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November 9, 2023

Pinellas County Board of County Commissioners
c/o Jewel White, County Attorney, and
Brendan Mackesey, Senior Assistant County Attorney
315 Court Street, 6th Floor
Clearwater, FL 33756-5165

Via Email Only To: jwhite@pinellas.gov and bmackesey@pinellas.gov

**Re: Supplement to Amended Notice of Appeal and Request for Hearing as to Issuance of Pinellas County Water & Navigation Division Permit No. WND-20-00231REV (Approved April 28, 2023) 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 & Mr. Mackesey,

As you know, this 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.

The purpose of this correspondence is to serve as a Supplement to the Amended Notice Appeal dated June 1, 2023, to address areas various factual and legal issues, *and clarify and/or obtain* the Water & Navigation Division’s position regarding the issuance of the disputed Permit No. WND-20-00231REV approved on April 28, 2023 (“2023 Permit”).

I. Mr. Feinstein’s Approval of the 2001 Permit Application “As Drawn” is a Condition of the Variance and Configuration of the Dock & Boat Lift

I am in receipt the Water & Navigation Division’s “Appeal/Case Description” and Notice of Hearings from Julie Simms dated October 23, 2023, and would like to confirm that the County *does not* consider Mr. Eric Feinstein’s approval of the “variances as drawn” in Permit No. P30636-01 (“2001 Permit”) to be a condition of the side setback variance for

the dock and boat lift which prevents its reconfiguration, despite the express language set forth in the 2001 Permit, the entire regulatory framework which is intended to keep docks and boat lifts in the Center 1/3 of the rear property line to protect the neighbors waterfront views, and the non-existence of any County Ordinance in 2001 which would permit the “reconfiguration” of a dock and boat lift without a new permit as discussed below in Section II.

More specifically, under Section 138-233, LDC, the Water & Navigation Division has approved the 2023 Permit *without the required variances* based upon the 2001 Permit, which relied entirely on Mr. Feinstein’s consent “as drawn,” where the 2023 Permit “does not meet the letter or the intent of the original standards required for such approval,” and “does not meet the letter or intent of the special standard or conditions.”

With respect to the 2001 Permit, the Myrback’s have filed the “Affidavit of Linda Feinstein,” and the Myrback’s predecessor-in-title, into the “Record of Appeal” which evidences that her husband, Eric Feinstein, “[w]ould never have approved any variances or drawings which could hold a boat larger than a personal watercraft because he loved the waterfront view and did not want it to be further obstructed. (Italics added)

II. Vested Rights & Grandfathering

Similarly, given that at the time Mr. Feinstein consented to the 2001 Permit there was *no* County Ordinance that would allow *reconfiguration* of a dock or boat lift without a new permit, both Mr. Feinstein and now the Myrback’s, as his successor-in-title, have a vested right for the approved configuration under the regulatory framework that existed in 2001, *unless* new construction is located entirely within the Center 1/3 of Mr. Donovan’s rear property line under Section 58-555, LDC, *or* a proper variance is obtained from the Board of Adjustments after due process to my client’s including notice and an opportunity to be heard.

In other words, Mr. Feinstein’s approval of the configuration of the dock and boat lift “as drawn” in the 2001 Permit cannot be broadened by the amendment of Section 58-544, LDC, in 2018.

The Myrbacks would further note that Mr. Donovan obtained Permit No. WND-22-00524 (“2022 Permit”) which allowed him to reconstruct the dock and boat lift in the same configuration set forth in the 2001 Permit. However, Mr. Donovan has apparently abandoned the 2022 Permit, and only used it *as a cover* to begin construction of the boat lift and dock which had not been approved by the Water & Navigation Division.

To date, the Water & Navigation Division has not provided any explanation as to how its issuance of the 2023 Permit can be reconciled with the Myrback’s vested rights and grandfathering of the regulatory framework in existence for the 2001 Permit.

III. Illegal Field Modifications to Dock by Mr. Donovan and his Predecessor-in-Title

Briefly, the Water & Navigation Division's Appeal/Case Description seems to tacitly approve the illegal field modifications made to the existing dock by Mr. Donovan and his predecessor-in-title, and states as follows:

Notably, aerials show that most of the stub out was removed by Dr. Donovan's predecessor in interest around 2007. This small remaining part of the stub out was removed by Dr. Donovan sometime after the May 2021 BOA Hearing discussed in the paragraph below.

More troublesome than this apparent lack of concern about the illegal field modifications, in the following paragraph the Water & Navigation Division seems to imply that it somehow mitigates the damage to the Myrback's waterfront view.

Consequently, the Myrback's request confirmation from Water & Navigation Division that such field modifications are illegal under applicable law, and that said modifications shall not be considered in these proceedings.

IV. Mr. Donovan does not have a Variance from the Side Setback Requirement for the Dock to Support the Issuance of the 2023 Permit

It is indisputable that Mr. Donovan does *not* have a variance from the side setback requirement to construct the dock and boat lift, *where a substantial portion of the dock and the entirety of the boat lift* are located outside the Center 1/3 as set forth in the exhibit attached hereto and incorporated herein.

Very specifically, the Housing and Community Developments correspondence dated May 5, 2021, which constitutes the "Order" from the Board of Adjustments and is attached hereto and incorporated herein, *is expressly limited to a variance for the length of the dock, and a variance for the side setback for the boat lift*, and states as follows:

Please be advised that by action of the Pinellas County Board of Adjustment and Appeals on May 5, 2021, *your request for a variance to allow for the construction of a private residential dock extending a total length of 50.5 feet from the seawall*, for the property located at 106 Harbor Drive in Palm Harbor, was conditionally approved based on the Board's concurrence with staff's findings and recommendation.

In addition, *your requested variance to allow for the construction of a private residential boat lift with a 4.7 foot side setback from the south property line* was conditionally approved based on the Board's determination that the request meets the criteria for granting variances found in Section 138-231 of the Pinellas County Land Development Code and Section 58-539 of the Pinellas County Code. (Italics added)

To be clear, and as set forth in the unambiguous language of this Order, *no variance was granted for the side setback for the dock*. Thereafter, the Myrback's appealed the Order to the Circuit Court for Pinellas County which in the attached and incorporated unanimous 3-0 ruling and 17 page opinion rendered on August 3, 2022, the Circuit Court *quashed the variance for the side setback for the boat lift* and held as follows:

Petition for Writ of Certiorari is **GRANTED**. The Variance Order issued by the Board on May 5, 2021 in the matter of VAR-21-15 is **QUASHED** *as to the portion granting the boat lift variance*. (Italics added)

Consequently, only the variance for the length of the dock survived the Circuit Court's review.

Mr. Donovan *does not* have a variance for the construction of the elongated 50.5 foot dock or boat lift located outside the Center 1/3 of his rear property line, where approximately the south four (4) feet of the elongated dock and the entirety of the boat lift are located outside the Center 1/3 as set forth in the attached exhibit. And again, the 2001 Permit expressly limits the configuration of the dock and boat lift "as drawn." These alone are valid reasons for the immediate revocation of the 2023 Permit.

However, and to date, neither the Water & Navigation Division nor the County Attorney's Office have provided a legally justifiable explanation of how the 2023 Permit was issued under these undisputed facts.

IV. The Water & Navigation Division Failed to Apply the Correct Law in the Issuance of the 2023 Permit

The Myrback's would clarify their position that the Water & Navigation Division failed to apply the correct law in the issuance of the 2023 Permit by ignoring and failing to apply Section 58-544, LDC, which *only permits consideration of one (1) previously issued permit* in the analysis of whether a variance is required for dock repair, reconstruction, and reconfiguration.

Instead of following Section 58-544, LDC, the Water & Navigation Division arbitrarily and capriciously approved the 2023 Permit entirely outside of the regulatory framework by marrying the variance for the length of the dock from the 2021 Permit with the variance for the side setbacks for the boat lift from the 2001 Permit as evidenced in the Appeal/Case Description which states as follows,

Therefore, Staff ultimately issued the subject permit revision reflecting the elongated dock (to 50.5') and boat lift in the same location reflected in the September 2021 Permit.

However, Section 58-544(a)(2), LDC, does not permit this "*mixing and matching*" of multiple permits in the determination of whether a variance is required, and there is no

substantial competent evidence to support the issuance of the 2023 Permit where it was approved without regard to the controlling ordinance.

As set forth in the Amended Notice of Appeal, the express language of Section 58-544(a)(2), LDC, only allows consideration of one (1) “previously issued” permit in the determination of whether a variance is required for a reconfiguration, and forbids multiple permits from being “*Frankensteined*” together as admitted by the Water & Navigation Division.

Consequently, if the Water & Navigation Division analyzed the 2023 Permit Application under the 2001 Permit, the application of Section 58-544(a)(2)(b), LDC, would require a variance because the *proposed dock is longer* than the dock in the 2001 Permit.

Alternatively, if the Water & Navigation Division analyzed the 2023 Permit Application under the 2021 Permit, Section 58-544(a)(2)(e), LDC, would require a variance because the *proposed boat lift* would be a “new structure” not included in the 2021 Permit and located entirely outside of the Center 1/3 of Mr. Donovan’s rear property line, recognizing that the Circuit Court quashed the side setback variance for the boat lift.

In addition, where it cannot be disputed that Mr. Donovan *did not* obtain a variance for that portion of the elongated 50.5 foot dock located within the side setback discussed above, Section 58-544(a)(2)(e) is further violated because there is approximately 32 square feet of new and previously unconstructed dock located in the side setback on the southwest portion of the dock (approximately 8 feet in length by 4 feet in width).

Further in the alternative, Section 58-544, LDC, may be unconstitutionally vague and ambiguous where a plain reading requires guesses at its meaning and reasonable people may differ as to its application with arbitrary and capricious results.

However, and to date, neither the Water & Navigation Division nor the County Attorney’s Office have provided a legally justifiable explanation of how the 2023 Permit was issued under these undisputed facts.

V. Conclusion

There are two primary purposes of the regulatory framework involved in this dispute which first allow owners to make reasonable use of their property, and second protects their neighbors from unreasonable encroachments and obstructions.

The issuance of the 2023 Permit obliterates this second purpose and the LDC provisions governing same. *As I have often stated to the County Attorney’s Office, my clients do not have to be right, but they would appreciate an explanation as to why may be wrong.*

Lastly, please include this correspondence and its attachments in the “Record on Appeal” as further judicial review may be required, and thank you for your consideration of the foregoing.

Sincerely,

A handwritten signature in blue ink, appearing to read "E. B. Cole". The signature is fluid and cursive, with the first name "Edward" and last name "Cole" clearly distinguishable.

EDWARD B. COLE, ESQUIRE
For the Firm

cc: Clients

Attachments: Center 1/3 Overlay of 2023 Permit
Board of Adjustments ruling dated May 5, 2021
Excerpt from Circuit Court ruling rendered August 3, 2022