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June 1, 2023

Board of County Commissioners
c/o Jewel White, County Attorney,
and Brendan Mackesey, Senior Assistant County Attorney
315 Court Street
Clearwater, FL 33756-5165
Via Email Only To: bmackesey@pinellas.gov

**Re: Amended Notice of Appeal and Request for Hearing as to
Issuance of Pinellas County Water & Navigation Division¹
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,

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.

Pursuant to Section 58-536, Pinellas County Land Development Code (“LDC”), please consider this correspondence to be my clients *formal and timely* Notice of Appeal and Request for Hearing of the Pinellas County Water & Navigation Permit No. WND-20-00231REV approved on April 28, 2023 (“2023 Permit”), and issued to James P. Donovan (“Mr. Donovan”), who resides at 106 Harbor Drive, Palm Harbor, FL 34683, and is the Myrback’s adjoining neighbor to the immediate north.

¹ This Amended Notice of Appeal and Request for Hearing contains only minor edits and corrections to typographical errors in the original.

Executive Summary

In approving the 2023 Permit the Water & Navigation Division misinterpreted the plain language of Section 58-544, LDC, where the proposed dock and boat lift *are not a repair, reconstruction, or reconfiguration under the parlance of said ordinance*, and the application should have been denied.

Given the undisputed facts of this dispute, the relevant provisions of the Land Development Code, the proper application of same, and well settled Florida law governing statutory interpretation, this proposed dock and boat lift *would require variances* from the Board of Adjustments and Appeals (“Board of Adjustments”) under Section 138-233, LDC. *The failure to schedule and conduct a hearing in that forum deprived my clients their rights to due process of law under the Constitutions of both the United States and State of Florida.*

Most Relevant Permitting History

At the threshold, an understanding of the issues raised in the Notice of Appeal and Request for Hearing requires familiarity with the four (4) most relevant permits for the dock and boat lift located at 106 Harbor Drive are summarized as follows:

- 2001 Permit - Permit No. P30636-01: The 2001 Permit includes a 42.5 foot dock and “PWC Deck Lift” *with the capacity to hold a personal watercraft or other boat of similar size*. Although the dock and boat lift were constructed *prior* to 2001, the 2001 Permit ratified the previously illegal and unpermitted expansion of the dock and installation of the boat lift, *and importantly*, included the consent of the Myrback’s predecessor-in-title as to the drawings and side setback variance set forth therein. The side setback were measured at 9 feet from the Myrback’s property line using the former “perpendicular” seawall extended property lines, and now under the current “extended” property lines measures only 4.79 feet from the side property line;
- 2021 Permit - Permit No. WND-20-00231: The 2021 Permit includes a 50.50 foot dock where a variance for length was granted by the Board of Adjustments in case No. VAR-21-15. The dock itself *violates* the side setback requirements of Section 58-555(b)(2), LDC, *and no variances for side setbacks for the dock were applied for or granted by the Board of Adjustments in the same case.*

The 2021 Permit does not include a boat lift. Although the Board of Adjustments had also approved a side setback variance in 2021, the Myrback’s filed a Petition for Writ of Certiorari which was granted in a unanimous and seventeen (17) page Order (“Circuit Court Order”) 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. 21-0000140-AP-88B, Circuit Court, Appellate Division, Sixth Judicial Circuit, State of Florida, Appellate Division.

The effect of the *Circuit Court Order* was to *quash – or eliminate in its entirety – the side setback variance for the boat lift, leaving only the dock, which as set forth above, encroaches upon the side setback, and no variances have ever been applied for or approved.*

- 2022 Permit - Permit No. WND-22-00524: The 2022 Permit includes a drawing of a dock and boat lift which *generally appear* to replicate the drawing in the 2001 Permit. However, in the field, and presumably after approval of the 2001 Permit, a portion of the dock referred to as the “stub-out” in front of the bow of the personal watercraft in Exhibit “A,” was *unlawfully removed* in part by Mr. Donovan, and in part by his predecessor-in-title.
- 2023 Permit - Permit No. WND-20-00231REV: The 2023 Permit is the permit on appeal which includes a 50.50 foot dock and boat lift *with the capacity for a forty (40) foot or longer vessel.*

Substantial Impairment to the Myrback’s Waterfront View

“Two pictures are worth 1,000 words.” Please see Exhibits “A” & “B” attached hereto and incorporated herein. The “before” condition with the personal watercraft is set forth in Exhibit “A,” and the “after” condition with Mr. Donovan’s twenty-seven (27) foot boat is set forth in Exhibit “B.” The Myrback’s would note that this boat lift configuration was constructed in violation of the drawings in the 2001 Permit, the 2022 Permit, and construction was completed *prior to* the approval of the 2023 Permit. *In this dispute, it is clear that Mr. Donovan has chosen to “seek forgiveness,” rather than prior approval.*

The approval of the 2023 Permit substantially and materially impacts the Myrback’s waterfront view and riparian rights by allowing Mr. Donovan to construct a boat lift that has the capacity to hold a vessel *forty (40) feet or longer, located well outside the Center 1/3 of his rear property line, and less than five (5) feet from the Myrback’s property line.*

This is contrary to the *express conditions* of the 2001 Permit which constitutes a side setback variance under the Land Development Code where the Myrback’s predecessor-in-title *only consented to “the proposed dock and variances as drawn.”* That drawing included a “PWC Deck Lift” which had limited capacity for a personal watercraft or similarly sized boat. The Myrback’s would highlight that the houses are situated to the northwest which further harms the impact on their waterfront view.

Bad Precedent for the Perversion of the Land Development Code

The approval of the 2023 Permit sets an *egregiously bad precedent for all owners of waterfront property* in Pinellas County because it is patent violation of the obvious Legislative intent of Section 58-555, LDC. That ordinance is intended to protect waterfront owners from harm to their valuable waterfront views and riparian rights by requiring their neighbor to locate their docks and boat lifts in the Center 1/3 of the rear property line, and limited the lengths of the docks to one-half the length of the rear

property line. In this dispute, the operation of Section 58-555(b)(2) would require Mr. Donovan's dock and boat lift to be not closer than 28.46 feet from the Myrback's property line, and at this time his dock and boat lift are located *only 4.79 feet* from the Myrback's property line, but 47.40 feet from the neighbor to the north's property line. That means the proposed boat lift and dock are *10 times closer* to the Myrback's property than the other neighbor to the north. (See Exhibit "C")

The Water & Navigation Division has effectively given its blessings and established a procedure for the *gross manipulation* of Chapter 58, LDC, by allowing a waterfront property owner, in this case Mr. Donovan, to:

First, obtain his neighbor's written consent for the issuance of a permit to construct a *relatively benign* dock and boat lift located outside the Center 1/3 where the boat lift has *very limited capacity and limited obstruction of the neighbor's waterfront view*; and

Second, after construction of said dock and boat lift, obtain a new permit to construct a new dock and boat lift under the Water & Navigation Division's misinterpretation of Section 58-544, LDC, *and without their neighbor's consent or a variance, that has enormous capacity and severe obstructions to their waterfront view, for which this neighbor would never have given their consent.*

This is exactly what happened in this dispute. Through its approval of the 2023 Permit, the Water & Navigation Division has permitted Mr. Donovan to have a nearly wide-open view of the Intracoastal Waterway, at the sole and substantial expense of the Myrback's who will have their waterfront view substantially diminished. The Board of County Commissioners should not allow the 2023 Permit to stand.

Grounds for Appeal

The Water & Navigation Division erred in its findings and determinations for the approval of the 2023 Permit, and the Myrback's grounds for this Notice of Appeal and Request for Hearing are set forth below. The undersigned attorney would note that this dispute involves a technical and tedious analysis of the operation of Section 58-544, LDC, which itself is a fairly complex ordinance.

- 1. The 4.79 Foot Side Setback Variance Established in the 2001 Permit is Expressly Limited to the Dock and Boat Lift "As Drawn" in the 2001 Permit, and Simply Does Not Apply to the Proposed Dock and Boat Lift Which are Substantially and Materially Different.**

In approving the 2023 Permit, the Water & Navigation Division *improperly relied* upon the 2001 Permit which established the side setback variance of 9 feet under the *former* "perpendicular" property lines, and now 4.79 feet under the *current* "extended" property lines. In obtaining that variance and permit, Eric Feinstein, the Myrback's predecessor-in-

title and the “Left Owner” on the 2001 Permit, consented to, “*the proposed dock and required variances as drawn in the space provided above.”² (Emphasis added)*

Consequently, Mr. Feinstein *only* consented to the proposed dock “as drawn” which was an *express condition* of the variance set forth in the 2001 Permit. By substantially and materially deviating from the drawings set forth in the 2001 Permit, Mr. Donovan is *violating* the conditions of the variance set forth therein, and therefore, the 2001 Permit *cannot* be used under Section 58-544(a)(2) governing “*reconfigurations.*”

By way of illustration, if Mr. Donovan wanted to “*repair*” or “*replace*” what was drawn in the 2001 Permit, he entitled to do so under Section 58-544(a)(1), and without the consent of the Myrbacks (who would have no objections). In fact, Mr. Donovan did exactly that when he applied for - and the County approved - the 2022 Permit. It appears to closely duplicate the drawings from the 2001 Permit. However, Mr. Donovan has apparently abandoned the 2022 Permit and the required “stub-out” because it does not have capacity for his twenty-seven (27) foot vessel set forth in Exhibit “B.”

In other words, the Water & Navigation Division’s first fundamental error is viewing the 2001 Permit as establishing the 4.79 foot side setback in perpetuity for any configuration of the dock and boat lift. This is only half right because while the 2001 Permit established the 4.79 foot setback subject to the provisions of Land Development Code, it only did so for the configuration of the dock and boat lift “as drawn” in the 2001 Permit.

To be clear, Mr. Feinstein only consented to a small and low-profile dock with capacity limited to a personal watercraft or similarly sized boat. He did not consent to a large dock with capacity for a forty (40) foot or longer vessel. In approving the 2001 Permit, the Water & Navigation exponentially and unlawfully expanded the scope of Mr. Feinstein’s consent in violation of the conditions of the 2001 Permit.

Further support for the Myrback’s position is found under Section 138-233, LDC, which governs “Modifications or Revocations” of variances. This requires that modifications of variances, “*meet the letter or the intent of the original standards required for such approval.*” (Emphasis added)

In terms of this dispute, where the variance was based *solely* on Mr. Feinstein’s consent the drawings variances in the 2001 Permit, a modification of the 2001 Permit to accommodate his twenty-seven (27) foot vessel would not “meet the letter or intent of the original standards” without the consent of the Myrbacks. That would result in the denial of the modification, and Mr. Donovan would be required to *obtain an entirely new variance* for the proposed dock and boat lift.

² The 2001 Permit is *identical* to a variance because a variance would have been required to construct the proposed dock and boat lift as drawn, *if* Mr. Feinstein did not consent to same.

Consequently, the 2001 Permit cannot be used for a “reconfiguration” under Section 58-544(a)(2). The Myrback’s would reiterate that Circuit Court Order dated August 2, 2022 quashed the side setback variance that was granted by the Board of Adjustments, and that there are *no other side setback variances* in the permitting history, nor did the Myrback’s provide their written consent to the 2023 Permit.

2. The Water & Navigation Division Violated the Express Provisions of Section 58-544, LDC, Which Only Permits Consideration of One “Previously Issued Permit” by “Mixing and Matching” Attributes of the 2021 Permit with the 2001 Permit and a Previously Approved Variance.

Analysis under Section 58-544, LDC, is expressly limited to “the four corners” of one (1) previously issued permit, and *does not* allow the Water & Navigation Division to consider multiple previously issued permits. We refer to this as the “*mixing and matching*” of permits, which is what the Water & Navigation Division did in approving the 2023 Permit.

Section 58-544, LDC, provides in relevant part as follows,

- (a) Where *any dock permit was previously issued under this article*, a variance granted under section 58-539 shall *not* be required for the county to issue a permit for repair, replacement, or reconfiguration of the dock where either subsection (a)(1) or (a)(2) below is satisfied:
 - (1) The dock is reconstructed in the same configuration approved in *said permit*.
 - (2) *Said permit* demonstrates nonconformance with any one or more of the following subsections in this article... (Emphasis added)

The emphasized language above requires analysis under Section 58-544, LDC, *to begin with one previously issued permit* which is then used as *the basis* to determine that the *permit to be issued* does not violate the second set of subparagraphs (a) through (f) that follow. Where there is no violation of that set of (a) through (f), a proper permit may be approved under Section 58-544.

In this dispute, the County Attorney’s Office informed the undersigned attorney that the Water & Navigation Division used the 2021 Permit as the *previously issued permit* as the basis for analysis under Section 58-544, LDC, and then compared it to the *permit to be issued*, which was the application for the 2023 Permit.

However, if the 2021 Permit is used as the basis, then the application for the 2023 Permit *must fail* because it would violate Section 58-544(a)(2)(e), LDC. Recall that the 2021 Permit only includes a dock and no boat lift, and that the Circuit Court Order entirely quashed the side setback variance for the boat lift.

Specifically, the 2021 Permit “demonstrates non-conformance” with the *dock length and side setback* requirements under Section 58-555(b)(1) & (b)(2) because: (a) The dock is *longer* than what is permitted under Section 55-555(b)(1); and (b) The dock *substantially encroaches into the side setbacks beyond the Center 1/3 of the rear property line* permitted under Section 58-555(b)(2).

Consequently, the 2023 Permit *clearly violates two* restrictions under Section 58-544(a)(2)(e), LDC, which requires that, “*The dock is reconstructed such that there are no new structures located beyond the applicable setback and length limits required in the unincorporated county,*” because:

- (a) Section 58-555(b)(1) limits the dock length to 42.70 feet (one half the rear property line), and the 2023 Permit’s dock is 50.50 feet long; *and*
- (b) Section 58-555(b)(2) requires that the dock and boat lift are constructed within the Center 1/3 of the rear property line or a 28.46 foot setback, and the 2023 Permit’s dock and boat lift are only 4.79 feet from the Myrback’s property line, and approximately 23 feet outside Mr. Donovan’s Center 1/3. (See Exhibit “C”)

Therefore, the Water & Navigation Division *incorporated* the 2001 Permit into its analysis under Section 58-544, LDC, by using the 2001 Permit to establish the 4.79 foot side setback in perpetuity for *any* configuration. As discussed above, it did establish that side setback, but *only* for the dock and boat lift configuration “as drawn” in the 2001 Permit.

The Water & Navigation Division may argue that the 2023 Permit does not violate Section 58-544(a)(2)(e), LDC, because it *expansively* interprets the *phrase “required in the unincorporated county”* to include “previously issued variances” or “previously issued permits.”

However, that is not what the ordinance says. It refers to the *general requirements* in the unincorporated county, and makes no reference or implications which would encompass *any other variances* which variances may have been approved for a *specific property*, or any other previously issued permits where the ordinance only allows one previously issued permit be considered.

In fact, Section 58-544(a)(2)(e), LDC, directly cites to Section 58-555(b)(1) & (b)(2) for the *standard application* for dock length (which is half the length of the rear property line) and side setback requirements (which is the Center 1/3 of the rear property line). Had the Board of County Commissioners wished to include “other variances or permits” in the analysis under Section 58-544, it would have done so.

In the event that the Water & Navigation Division asserts that the 2001 Permit was the basis for analysis under Section 58-544, LDC, that would likewise result in the denial of

the 2023 Permit because the dock in the 2023 Permit is *substantially longer* than the dock in the 2001 Permit, and therefore violates Section 58-544(a)(2)(e).

Florida law is beyond well settled that statutes and ordinances must be, “*interpreted as they are written,*” and not as they “*may*” have been intended. In addition, the law is also well settled that a *local government’s particular interpretation* of a statute or ordinance is not entitled to any special consideration. Courts, and this Board, must look at the actual text of the ordinance in dispute.

Therefore, where the Water & Navigation Division mixed and matched the 2021 Permit as its basis for analysis under Section 58-544, LDC, with the 2001 Permit and/or the previously issued variance for length issued by the Board of Adjustment, it violated the express terms of said ordinance which directly references the general requirements set forth in Section 58-555(b)(1) & (b)(2).

3. The 2023 Permit is an Entirely New Permit, it is Not a Revision to the 2021 Permit.

Briefly, the Myrback’s would add that the application for the 2023 permit and the 2023 Permit itself are an entirely new permit application and an entirely new permit, contrary to the undersigned attorney’s communications with the County Attorney’s Office indicating that “technically, the [2023] permit is a revision to the permit that was issued on May 18, 2021.” (Parenthetical added)

Amendment to Notice of Appeal and Request for Hearing

Given that the 2023 Permit was only approved on April 28, 2023, neither the undersigned attorney nor the Myrbacks have had a full opportunity to fully review and research same, and although this Notice of Appeal and Request for Hearing is intended to be comprehensive, the Myrback’s reserve the right to amend same as additional facts and legal research warrant. Potential amendments may include, but are not limited to, the 2023 Permit constituting an illegally expanded: (a) Non-conforming structure; (b) Non-conforming use; and/or(c) Variance.

Record on Appeal

For purposes of this Notice of Appeal and Request for Hearing, my clients would like to include the following documents in the “record” of this action for consideration by the Board of County Commissioners, and for purposes of potential further judicial review:

- The full and complete file, application for permitting, and permitting history for all boat docks and lifts at 106 Harbor Drive, including but not limited to all documents, drawings, and photographs;
- The full and complete file and record of Case No. VAR-21-15 before the Board of Adjustments and Appeals, including but not limited to, all documents, photographs, “Powerpoint” presentations, transcripts, etc.;

- The full and complete file and record of in Case No. 21-000014-AP-88B before the Circuit Court;
- All written communications regarding the application and approval of the 2023 Permit between Pinellas County, Water & Navigation Division, County Attorney's Office, Mr. Donovan, the Myrbacks, including their attorneys, representatives, employees, and agents, including but not limited to, emails and all other documents;
- All non-privileged documents in Pinellas County's possession, custody and control regarding the 2023 Permit and application, including legal opinions, memoranda, legal research, internal communications, emails, etc.

Please advise how my clients may most easily ensure these documents are included in the record for this appeal, which may include the delivery of hard copies to your office of the documents we have access. To the extent that the County is in exclusive possession of the documents set forth above, please consider this a Public Records Request for same pursuant to Chapter 119, Fla.Stat.

Thank you for your assistance in this matter.

Sincerely,

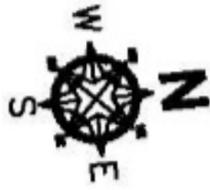
A handwritten signature in blue ink, appearing to read "E. B. Cole". The signature is fluid and cursive, with the first name "Edward" and last name "Cole" clearly distinguishable.

EDWARD B. COLE, ESQUIRE
For the Firm

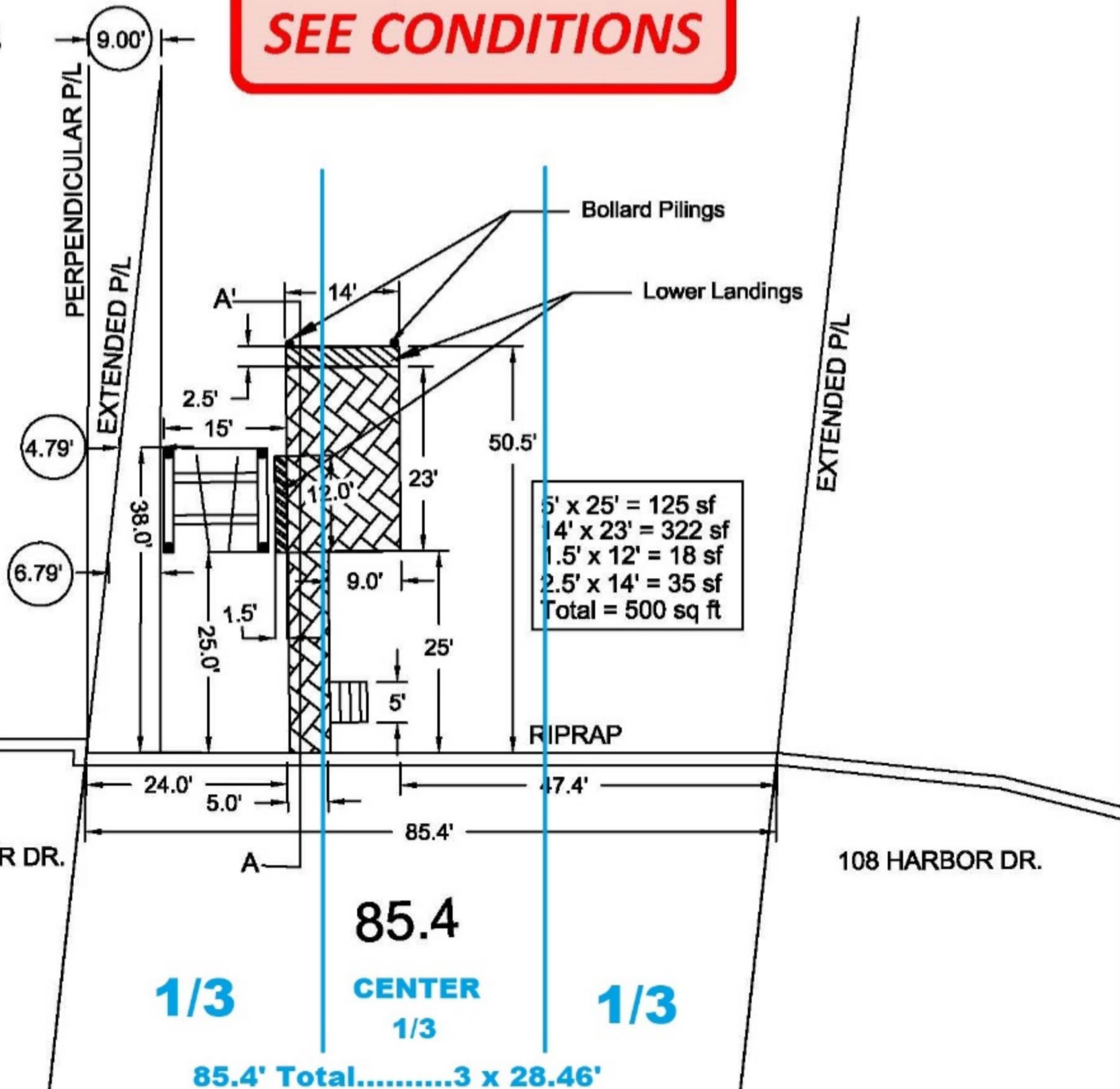
cc: Clients







SEE CONDITIONS



Permit No.: WND-20-00231REV
 Date Approved: 04/28/2023
 Approved By: JSims
 Pinellas County Water and Navigation

SEE SHEET 4 FOR CROSS SECTION A - A'

SHEET 3