CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

MEMORANDUM

January 2, 2014

TO: Town Council and Town Manager, Terry Stewart

CC: Marilyn W. Miller, Esquire
James T. Humphrey, Esquire
Mr. Walter Fluegel

FROM: John F. Dickinson and Jesse D. Bannon

RE: Land Development Code Interpretation and Opinions Pertaining to Elevated Pools and Decks

---

To the Town Council and Town Manager:

You have requested that we provide you with our independent interpretation of the Town's Land Development Code ("LDC") as it relates to setbacks from a seawalled canal or seawalled natural body of water for elevated swimming pools and elevated decks on residential property. Based upon Florida's case law regarding the interpretation of land use codes and property rights, the plain and ordinary meaning of the words should be used to interpret what was meant when the language is clear, and courts should not rely on the rules of statutory interpretation including looking to legislative intent. When the language of a zoning regulation is ambiguous and must be interpreted, the language should be interpreted to be the least restrictive on the property owner, regardless of the legislature's intent, as zoning regulations are in derogation of private rights of ownership. After an exhaustive review of the LDC, we have arrived at the following opinions and interpretations of the LDC as it relates to setbacks from a seawalled canal or seawalled natural body of water for elevated swimming pools and elevated decks on residential property.

It is our opinion that the LDC permits elevated, nonroofed swimming pools and decks to be placed up to but not closer than 5 feet from a seawalled canal or seawalled natural body of water provided that these nonroofed accessory structures (1) are not enclosed (except by fence or screened enclosure) and (2) are not structurally part of the principal building. Section 34-638(b) of the LDC directs us to find the minimum setback

200 WEST FORSYTH ST.
SUITE 1700 · JACKSONVILLE, FLORIDA 32202-4317
TELEPHONE: (904) 356-8900 • FACSIMILE: (904) 356-8200

dimensions for accessory buildings/structures[1] in §§34-1174 – 1176. Section 34-1176 of the LDC sets forth regulations for swimming pools, decks, tennis courts, porches, and other similar recreational facilities. Section 34-1176(b)(1)a.2. states that the water body setbacks for nonroofed swimming pools and decks are set forth in §34-638(d)(3). Pursuant to §34-638(d)(3)b., buildings and structures must not be placed closer than 25 feet[2] to a canal, bay, or other water body (setbacks from the Gulf of Mexico are governed by §34-638(d)(3)a.). However, §34-638(d)(3)c. provides exceptions to the 25-foot setback for certain accessory structures, including nonroofed swimming pools and decks.

Section 34-638(d)(3)c.3. permits nonroofed swimming pools and decks that are not enclosed, except by a fence or open-mesh screening, to be placed up to but not closer than 5 feet from a seawalled canal or seawalled natural body of water. In other words, in order for a nonroofed swimming pool and deck to qualify for the exception to the 25-foot setback, it must not be enclosed except by a fence or open-mesh screening ("enclosed on at least three sides with open-mesh screening from a height of 3½ feet above grade to the top of the enclosure").[3]

---

[1] An accessory building or structure is defined in §34-2 of the LDC to mean "a building or structure which is customarily incidental and subordinate to a principal building or to the principal use of the premises, and located on the same premises." The principal use of residential property is habitation, and thus swimming pools and decks would be accessory structures. Moreover, the section on swimming pools and decks (§34-1176) is found in the division of the LDC entitled Accessory Uses, Buildings, and Structures.

[2] Per §34-638(d)(3)b.3., if the property has a seawall, the setback is measured from the seaward side, i.e. the wet side, of the seawall to the structure.

[3] Based on our review of the permit applications for the properties at issue on Palermo Circle, on our site visit to 301 Palermo Circle and 561 Palermo Circle on December 12, 2013, and on our conversations with the Town's Community Development Department staff, there are no plans to enclose any of the elevated swimming pools and decks with fences or open-mesh screening. Thus, any height and setback restrictions for fences and open-mesh screening do not affect this opinion. Furthermore, it has come to our attention that Lee County has an almost identical zoning regulation to §34-638(d)(3)c.3. in its land development code, and Lee County's staff has interpreted its code to restrict pool and deck heights to 42 inches (3½ feet). We do not know if there is another provision within Lee County's code restricting pool and deck heights or if there is another reason for that interpretation. However, it is clear that the language, "3½ feet above grade *to the top of the enclosure*," is referring specifically to open-mesh screen enclosures, not the height of the pool or deck.

The last sentence of §34-638(d)(3)c.3. adds a further requirement to open-mesh screen enclosures, stating that "[e]nclosures with any two or no more sides enclosed by opaque material shall be required to comply with the setbacks set forth in subsections (d)(3)a. and (d)(3)b. of this section." In other words, open-mesh screen enclosures using opaque material on more than one side must comply with the water body setback for structures that do not fall within an exception, which in this case is 25 feet.

While it is our understanding that one or more residents of the Town of Fort Myers Beach have interpreted this last sentence of §34-638(d)(3)c.3. to be a *general* prohibition on enclosures that are enclosed by opaque material,[4] it becomes clear that the language solely provides another requirement on open-mesh screen enclosures when you compare that language in §34-638(d)(3)c.3. with the language used in §34-1176(b)(1)b. Section 34-1176(b)(1)b. lists the requirements for open-mesh screen enclosures for swimming pools and decks, requiring that:

1. At least three sides of the enclosure are open-mesh screening from a height of 3½ feet above grade to the top of the enclosure.
2. Enclosures with any two or more sides enclosed by opaque material shall be required to comply with all setbacks required for a principal building.

The requirements in §34-1176(b)(1)b. for open-mesh screen enclosures are the same as the requirements set forth in §34-638(d)(3)c.3. Thus, in our opinion, the language in the last sentence of §34-638(d)(3)c.3. should be interpreted in the same way it is used in §34-1176(b)(1)b., to set forth an additional requirement on open-mesh screen enclosures, and should not be interpreted as a general prohibition on enclosures that are enclosed by opaque material.

Moreover, if we assume for arguments sake that it is not clear, but rather is ambiguous, that the language in §34-638(d)(3)c.3. and §34-1176(b)(1)b. is used to modify open-mesh screen enclosures, then the rules of interpretation require that the language be interpreted to be

[4] Some residents have also asserted that the space between the opaque walls of the elevated deck constitute an "enclosure" for purposes of prohibiting elevated pools. However, the ordinary meaning of "enclosure" with respect to a swimming pool and deck would be the surface area of the deck and pool, not the cement and steel below.

the least restrictive on the property owner. Our interpretation that the language in §34-638(d)(3)c.3. regarding enclosures does not require elevated pools and decks to have a 25-foot setback is, in fact, the least restrictive interpretation for the property owner. Accordingly, unless the swimming pool and deck have an open-mesh screen enclosure and two or more sides of it are opaque material, then the minimum setback should be 5 feet from a seawalled canal or seawalled natural body of water.

Finally, whether or not an accessory structure is "attached" to the principal building will affect the setback of that accessory structure. Section 34-1173(b) of the LDC provides that accessory structures "may be erected as part of the principal building or may be connected to it by a roofed porch, patio, or breezeway, or similar structure, or they may be completely detached." Section 34-1173(b)(1) provides that "[a]ny accessory building or structure which is structurally a part of the principal building shall comply in all respects with the regulations for a principal building." In the context of the issue at hand, it is our opinion that §34-1173(b)(1) means that if an elevated, nonroofed swimming pool and deck were to be "structurally a part of the principal building," then the minimum setback from a seawalled canal or seawalled natural body of water would be 25 feet, not 5 feet. We interpret an "accessory building or structure which is structurally a part of the principal building" to mean that either: (1) the principal building and accessory structure have connecting roofs; or (2) the accessory structure relies on the principal building for structural support (or vice versa). Accordingly, as long as the accessory structure does not have a roof and neither the accessory structure nor the principal building relies on the other for structural support, then the accessory structure is not, in our opinion, structurally a part of the principle building and need not comply with the regulations for the principal building. This means that a structurally independent, nonroofed accessory structure may be abutted to the principal building without having to comply with the setback for the principal building. Moreover, we would also interpret this to mean that the abutted support columns for the accessory structure and principal building could be covered with stucco or another material for aesthetic purposes, as long as the material used does not lend structural support to either the accessory structure or principal building.

It is our opinion that the height of an elevated, nonroofed swimming pool and deck does not affect the 5-foot setback from a seawalled canal or seawalled natural body of water. This opinion is based on three observations in the LDC. First, there exists no regulation in the LDC restricting the height of swimming pools and decks apart from the general height restrictions found in §34-631 and Table 34-3. Second, §34-1176(c)(2) actually provides for the placement of swimming pools more than 4 feet above ground level. Third, §34-638(d)(3)c.3. does not provide for differing setbacks based on the height or elevation of the nonroofed accessory structure.[5]

It is our opinion that the restrictions placed on "walls" in §34-1741 – 1744 apply only to free-standing walls and do not apply to the walls of structures. This opinion is based on Figure 34-29 in §34-1742, which clearly depicts only free-standing fences and walls as examples of what is being regulated in this division, which is entitled Fences, Walls, and Entrance Gates. In addition, this opinion is based on our observation that the height and setback restrictions for "walls" in §34-1744 are not the same as the height and setback restrictions for the walls of principal buildings and roofed accessory structures found in §34-638(d)(3). Thus, by extension, the restrictions placed on "walls" in §§34-1741 – 1744 were not meant to be applied to the walls of nonroofed accessory structures, either.

In sum, it is our opinion that under the LDC, an elevated nonroofed swimming pool and deck that (1) is not enclosed except by a fence or open-mesh screening (which is not made of opaque material on more than one side) and (2) does not rely on the principal building for structural support is permitted to be placed up to but not closer than 5 feet from a seawalled canal or seawalled natural body of water without the need of a variance from the Town Council.

---

[5] It is our understanding that one or more residents have asserted that the LDC prohibits elevated swimming pools and decks over 42 inches (3½ feet) within 25 feet of a body of water. However, we have found no such restriction within the LDC.

Should you require further clarification of our interpretation of the Land Development Code or the opinions contained herein, please do not hesitate to contact us.

Sincerely yours,

John F. Dickinson