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

HAROLD MILLS, CASE NO.: 2015-CA-0002829-O

Petitioner,

v.

TOWN OF WINDERMERE,
a Florida municipality,

Respondent.
_____/

Petition for Writ of Certiorari
from the decision of the Town Council of
Windermere.

Samual A. Miller, Esq.,
for Petitioner.

Thomas J. Wilkes, Esq., Heather Ramos, Esq.,
and Paul H. Chipok, Esq., for Respondent.

Before WOOTEN, DOHERTY, and TURNER, JJ.

PER CURIAM.

**FINAL ORDER DENYING SECOND AMENDED PETITION FOR WRIT OF CERTIORARI**

Petitioner Harold Mills sought certiorari review of the Town of Windermere's denial of his request for a variance from a zoning regulation. We have jurisdiction under Florida Rule of Appellate Procedure 9.030(c)(3). The Second Amended Petition for Writ of Certiorari is denied.

Harold Mills purchased a four-acre piece of property in the Town of Windermere. The property is located on Lake Butler and contains a man-made island surrounded by a lagoon, which is connected to Lake Butler. Mills is building a house on the property and plans to add a guest house. Mills also wishes to build a gazebo on the island. The gazebo would be several

hundred feet from Lake Butler. Before Mills purchased the property, it contained a house called the Kon Tiki, and a portion of the house was built on the island. That structure burned down.

On August 28, 2013, in a letter to Windermere's Project Planner, Mills requested a variance to build the gazebo. In the letter, Mills states that he "requests a variance from the requirement that no structure may be erected within 50 feet of the normal high water elevation set forth in Article V, Section 5.05[.]03 . . . ." (App. Ex. D at 1-2.) The island is approximately seventy feet wide by 220 feet long. According to this letter, the proposed location for the gazebo would be approximately twenty to twenty-four feet "from the normal high water line of the lagoon surrounding the island . . . ." (*Id.* at 2.)

Mills presented his request to the Development Review Board, as dictated by Windermere's Land Development Code. The Development Review Board denied the request on October 15, 2013. Mills then appealed the decision to the Windermere Town Council.

On November 12, 2013, the Town Council held a hearing on Mills's variance request. At the hearing, Mills argued that the variance was necessary due to the irregular shape of the island. Mills pointed out that the gazebo would be over 300 feet from Lake Butler, and therefore the gazebo does "meet the elevation required for a structure on this site." (Hr'g Tr. 8:22-9:4.) Council members asked various questions, including questions from Council Member Armstrong regarding the noise from a planned television and handling grease from a grill on the gazebo.

The Kon Tiki was also discussed. According to the Council members and the town manager, the Kon Tiki was built before the property became part of Windermere, and Orange County would have done the permitting, but no one was able to find the permit allowing creation of the island. At the end of the hearing, the Town Council voted 3-2 to deny the variance request. Council Member Armstrong was one of the two votes in favor of the variance.

Following the hearing, the Council did not enter a written order. To try to obtain one, Mills's attorney wrote a letter to Windermere's town manager on February 3, 2015, more than fourteen months after the Town Council's hearing on the matter. In the letter, Mills's attorney stated that Windermere "improperly failed to approve Mr. Mills'[s] request to construct a gazebo on his property. Mr. Mills demands immediate correction of this failure." (App. Ex. H. at 1.) The letter laid out several arguments for why Windermere should do this, including that a variance was not required. The letter also noted difficulty Mills's attorney had in obtaining the Land Development Code. In a footnote, Mills's attorney mentioned the Kon Tiki and how he could not find any adverse action against the Kon Tiki's owner regarding the portion of the house on the island. Mills's attorney also wrote, "There is clear evidence of officials taking photos of Mr. Mills'[s] property and exposing them publicly for personal agendas although the photos clearly do not illustrate any violations of town regulations." (*Id.* at 5.)

On February 25, 2015, in response to the earlier letter, Windermere's attorney sent a letter to Mills's attorney purporting to be "the written notice required by subsection 166.033(2) of the Florida Statutes" memorializing the Council's denial of the variance. (App. Ex. I.) Mills then filed this certiorari proceeding to appeal that denial.

## I. Standard of Review

In a certiorari proceeding to review a governmental agency's decision regarding a variance request, the circuit court must determine whether the lower tribunal's decision was supported by competent substantial evidence, whether there was a departure from the essential requirements of the law, and whether procedural due process was accorded. *Wolk v. Bd. of Cnty. Comm'rs*, 117 So. 3d 1219, 1223 (Fla. 5th DCA 2013).

## II. Essential Requirements of the Law

Mills argues that Windermere departed from the essential requirements of the law. First, Mills argues that a variance was not required. Second, Mills argues that Windermere's interpretation of the Code requiring a fifty-foot setback from the lagoon would deprive Mills of any beneficial use of the island. Third, Mills contends that the gazebo does comply with the setback requirement. Fourth, Mills argues that Windermere incorrectly concluded that the hardship justifying the variance was self-imposed.

### A. Variance not required and denial of any beneficial use of land

Mills makes several arguments that a variance was not required, including that a gazebo is not subject to the setback requirements. The arguments that a gazebo is not subject to the set-back requirement and that the fifty-foot setback would deprive Mills of any beneficial use of his property were not raised at the hearing before the Town Council. The arguments regarding the setback requirement's applicability to gazebos were presented to Windermere, but not until February 3, 2015, in a letter addressed to the town manager. This was more than one year after the Town Council's hearing and decision denying the variance.

In *Fort Lauderdale Board of Adjustment v. Nash*, 425 So. 2d 578, 578 (Fla. 4th DCA 1982), the respondent owned property that contained "both a single family residence and a structure variously referred to as a tiki hut or patio bar." The structure violated setback lines imposed by the city's ordinances, so the respondent sought a variance. *Id.* at 578-79. The city denied the variance, and the respondent successfully petitioned the circuit court for certiorari review of the denial. *Id.* at 579. In the circuit court, the respondent argued that the structure was not a building, and thus the setback requirements did not apply to it, and a variance was not required. *Id.* The Fourth District rejected this argument because it was not made to the Board of

Adjustment below, among other reasons. *Id.* Because it was not made there, "the court acted inappropriately by basing its reversal on a theory espoused for the first time in the petition for review." *Id.* The issues of whether the patio bar was a structure and whether the setback requirements applied to it had "never properly been placed in issue in these proceedings. Those determinations are thus precluded in this forum." *Id.*

Just as the respondent in *Nash* did not make his arguments regarding the inapplicability of the zoning ordinance and need for a variance to the board below, Mills failed to argue to the Town Council that a variance was not required or that applying a fifty-foot setback would deprive him of any beneficial use of the island (Hr'g Tr. 8:16-9:4). He did make the gazebo argument, but did so more than one year after the hearing and to the town manager, not to the Town Council. These questions were therefore never properly before the Town Council and thus are precluded from being considered here. *See generally Parlier v. Eagle-Picher Indus., Inc.*, 622 So. 2d 479, 481 (Fla. 5th DCA 1993) ("There is a general rule of appellate review, based on practical necessity and fairness to the opposing party and the trial judge, that issues not timely raised below will not be considered on appeal.").

B. Compliance with zoning regulation

Mills argues that the gazebo does comply with the zoning regulation, as it is more than fifty feet from Lake Butler and the setback requirement applies to Lake Butler, not the lagoon. To support this argument, Mills points to the Land Development Code provision containing the setback requirement and the definition of "normal high water elevation."

"Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration." *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999). But if the agency's construction is clearly

erroneous or unreasonable, then the court will not defer to it. *Id.* Zoning ordinances follow statutory rules of construction, and, therefore, "an ordinance should be given its plain meaning and any doubts should be construed in favor of the property owner." *Shamrock-Shamrock, Inc. v. City of Daytona Beach*, 169 So. 3d 1253, 1256 (Fla. 5th DCA 2015).

Mills requested a variance from Article V, Section 5.05.03, of the Land Development Code, which is titled "Structures Near Lakes, Canals or Runs," and states, "No structure to include accessory uses shall be erected or placed within 50 feet of the normal high water elevation and no fill shall be permitted below that normal high water elevation." Section 5.06.02, the definitions section for Article 5, states, "Normal high-water elevation, in this division of this Land Development Code, is set at 97.5 feet MSL (Mean Sea Level) for Lake Bessie and 99.5 feet MSL for other Butler Chain water bodies." Mills argues that this definition means that there is no normal high water elevation for lagoons under the Code. Mills contends that if the drafters wanted the normal high water elevation to apply to lagoons, then they would not have used the phrase "water bodies," especially because the definition in the Land Development Code for "waterway" specifically includes lagoons. Windermere, Fla., Land Dev. Code § 5.06.02 (1992). Mills argues that the lagoon is not a Butler Chain water body because the statutory language and the town documents suggest that this phrase only applies to the Butler Chain of Lakes.

Division 5.05.00, which contains the setback requirement, does not have a definitions section, but does incorporate the definitions set forth in "Chapter 16, flood damage prevention; chapter 24, planning and development; part II, Code of Ordinances;[1] Charter and general

[1] It is not clear what "part II, Code of Ordinances" refers to, as nothing in the Code of Ordinances is labeled "part II." Instead, the Code of Ordinances is divided into Chapters, beginning with Chapter 1 and ending with Chapter 36. The Land Development Code is separate from the Chapters and is divided into Articles, beginning with Article I and ending with Article XV.

ordinances of the town." § 5.05.01. "Water body" is not defined in any of these provisions.[2]

As noted above, zoning ordinances follow statutory rules of construction. *Shamrock-Shamrock, Inc. v. City of Daytona Beach*, 169 So. 3d 1253, 1256 (Fla. 5th DCA 2015). The plain and ordinary meaning should be given to a word that the legislature did not define. *See Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Schs., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009). To ascertain the plain and ordinary meaning, courts look to the dictionary definition. *Id.*

"Waterbody" is defined in the Oxford Dictionary as "[a] body of water forming a physiographical feature, for example a sea or a reservoir." Oxford Dictionaries (last visited Nov. 17, 2015), http://www.oxforddictionaries.com/us/definition/american_english/waterbody. It appears that a lagoon is a water body under the plain and ordinary meaning of the phrase, as it is a body of water forming a physiographical feature. Because the lagoon is connected to Lake Butler, Windermere's interpretation that Mills's lagoon is a Butler Chain water body is not clearly erroneous or unreasonable.

If the drafters meant for the normal high water elevation to apply to the Butler Chain of Lakes, then they would have used the phrase "Butler Chain of Lakes," not "Butler Chain water bodies." Interpreting "Butler Chain water bodies" as applying to a lagoon that connects to Lake Butler is neither clearly erroneous nor unreasonable. Therefore, Windermere did not depart from the essential requirements of the law in finding that the gazebo does not comply with the setback requirements because it is closer than fifty feet to the lagoon.

C. Hardship

In *Wolk v. Board of County Commissioners*, 117 So. 3d 1219, 1224 (Fla. 5th DCA 2013), the Fifth District Court of Appeal laid out the procedure that the circuit court must follow in

[2] "Water body" is defined in section 5.02.02, but those definitions apply to Division 5.02.00 Environmentally Sensitive Lands, rather than all of Article V. The setback requirement is contained in Division 5.05.00 Floodplains.

reviewing determinations of variance requests. In *Wolk*, the Board of Adjustments denied the variance, the Board of County Commissioners granted the variance, and the circuit court upheld the county commissioners' decision. *Id.* at 1221-22. Under the county's Land Development Code, the variance request must satisfy six criteria to be granted. *Id.* at 1221. Although there was evidence that the Board of Adjustment determined these criteria, there was no evidence that the county commissioners did so, even though the Code states that the appeal of the Board of Adjustment's decision to the county commissioners is heard de novo. *Id.* at 1222, 1224. The Fifth District held that the circuit court should have answered the question of whether the county commissioners' decision to grant the variance was lawful "by determining whether the Board applied the six criteria listed in the Code." *Id.* at 1224. When the circuit court failed to do this, it departed from the essential requirements of the law. *Id.*

Under Windermere's Land Development Code, the Development Review Board may recommend granting a variance under certain circumstances. § 10.02.02. "The development review board shall first determine whether the need for the proposed variance arises [o]ut of the physical surroundings, shape, topographical condition or other physical or environmental conditions that are unique to the specific property involved." § 10.02.02.(a).

After this determination, and similarly to the Land Development Code in *Wolk*, the Windermere Development Review Board cannot grant a variance unless it makes a positive finding regarding each of six criteria. § 10.02.02.(b). The first of these six is that "[t]here are practical or economic difficulties in carrying out the strict letter of the regulation." § 10.02.02.(b)(1). The Development Review Board's decision may then be reviewed by the Town Council, but the Code does not state the standard of review that the Council applies to the Development Review Board's decision. *Id.*

Because the Development Review Board and the Council denied Mills's request for a variance, they must have found that at least one of those criteria was not met. The only criteria that Mills argues in his Second Amended Petition that he also argued to the Council is that the need for the variance arises out of the shape of the property (section 10.02.02.(a)), and that "there are practical or economic difficulties in carrying out the strict letter of the regulation." § 10.02.02.(b)(1). Windermere contends that Mills has reasonable use of his property, as he can still build a house and guesthouse on other locations on it. Mills does not argue that Windermere failed to follow the requirements of the Land Development Code by disregarding the criteria listed in section 10.02.02.

To qualify for a variance, an exceptional and unique hardship must be demonstrated. *Nance v. Town of Indialantic*, 419 So. 2d 1041, 1041 (Fla. 1982). The circuit court then reviews whether the council's denial of the variance is supported by competent substantial evidence. *Id.*

Because the Council denied the variance, we must determine whether competent substantial evidence exists that Mills lacked an exceptional and unique hardship. Under Windermere's Code, this falls under subsections 10.02.02.(a) and (b)(1). Subsection (a) contains the exceptional and unique aspect: "the need for the proposed variance arises [o]ut of the physical surroundings, shape, topographical condition or other physical or environmental conditions that are unique to the specific property involved[.]" And subsection (b) contains the hardship aspect: "there are practical or economic difficulties in carrying out the strict letter of the regulation."

"A variance . . . is not justified unless no reasonable use can be made of the land without the variance." *Herrera v. City of Miami*, 600 So. 2d 561, 562 (Fla. 3d DCA 1992). Granting a

variance requires "the critical finding that, without the variance, it is virtually impossible to use the land as it is presently zoned." *Id.* at 562-63.

In the few cases where Florida courts held that the variance should have been granted, the owners could not build on the property and comply with the zoning requirements. *Anon v. City of Coral Gables*, 336 So. 2d 420 (Fla. 3d DCA 1976); *City of Coral Gables v. Geary*, 383 So. 2d 1127 (Fla. 3d DCA 1980). In *Geary*, the owner could not build in accordance with the regulations due to the lot's shape. *Geary*, 383 So. 2d at 1128. In *Anon*, the house could not be built on the residentially-zoned lot because of the setback requirement, so the owner needed the variance to build in accordance with the zoning. *See Anon*, 336 So. 2d at 423. The court specifically distinguished it from those cases where the owners could use the land in another way, because in *Anon*, denying the variance was akin to "a complete denial of the use of the owner's property." *Id.*

In this case, Mills can and is building a house (and plans to build a guest house) on his property. The setback requirement does not cause him to lose all reasonable use of the property. This is similar to the pool enclosure in *Town of Ponce Inlet v. Rancourt*, 627 So. 2d 586 (Fla. 5th DCA 1993). In *Rancourt*, a pool enclosure built to comply with the zoning regulations would leave some unusable space on the property. *Id.* at 587. Instead of building such an enclosure, the owners built one that did not comply with the setback requirements and then sought a variance. *Id.* The Fifth District held that the owners did not meet the requirements for a variance, as the hardship was only an economic one and was self-created. *Id.* at 588.

The Fifth District's decision in *Rancourt* demonstrates that compliance with zoning regulations that render a portion of the property unusable is not a hardship that justifies a variance. Instead, it is a hardship that is only economic and self-created. That is the situation

here. Even if the island on the property is allegedly unusable because a gazebo cannot be built on it, Mills can still use the rest of the property in compliance with the zoning regulations, just as the owners in *Rancourt* could have built a pool enclosure that complied with the setback requirement, but rendered a portion of their property unusable. Mills is building a house and plans to build a guesthouse on the property. He is not denied the reasonable use of his property by not being permitted to build a gazebo on one particular spot on his property. Because the Fifth District held that the hardship in *Rancourt* was only an economic one and was self-created, the alleged hardship here is also characterized the same way.

There is no evidence that practical or economic difficulties exist in Mills building a residence on his property that complies with the setback requirements, as section 10.02.02.(b)(1) requires for a variance. Because there is no hardship justifying a variance, the Town Council did not depart from the essential requirements of the law in denying Mills's request for one.

Mills failed to preserve several of his arguments regarding Windermere's alleged departure from the essential requirements of the law for certiorari review. Windermere's interpretation of water body in the definition of normal high water elevation is not unreasonable or clearly erroneous, and thus Mills failed to demonstrate that the gazebo is in compliance with the Land Development Code. Finally, Mills did not allege a hardship sufficient to justify granting a variance. Thus, Windermere did not depart from the essential requirements of the law.

## III. Due Process

Mills makes three arguments regarding how he was denied due process. First, Mills argues that Windermere did not provide him with or make available to him a full and complete copy of its Land Development Code. Second, Mills argues that the Town Council was composed of biased decision makers that harassed him with irrelevant questions when he tried to obtain the

variance. Third, Mills argues that his due process rights were violated when Windermere unreasonably delayed in providing a formal decision denying the variance.

A. Failure to provide copy of Land Development Code

Mills argues that he was denied due process because Windermere did not provide him with a full copy of the Land Development Code. Mills asserts several facts regarding the availability of the Code, such as that it "was not available online, and was in the form of a notebook with handwritten notes." (Second Am. Pet. Writ Cert. 20.)

This argument was not made to the Town Council. Nowhere does it appear in the appendices before the Court that Mills asked Windermere to provide him with the Code so that he could review whether his proposed gazebo would comply with it, nor does it state anywhere that he was having difficulty complying with the Code because he could not locate it. This argument was presented to Windermere, but not until the February 3, 2015, letter to Windermere's town manager.[3] This was more than a year after the Town Council's hearing and decision denying the variance. Because this argument was not presented to the Town Council, it is unavailing.

B. Lack of impartial decision makers

Next, Mills argues that he was denied due process because the Council members were biased. Mills argues that this partiality is demonstrated by "officials" taking pictures of his property and exposing them publicly for personal agendas, that the variance request faced more scrutiny than others' variance requests, and that the Council members asked questions that were irrelevant to the variance request.

[3] The letter does mention that Mills's attorney "had previously requested to inspect a complete copy of the Land Development Code for a separate issue and was informed that the one single copy that the Town maintained was not in the Town and[] was unavailable to be reviewed in its entirety." (App. Ex. H.) No additional details are given regarding this "separate issue," such as whether it was on behalf of Mills or another client or whether it was related to the property at issue here or a different piece of property or when this request was made.

The appendices before the court do not contain any information regarding officials photographing Mills's property or the identities of these officials, just the assertion in the February 3, 2015, letter that this was done. There is also nothing regarding the level of scrutiny faced by other variance seekers. Thus, it is impossible for the Court to review these claims.

The Court does have a transcript of the proceedings before the Council. Mills asserts that questions regarding the volume of the television and how grease would be handled were irrelevant and thus demonstrated bias. The Council member that brought up the grease and the television volume was Council Member Armstrong, and he voted in favor of the variance. Therefore, the allegedly irrelevant questions do not demonstrate that the Council was biased.

C. Delay in formal decision denying variance

At the hearing held on November 12, 2013, the Town Council voted to deny the variance, but a written order was not created. On February 25, 2015, more than fourteen months later, Windermere's attorney sent a letter to Mills's attorney purporting to be "the written notice required by subsection 166.033(2) of the Florida Statutes" and memorializing the Council's decision. (App. Ex. I.) Mills asserts that this delay of over one year in presenting a final order deprived him of due process because it "prohibited Mr. Mills from resorting to a court for judicial appeal." (Second Am. Pet. Writ Cert. 22.)

Mills does not cite any law supporting his position that the delay violated his due process rights. In cases where there was a delay in administrative proceedings, Florida courts held that the aggrieved parties must demonstrate how the delays prejudiced them. For example, in *Carter v. Department of Professional Regulation, Board of Optometry*, 633 So. 2d 3, 4-5 (Fla. 1994), the proceedings lasted approximately six years and violated statutory time deadlines. This could not compel dismissal of the disciplinary order, however, because there was no showing that the

delay "impaired the fairness of the proceedings or the correctness of the action and may have prejudiced the licensee." *Id.* at 5. Because the statutes did not set out sanctions for violating the time deadlines, the Supreme Court of Florida held that a harmless error analysis was appropriate. *Id.* at 6. *See also Sch. Bd. of Leon Cnty. v. Weaver*, 556 So. 2d 443, 446 (Fla. 1st DCA 1990) (denying appellant's request to reverse final order because it was not rendered until ten months after submission of the recommended final order, in violation of the statutory deadline, because appellant "failed to demonstrate that the Commission's delay has otherwise impaired the fairness of the proceeding or the correctness of the action taken."); *W. Acceptance Co. v. State, Dep't of Revenue*, 472 So. 2d 497, 501 n.2 (Fla. 1st DCA 1985) (denying reversal of order entered three years after hearing and beyond regulatory time limit because reversal is only appropriate when the untimeliness impairs fairness of proceedings or correctness of action and results in prejudice; no showing below or in record regarding prejudice).

One Florida case did reverse an agency order due to untimeliness in its entry, but in that case the licensee demonstrated how the delay prejudiced him. *Kasdaglis v. Dep't of Health*, 827 So. 2d 328, 332 (Fla. 4th DCA 2002). In *Kasdaglis*, the department violated the statutory time limit to enter a final order within ninety days after the recommended order was submitted to the parties. *Id.* at 330. Instead, the final order was entered almost eight months after the oral ruling. *Id.* at 331. The licensee argued that he was prejudiced by the delay because he could not continue teaching, he was uncertain of his rights because of the board's oral rulings, he could not renew his malpractice insurance because he did not know how to classify the pending action, and his practice suffered financial losses. *Id.* at 332. The Fourth District held that this delay substantially affected the fairness of the proceedings, and the remedy for this was to reverse the order. *Id.*

As demonstrated above, it is rare for a court to reverse an agency's order due to a delay in rendering a final decision. Florida courts are reluctant to do so even when statutory deadlines were violated. Florida courts only reverse orders based on this argument when the aggrieved parties demonstrate how the delays prejudiced them. The licensee in *Kasdaglis* was successful because he could point to specific instances of prejudice—including financial losses and harm to his practice directly attributable to the delay. *Id.*

In this case, Mills's sole contention of how the delay harmed him is that it "prohibited Mr. Mills from resorting to a court for judicial appeal." (Second Am. Pet. Writ Cert. 22.) This does not seem to impair the fairness of the proceedings or the correctness of the action resulting in prejudice to Mills. Mills also does not explain how he was prevented from pursuing a petition for writ of mandamus forcing the Council to enter an order. In *Milanick v. Town of Beverly Beach*, 820 So. 2d 317, 318 (Fla. 5th DCA 2001), the petitioner sought to compel the town to record an ordinance it passed. The Fifth District held that a petition for writ of mandamus was the appropriate vehicle for relief, and the town had a clear legal duty to perform the ministerial act of recording the ordinance. *Id.* at 319-20. The court stated, "In mandamus, the relief sought may very well be rendition of a promised order." *Id.* at 319.

The Court rejects Mills's argument that he was denied due process by Windermere's delay in entering a written order. Mills fails to demonstrate how the delay impaired the fairness of the proceedings or the correctness of denying the variance resulting in prejudice to him. He also does not explain why he did not pursue a petition for writ of mandamus seeking to compel Windermere to enter a written order.

Mills did not show that Windermere denied him due process. Some arguments were not preserved for certiorari review, there is no evidence of bias before the Court, and Mills did not illustrate prejudice caused by the delay in entering a written order.

## IV. Prior structure on the island

In the Reply to the Response to the Second Amended Petition for Writ of Certiorari, Mills argues that the existence of a prior structure on the island necessitates granting the variance. Mills contends that the existence of this structure necessarily means that either Windermere granted a variance or that Windermere ratified construction of the structure and is now estopped from arguing that Mills created the hardship.

The existence of an earlier structure on the island does not prove that Windermere granted a variance or ratified its construction. During the Council meeting, the Kon Tiki was discussed. According to the Council members and the town manager, the Kon Tiki was built before the property became part of Windermere and Orange County would have done the permitting, but no one was able to find the permit allowing creation of the island. Thus, it is more probable that Windermere did not grant a variance for the prior structure because the property was not within the town limits of Windermere when it was built.

Mills does not cite any law supporting his contention that a prior structure evidences that the town ratified its construction. Mills also did not raise this argument before the Council or in his Second Amended Petition for Writ of Certiorari. Mills did note in a footnote in his February 3, 2015, letter to the town manager that

> [p]reviously, there was a portion of a house, known as "Kon Tiki," built on the island with the main, connected portion of the house built on the mainland. Akerman has not been able to locate evidence regarding any denial or adverse action by Town against the prior owner with respect to the

> portion of that house built on the island. That entire structure was later destroyed by fire.

(App. Ex. H 4 n.2.) The Second Amended Petition for Writ of Certiorari repeats this almost verbatim.

The letter, which was dated more than one year after the Town Council's hearing and decision, does not state that the existence of the prior structure means that Windermere ratified construction of it or granted a variance for it. Nor does the letter request that the variance be granted because of that prior structure. The Second Amended Petition for Writ of Certiorari also does not contain these arguments. Thus, these arguments were raised for the first time in the Reply to the Response to the Second Amended Petition for Writ of Certiorari.

An argument may not be raised for the first time in a reply. *Parker-Cyrus v. Justice Admin. Comm'n*, 160 So. 3d 926, 928 (Fla. 1st DCA 2015). In *Department of Highway Safety & Motor Vehicles v. Dellacava*, 100 So. 3d 234, 236 (Fla. 5th DCA 2012), the circuit court granted a petition for writ of certiorari based on an argument raised for the first time in the reply to the response to the petition. The Fifth District quashed the circuit court's order, holding that the circuit court deprived the respondent of due process by granting the petition based on an argument raised for the first time in the reply. *Id.* It was a denial of due process because the respondent did not have an opportunity to address the argument. *Id.*

Thus, the Court will not grant the Second Amended Petition for Writ of Certiorari based on Mills's argument, as it was first raised in his Reply, which foreclosed Windermere from responding to it. Under the Fifth District's decision in *Dellacava*, granting the Second Amended Petition on this basis would violate Windermere's due process rights.

Mills did not preserve several of his arguments for certiorari review. Of the ones that were properly before the Court, they failed to demonstrate how Windermere departed from the essential requirements of the law or denied Mills due process.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Second Amended Petition for Writ of Certiorari is **DENIED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida, on this 30th day of November, 2015.

/S/
**WAYNE C. WOOTEN**
**Presiding Circuit Judge**

DOHERTY and TURNER, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Samual A. Miller, Esq.**, Akerman LLP, 420 S. Orange Ave., Suite 1200, Orlando, FL 32801; and **Thomas J. Wilkes, Esq., Heather Ramos, Esq., and Paul H. Chipok, Esq.**, GrayRobinson, P.A., P.O. Box 3068, Orlando, FL 32802-3068; on this 30th day of November, 2015.

/S/
Judicial Assistant