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November 12, 2024

Board of County Commissioners
c/o Jewel White, County Attorney, and
Kirby Kreider, Assistant County Attorney
315 Court Street
Clearwater, FL 33756-5165
Via Email To: jwhite@pinellas.gov and kkreider@pinellas.gov

**Re: Request for Continuance of Hearing on November 19, 2024
Amended Notice of Appeal and Request for Hearing as to
Issuance of Pinellas County Water & Navigation Division
Permit No. WND-24-00077 dated July 19, 2024
Issued to James P. Donovan
106 Harbor View Drive
Palm Harbor, FL 34683
My Clients: Brian Myrback & Lori Myrback, as Trustees of the
Myrback Family Revocable Trust dated October 15, 2015**

Dear Board of County Commissioners, Ms. White & Ms. Kreider,

This law firm represents Brian Myrback & Lori Myrback, as Trustees of the Myrback Family Revocable Trust dated October 15, 2015 (“the Myrback’s”), who reside at 104 Harbor View Drive, Palm Harbor, FL 34683.

Further to my client’s previous Notice of Appeal and Request for Hearing dated August 16, 2024 and the Pinellas County Water & Navigation Permit No. WND-24-00077 dated July 19, 2024 (“2024 Dredge Permit”), and issued to James P. Donovan (“Mr. Donovan”), who resides at 106 Harbor Drive, Palm Harbor, FL 34683, the purpose of this correspondence is to: (1) Request a continuance of the hearing set before the Board of County Commissioners on November 19, 2024 at 6:00 pm; *and* (2) Amend the Notice of Appeal and Request for Hearing dated August 16, 2024.

Request for Continuance of Hearing on November 19, 2024

Presently, the hearing before the Board of County Commissioner's is to either grant or deny the Myrback's requested quasi-judicial hearing on the issuance of the 2024 Dredge Permit. The Myrback's request a sixty (60) day continuance of that hearing, *or in the alternative*, that the Board grant the Myrback's requested quasi-judicial hearing and schedule it not sooner than ninety (90) days thereafter.

The basis for this request is the Myrback's and the undersigned attorney's inability to prepare for the hearing from the impacts of Hurricane Helene which severely flooded waterfront and low-lying properties along the west coast of Florida on September 26, 2024, and Hurricane Milton which impacted Pinellas County on October 5, 2024.

Specifically, Hurricane Helene entirely flooded the Myrback's home resulting in massive damages, the relocation of their family to a rental home, plus an enormous amount of time and effort to remove the destroyed walls, flooring, cabinetry, furniture, and countless personal items. To date, the home remains uninhabitable and the Myrback's are presently navigating the maze of private insurance carriers, insurance adjusters, contractors, inspectors and government aid programs and offices to assess the damage to their home, determine their options to rehabilitate or reconstruct, and obtain insurance proceeds and grants under their policies and government programs. Although Hurricane Milton's damage to their home was less severe, it further aggravated the pre-existing damage and negatively impacted their ability to address the damage from Helene due to power outages and the unavailability of gasoline.

Further, the undersigned attorney was not spared from Hurricane Helene, and although fortunate to have only a flooded garage, has been consumed by the preparation for two hurricanes, the on-going clean-up from Hurricane Helene, evacuation to the east coast of Florida for Hurricane Milton, and unexpected side effects from these storms. Collectively, the undersigned has only been able to perform a limited amount of work from late September through early November, and although nearly complete, the cleanup from Hurricane Helene remains ongoing.

Given that the Myrback's and their undersigned counsel may not be able to attend the hearing set for November 19, 2024, it is important to highlight that Florida law is well settled that the *wholesale denial* of the requested quasi-judicial hearing would result in a patent "failure to afford procedural due process" under first tier certiorari review. At minimum, the Myrback's are entitled to an evidentiary hearing, the right to present evidence and cross-examine witnesses, all before an impartial adjudicator. *Miami-Dade County v. City of Miami*, 315 So. 3d 115 (Fla. 3d DCA 2020); *Carillon Community Residential v. Seminole County*, 45 So. 3d 7 (Fla. 5th DCA 2010); *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So. 2d 693 (Fla. 5th DCA 2001); *Miami-Dade County v. Reyes*, 772 So. 2d 24 (Fla. 3d DCA 2000); *Gulf & Eastern Development Corp. v. City of Fort Lauderdale*, 354 So. 2d 57 (Fla. 1978); *Florida International University v. Ramos*, 335 So. 3d 1221 (Fla 3d DCA 2021) *Miami-Dade County v. Snapp*

Industries, Inc., 319 So. 3d 739 (Fla. 3d DCA 2021); *Powell v. City of Sarasota*, 953 So. 2d 5 (Fla. 2d DCA 2006).

Of particular import to any blanket refusal to hold a quasi-judicial hearing are *Hess v. Hess*, 290 So. 3d 512, 517 (Fla. 2d DCA 2019), where the Second District found that the lower judge's declaration *before* opening and before hearing evidence that they would not consider a particular issue constituted pre-judging matter that denied due process, and *ABC Ventures, Inc. v. Board of County Commissioners of Brevard County*, 1996 WL 35065370 (Fla. Cir. Ct. 1996), where the Court found that a commissioner's motion to deny rezoning in the *beginning* of quasi-judicial hearing before receiving any evidence was cause to question the commissioner's impartiality.

For these reasons, the Myrback's request a sixty (60) day continuance of the hearing set for November 19, 2024, or in the alternative, that the Board grant the requested quasi-judicial hearing and that it not be scheduled for a minimum of ninety (90) days thereafter.

Amended Notice of Appeal and Request for Hearing

Grounds for Appeal

1. Failure to Comply with Required Ordinances

Substantively, the 2024 Dredge Permit would allow Mr. Donovan to dredge forty-two (42) cubic yards of earth from the south side of his dock. However, the permit application sought to dredge both the south and north sides of the dock, indicating Mr. Donovan's intention to construct a second boat lift on the north side of the dock and inside the Center 1/3 of his rear property line.

To be clear, the 2024 Dredge Permit is unprecedented in the County's history which has never issued a dredge permit for the west side of Harbor Drive in the St. Joseph Sound Aquatic Preserve as documented in an email from the Water & Navigation Division dated March 11, 2024.

And despite the County having never issued a dredge permit on the west side of Harbor Drive, over the past approximately sixty years since the 1960's approximately fifteen (15) properties have constructed docks and boat lifts dating back and enjoyed reasonable use of their submerged land for ingress and egress to their upland property.

These 15 properties specifically include Mr. Donovan's property where its first dock permit was issued to David Richards on November 12, 1971 (Permit No. P2049), and a second dock permit was issued to Kenneth Gibbs on October 11, 1989 (Permit No. RP16910589). Mr. Gibbs made several unlawful and unpermitted improvements to the dock by increasing its length and adding a boat lift outside the Center 1/3 of his rear property line sometime between 1989 and 2001 in violation of Section 58-555, LDC.

Mr. Gibbs then obtained the third dock permit on September 27, 2001 (Permit No. P30636-01), which made lawful Mr. Gibbs prior unpermitted dock extension and boat lift. This permit was issued based solely on his written agreement with his neighbor to the south and the Myrback's predecessor-in-title, Eric Feinstein, who agreed to the variance from the side setback requirements for the specific boat lift and dock design "as drawn" in the permit, which limited the capacity of the boat lift to a personal watercraft or similarly sized vessel about twelve (12) feet long.

Consequently, for at least the past 23 years, Mr. Donovan's property has enjoyed reasonable use of their submerged land for ingress and egress to their upland property *without* the issuance of any dredge permits, as have the other approximately fourteen (14) property owners along with west side of Harbor Drive also *without* the issuance of any dredge permits.

Therefore, the first ground for appeal is the 2024 Dredge Permit was issued in violation of Section 58-572, which requires a minimum of one affirmative response to subsections (1) through (5) and *cannot* be satisfied where:

- (1) The dredging is *not* connected with a public navigation or transportation project;
- (2) The dredging is *not* necessary for erosion control or the protection of upland riparian property;
- (3) The dredging is *not* necessary to improve ingress and egress with respect to upland riparian property;
- (4) The dredging does *not* involve filling; and
- (5) The dredging is *not* necessary to enhance the quality or utility of the submerged lands or the public health, safety and welfare generally.

Where it is undisputed that Subparagraphs (1), (2) & (4) are answered in the negative, Subparagraphs (3) & (5) are likewise answered in the negative where Mr. Donovan's property has enjoyed reasonable use of their submerged land for ingress and egress of boats to the upland property for at least 23 years *without* the issuance of any dredge permits.

Further, it is undisputed that Mr. Donovan's submerged land meets the minimum depth requirement of 18 inches under Section 58-543(f), LDC. Therefore, in the issuance of the 2023 Permit, the County determined that Mr. Donovan had "adequate water depth for the proposed boat use" under Section 58-543(h)(1).

Despite that determination, Mr. Donovan now seeks the 2024 Dredge Permit to accommodate a 27 foot boat which requires a *deep water dock* and is substantially larger than *all prior boats* which have used the dock and boat lift at this property.

Further, the 2024 Dredge Permit will not improve the ingress and egress of a boat to the Intracoastal Waterway, or the quality or utility of the submerged lands. Instead, it will only create an “underwater bathtub” at low tides which will allow the boat to float, but not escape the dredged bathtub. The dredge profile in the application clearly illustrates same.

Consequently, Mr. Donovan cannot satisfy the requirements of Section 58-572, LDC for the issuance of the 2024 Dredge Permit.

2. Environmental Damage

The 2024 Dredge Permit was also issued in violation of Section 58-530(b)(4-6), LDC, which requires a dredge permit to be “denied or modified” where the project would:

- (4) [B]e likely to adversely affect the water quality presently existing in the area or limit progress that is being made toward improvement of water quality in the area;
- (5) [H]ave a material adverse effect upon the natural beauty and recreational advantages of the county; *or*
- (6) [H]ave a material adverse effect upon the conservation of wildlife, marine life, and other natural resources, including beaches and shores, so as to be contrary to the public interest. (Italics added)

Section 58-533, LDC, elaborates on these environmental concerns and states as follows:

In order to provide protection for those habitats having a high degree of ecological value, proposed projects shall be specifically reviewed for adverse impacts to vegetated wetland areas; vegetative, terrestrial, or aquatic habitats critical to the support of listed species in providing one or more of the requirements to sustain their existence, such as range, nesting or feeding grounds; habitats which display biological or physical attributes which would serve to make them rare within the confines of the county, such as natural marine habitats, grass flats suitable as nursery feeding grounds for marine life, or established marine soil suitable for producing plant growth of a type useful as nursery or feeding grounds for marine life... (Italics added)

Likewise, the County’s Strategic Plan requires it to, “Practice Superior Environmental Stewardship where Section 3.2 is intended to preserve and manage environmental lands, beaches, parks and historical assets, and Section 3.3 is intended to protect and improve the quality of our water, air, and other natural resources.

With respect to all of these requirements, the 2024 Dredge Permit would have a materially adverse effect on the *water quality and clarity* in this area of the St. Joseph

Sound Aquatic Preserve, and in turn, the recreational advantages of the County. Further, the 2024 Dredge Permit would have a materially adverse effect upon the *conservation of seagrass* in and around the dredged area.

The Myrback's are investigating the anticipated environmental damages and would highlight County staff's "Field Report" dated March 1, 2024 which found "*dense seagrass on the left side*" of Mr. Donovan's dock in the *identical area* approved for dredging under the 2024 Dredge Permit. (Italics added) The Myrback's understand that Mr. Donovan's contractor provided conflicting information as to seagrass density from their field inspections performed on January 16, 2024 and February 20, 2022, but it is *unknown* how these conflicting reports satisfied the environmental criteria for the issuance of the 2024 Dredge Permit.

In addition, in obtaining the 2023 Permit which is presently on appeal and discussed below, Mr. Donovan's retained expert Terry Skapic testified before the Board of County Commissioners on December 12, 2023, that the existence of seagrass on the north side of the dock required the boat lift to be located on the south side. However, at that time of her testimony, Mr. Donovan had *already* obtained permits from the Army Corp of Engineers and Florida Department of Environmental Protection to dredge *both the south and north sides of the dock*. This is an astonishing abuse of the County's regulatory framework and makes a mockery of the Water & Navigation Division.

The Myrback's would note that Ms. Skapic has previously and emphatically testified that the County should *not* consider any seagrass reports or studies which are performed outside the growing season which runs from June 1st to September 30th, pursuant to the "Guidance on Surveys for Potential Impacts to Submerged Aquatic Vegetation," prepared by the Office of Resilience and Coastal Protection Florida Department of Environmental Protection and dated December 8, 2020. Obviously, this would *exclude* consideration of both seagrass reports from Mr. Donovan's contractors who performed their field inspections on January 16, 2024 and February 20, 2022.

3. Prior Alleged Dredging Along the West Side of Harbor Drive

The Myrback's would further note that the Water & Navigation Division's issuance of the 2024 Dredge Permit involves the assertion that the west side of Harbor Drive had been "previously dredged" to create a channel as part of the development of the Harbor Drive peninsula in the 1950's or 1960's, and the 2024 Dredge Permit is therefore considered "maintenance."

However, the Water & Navigation Division has not produced competent substantial evidence of the asserted dredging during that time period, *but even if that is correct*, any asserted "channel" along the west side of Harbor Drive and around the tip of the peninsula to Lungrun Cove has been long since abandoned. *To be clear, any asserted channel could not be reconstituted because it is presently obstructed by at least 15 different docks and boat lifts on top of its previous path.*

Another issue involves the application for the 2024 Dredge Permit which asserts that the “Affected Water Body” is “Lungrun Cove,” when in fact it is located in the St. Joseph Sound Aquatic Preserve.

4. Pending Appeal Regarding the Boat Lift’s Location

Section 58-533(a-b), LDC, specifically authorizes the Board of County Commissioners, Board of Adjustments and Appeals, and County staff to consider any, “*information supplied during the administrative and public hearings in the issuance or denial of permits under this article,*” under their “right to modify, amend, or alter any application” brought before them. (Italics added)

Consequently, it is appropriate to consider the *pending appeal* in that certain action styled *Brian Myrback and Lori Myrback, as Trustees of The Myrback Family Revocable Trust dated October 15, 2015 v. James P. Donovan and Pinellas County, a political subdivision of the State of Florida*, Case No. 24-0000001-AP-88B, Circuit Court, Pinellas County, State of Florida (“the Second Appeal”), involving the County’s issuance and approval to Mr. Donovan for Permit No. WND-20-00231-REV (“2023 Boat Lift and Dock Permit”).

In the Second Appeal the Myrback’s seek to *quash* the 2023 Boat Lift and Dock Permit issued to Mr. Donovan on the grounds that it interferes with the 2001 agreement between Mr. Gibbs and Mr. Feinstein under Section 58-505, LDC, and that the County failed to follow the plain language of Section 58-544(a)(2) in the issuance of the permit which limits analysis to only one “previously issued permit.”

Accordingly, if the Circuit Court rules in favor of the Myrbacks in the Second Appeal, the 2023 Boat Lift and Dock Permit will be quashed, and Mr. Donovan would be required to seek a variance from the side setback requirements for the boat lift from the Board of Adjustments & Appeals under the rigorous requirements of Section 138-231, LDC.¹

Therefore, at this time, Mr. Donovan is seeking to dredge the submerged land in and around the location of the boat lift while the location of that same boat lift is being challenged in the Circuit Court and is likely to be quashed. If that occurs and Mr.

¹ The Board of County Commissioners will recall that Mr. Donovan’s 2021 Boat Lift and Dock Permit was *partially quashed* in a unanimous opinion from the Circuit Court in the original lawsuit between the parties styled *Brian Myrback and Lori Myrback, as Trustees of The Myrback Family Revocable Trust dated October 15, 2015 v. James P. Donovan and Pinellas County, a political subdivision of the State of Florida*, Case No. 21-000014-AP-88B, Circuit Court, Pinellas County, State of Florida (“the First Appeal”). This involved the County’s issuance and approval of Permit No. WND-20-00231 (“2021 Boat Lift and Dock Permit”). In the First Appeal, the Circuit Court quashed the variance from the side setback requirements for the boat lift set forth in the 2021 Boat Lift and Dock Permit.

Donovan is unable to satisfy the criteria for a variance from the side setback requirements from the Board and Adjustments & Appeals, or is granted the variance which is again quashed as in the First Appeal, the boat lift would have to be removed from the south side of dock and relocated to the north side. The Board of County Commissioners will recall that it was the Water & Navigation Division's original recommendation to locate the boat lift on the north side of the dock in 2020.

Although it may be Mr. Donovan's strategy to complete the dredging as soon as possible so that, "the damage is done" in an effort to keep the boat lift on the south side of this dock, the Board of County Commissioners and County staff have, "the right to modify, amend, or alter" the 2024 Dredge Permit *to prevent any dredging and protect the environment pending final adjudication of all legal proceedings directed at the location of Mr. Donovan's boat lift under Section 58-533, LDC.*

Amendments to Notice of Appeal and Request for Hearing

Given that the 2024 Dredge Permit was only approved on July 19, 2024, neither the Myrbacks nor the undersigned attorney have had a full opportunity to investigate this dispute, and although this Amended Notice of Appeal and Request for Hearing is intended to be comprehensive, the Myrback's reserve the right to amend same with additional facts, legal issues, and supporting documentation.

Thank you for your assistance in this important matter, please confirm your receipt of this Amended Notice of Appeal and Request for Hearing, and that it will be presented to the Board of County Commissioners prior to and at the hearing set for November 19, 2024.

Sincerely,



EDWARD B. COLE, ESQUIRE
For the Firm

cc: Clients
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