structure extension allowance is increased to no more than 27.5% into the Hillsborough River as depicted in the current plans identified in the application on file with the EPC.

NOTICE OF RIGHTS

The EPC's proposed action on this variance shall become final unless a timely appeal via writ of *certiorari* to the 13th Judicial Circuit is filed with any appropriate fee. A copy of the appeal must be provided to the EPC Legal Department, 3629 Queen Palm Dr., Tampa, Florida 33619.

DONE AND ORDERED this 2nd of April, 2014 in Tampa, Florida.



Les Miller, Chairman
Environmental Protection Commission
of Hillsborough County
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