

From: btherrell@hushmail.com
To: [Zoning Inquiries](#)
Subject: Variance Hearing, 03/21/2024, 23-11000016, Nancy Canal
Date: Thursday, March 21, 2024 1:37:47 PM
Attachments: [Legal Opinion Nancy Canal Accardi \(3\).pdf](#)
[VARIANCE RESPONSE 23-11000016.docx](#)

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Brian Therrell & Lindsey Derby

924 SE 10th Ct

Pompano Beach, FL 33060

RE: Public Hearing of Variance for Pompano Beach Real Estate Investments,

P&Z# 23-11000016

zoning@copbfl.com

To whom it may Concern:

I am writing to voice my strong opposition to the variance request referenced above. My reasons are stated below pertaining the property on the eastern side of the Nancy canal in Cypress Lakes Estates.

I believe you are in receipt of a legal opinion, authored by Attorney Robert S. Hackleman for the defense of Mr. & Mrs. Edmund Acardi (The Acardi's). I have attached said opinion in the event you have not received it. The legal opinion, authored for the Acardi's, was presented to the City of Pompano Beach in defense of the City's action against The Acardi's compelling them to construct a seawall alongside the east side of the Nancy Canal, the canal that the variance is being requested.

In the opinion, Acardi's own counsel makes the case that The Acardi's do not own the rights to the access to the Nancy Canal, eliminating their responsibility to construct the seawall. It is interesting that years later, now as the desire to build a dock (for purposes not quite clear at this point), now believe they indeed have said rights to the waterway as it is in their current interest.

The of the ownership of the canal has been argued many times since the development of the Cypress Lakes Estates community. However, in the attached opinion, it is clear that the applicants knew and must know now, based on their own arguments from years prior, that their property is essentially "landlocked". It is the belief of many in our community that not only should the variance not be permitted, but that the constriction of ANY mooring structure from Pompano Beach Real Estate Investment property IS NOT permitted as they do not own the rights to the waterway. Any

reference otherwise is fraudulent and an attempt to steal the rights to the Nancy Canal waterway.

The construction of this dock, as applied for, would SIGNIFICANLTY obstruct the ability of the property owners in the community who do indeed have rights to build docks along their properties and utilize the canal for access. Obstruction of this already limited canal will significantly reduce or negate our ability to navigate the canal. This presents irreparable harm and cannot be permitted.

The plans presented to the city state that the dock will allow the east property owner to utilize the canal for its intended purpose. There is no other way to understand that statement other than the eastern property owners desire to claim which they do not own. The Accardi's own defense, in legal opinion presented, written years ago by their own counsel, clearly states they do not have access to that canal and were not responsible for its maintenance (which they have never done). The eastern property is landlocked and therefore cannot be described as its intended purpose of using the property for water access.

Lastly, a review of the wildlife and ecosystem has not been completed for the proposed area. The development of the proposed project in an area that has never been legally used for the purpose of water access by the eastern property would significantly alter the naturally developed ecosystem. Studies of the impact of the project would need to be done and reviewed before any construction begins.

In summation, the eastern property owners do not have water access and never have, by their own admission. The variance proposed would significantly obstruct the current residents' ability to navigate the Nancy canal and the development of the project would significantly harm the natural ecosystem that has developed over 50 years. The project is an attempt to claim property that is not owned by the eastern landowners of the Nancy Canal and must not be permitted.

I strongly oppose the variance requested and the project wholly. The City of Pompano Beach must protect its residents in this matter and ensure that the Nancy Canal remains navigable for generations to come.

Sincerely,

Brian Therrell & Lindsey Derby

CODE ENFORCEMENT BOARD
CITY OF POMPANO BEACH, FLORIDA

CITY OF POMPANO BEACH, FLORIDA)	CASE NO. 03078
)	CEB#0444
Petitioner,)	
)	Florida Bar No:284041
vs.)	
)	
MR. & MRS. EDMOND ACCARDI)	
)	
Respondents.)	

MEMORANDUM OF LAW

MR. & MRS. EDMOND ACCARDI ("Accardi"), the owners of the property located at 909 South Federal Highway in Pompano Beach, Florida, through their undersigned attorneys, submit this memorandum for consideration by the City of Pompano Beach, Code Enforcement Board ("Board") with respect to the alleged violation of Ordinance §151.04.

I.

BACKGROUND

On August 27, 1985, the City served a final notice of violation upon Accardi advising that Accardi had violated Municipal Ordinance Section 151.04 by maintaining a public nuisance or a condition which is injurious to the health, safety or welfare of the neighborhood or community or dangerous to the navigability of any canal. Accardi was ordered to construct a seawall "along the entire section" of his property abutting the canal. Thereafter, Accardi received a notice of hearing to appear before the Board.

RESPONDENT'S
EXHIBIT # 8

The origin of the seawall controversy and the present notice of violation may be traced to the filing of a plat in 1960 for a housing subdivision known as "Cypress Lake Estates". In that plat, the subdivision developer dedicated to the perpetual use of the public certain waterways within the subdivision, including the Nancy Canal located at the eastern boundary of the subdivision.

At the time of the dedication, the developer owned all of the property located within Cypress Lake Estates, including the Nancy Canal. However, the land to the east of the Nancy Canal dedication was held by independent landowners, including the predecessor in title to Accardi.

These eastern landowners never agreed to the creation of the Nancy Canal. Their agreement was not needed; that decision belonged exclusively to the developer, who owned and offered to dedicate the property, and the City, which accepted the canal dedication.

Following the filing of the plat, the development of the subdivision and the dredging of the canals ensued.

In the case of the Nancy Canal, two significant events occurred. First, the Nancy Canal was not excavated to its full dedicated width. Approximately ten feet of right-of-way on the east side of the canal remained unexcavated thereby creating a ten foot buffer of solid land for use as a maintenance roadway between the waters of the Nancy Canal and the property of the eastern landowners. Second, in contrast to everywhere else in the subdivision, no seawall was constructed on the east side of

the Nancy Canal. Why the City failed to require the construction of a seawall by the developer remains a mystery.

Once again, the eastern landowners had nothing to do with either of these events. Indeed, had they wanted to, there was nothing that they could do to change the result. The eastern landowners did not own the property underneath the Nancy Canal; that was owned by the developer and its successors in title. They did not own the canal right of way; that was owned by the City for the benefit of the public. They did not even have access to the water; that was barred by the ten foot strip of solid land.

In 1969, after receiving complaints that the unseawalled east side of the Nancy Canal was eroding, the then City Engineer, R.C. Mills wrote the eastern owners advising them that the City Ordinance No. 69-62 required them to construct seawalls along their property because material from their property was allegedly eroding into the canal and causing a navigable hazard. As evidenced by memorandum, No. 70-30 dated November 21, 1969 from the City Engineer to the then City Manager, the attorneys for certain of the eastern property owners brought to the City's attention the fact that it was not the land owner's property, but the 10 foot strip of property dedicated to the City that was eroding into the canal.

On January 27, 1970, the City attorney issued a written legal opinion to the City Manager advising that the eastern landowners were not responsible for seawalling.

Despite the fact that the failure of the City to maintain its 10 foot strip of property had caused the erosion into the Nancy Canal, the City refused to expend its own monies to solve the erosion problem by building a seawall. However, the City did attempt in 1971 and 1970 to resolve the erosion problem through negotiations with the eastern property owners. The City proposed that the eastern property owners construct a seawall in exchange for title to the 10 foot buffer of property on the east side of the canal. Unfortunately, the City merely owned an easement interest; title to the property was vested in owners on the west side of the canal as successors in title to the original developer of the subdivision. These negotiations broke down when the western property owners refused to quit-claim their property interest in the 10 foot strip of property to the eastern property owners.

Following the breakdown of negotiations, the City next addressed the erosion problem in 1974, when the City Engineer became alarmed about the City's exposure to liability for failing to take measures to maintain the canal bank to prevent the erosion of the east side of the Nancy Canal. In a written legal opinion, dated July 2, 1974, the City Attorney confirmed the City's exposure to possible liability and suggested the following remedy:

Sections 44.01.3, 44.01.4 and 44.01.5 of the Code of Ordinances give the City Commission the authority to order an abutting property owner to construct a seawall if such a seawall is necessary in order to abate a public nuisance or abate a condition which is injurious to the health, safety or welfare of

the neighborhood or community, or dangerous to the navigability of any canal. If the abutting property owner refuses to obey the Commission order, the Commission is empowered to direct a seawall to be built and the property owner to be charged for the cost of the construction. Thus, in view of the ownership of the entire bed and banks of the Nancy Canal by the abutting property owners on the western side of the canal, the City Commission should the Commission find a seawall in that area to be necessary, could order it to be constructed by the property owners abutting the canal on the west.

Although the City failed to act on the recommendation, it is essential to recognize that in the City Attorney's opinion, the burden of seawalling fell not upon the eastern owners, but upon the western property owners who as the successors in interest to the developer owned title to the entire bed and banks of the Nancy Canal.

For the next decade, the City permitted material from its ten foot strip to erode unchecked into the canal. The City took no action to maintain and repair the canal.

In 1985, the Nancy Canal became a hot political issue. A well organized citizens group repeatedly protested the unnavigability of the Nancy Canal to the City Commission and demanded that the City dredge the canal.

In the spring of 1985, Accardi commenced negotiations to purchase the property from its owner. In May, after adverting to the Nancy Canal controversy by reading a newspaper article appearing in the Sun Sentinel, Accardi and his attorney met with a representative of the City Building Department and received

unqualified assurances that the property he proposed to purchase was not involved or affected in any way. In reliance upon this representation, Accardi agreed to and did purchase the property.

Unbeknownst to Accardi, in June of 1985, Commissioner Gomes supplied the City Attorney with a two page legal opinion rendered in a case styled Calvert v. Morgan, 436 So.2d 314 (Fla. 1st DCA 1983). Gomes provided the opinion in an effort to convince the City Attorney to reverse his 1974 opinion that the western property owners were responsible for seawalling.

During the course of the City Commission meeting of July 9, 1985, in response to the urging of Commissioner Gomes, the City Attorney reversed his previous stand and, based solely upon the case supplied by Gomes, concluded that the City could lawfully require the eastern owners to construct a seawall. Despite his change of heart, the City Attorney felt compelled to express publically his reservations about whether the case really applied.

On July 17, 1985, the City Attorney issued a written opinion advising that he regarded the court case supplied by Commissioner Gomes "as sufficient authority" to cite the eastern property owners, noting that any penalty assessed by the Board "for failure to construct a seawall would be appealed to circuit court where a definitive ruling on the validity of the case authority cited by Commissioner Gomes could be obtained."

On August 27, 1985, the City served Accardi with a notice of violation.

To date, the City has failed to dredge the Nancy Canal. Indeed, no money has been budgeted for that purpose in fiscal 1986.

II.

DISCUSSION

A. THE CITY, NOT ACCARDI, CREATED THE NUISANCE AND MUST ABATE IT.

1. The duty of the City to maintain and repair its right-of-way.

In 1960, by virtue of the public dedication of the

Nancy Canal, the City did not obtain the fee simple title to the dedicated property. As a matter of law, the dedicator of the property (e.g. the predecessor in interest) retained fee simple title to the dedicated land. However, the City did acquire a property interest in the land in the nature of an easement. Hollywood, Inc. v. Zinkil, 403 So.2d 528, 537 (Fla. 4th DCA 1981); Bonifay v. Dickson, 459 So.2d 1089, 1095 (Fla. 1st DCA 1985); see Florida State Turnpike Authority v. Anhoco, 116 So.2d 8 (Fla. 1959).

Upon accepting the dedication of the Nancy Canal right-of-way, the City, by operation of law, assumed the duty to maintain and repair its easement, including the 10 foot strip of property adjoining the eastern side of the Nancy Canal. Morrill v. Recreational Development, Inc., 414 So.2d 590 (Fla. 1st DCA 1982); see Collom v. Holton, 449 So.2d 1003 (Fla. 2d DCA 1984).

2. The City breached its duty to maintain and repair its right-of-way.

Since 1960, the City has done nothing to repair or maintain its 10 foot strip of property located adjacent to the east side of the Nancy Canal. In breach of its legal duty, the City simply permitted the property to erode unchecked for over a quarter of a century. Even though the City was advised in writing by its own attorney in 1970 that the City, not the land owners, had an obligation to construct a seawall along the east side of the Nancy Canal, the City choose not to.

Today, the material which eroded from the 10 foot strip of land held by the City is obstructing the navigability of the Nancy Canal. However, the City refuses to accept its responsibility to abate the nuisance. Instead, the City is attempting by the present enforcement action to shift the burden of abating the nuisance from its shoulders onto the backs of the landowners on the east side of the Nancy Canal, including Accardi.

3. The City, not Accardi, must abate the nuisance.

Fortunately, the law does not permit any municipality to evade its responsibilities so easily. Neither this City nor any city may create a nuisance and then assess the cost of abating that nuisance against the property of private landowners. City of Mason v. Buchman, 211 N.W. 2d 552 (Ct. App. Mich. 1973); 6 McQuillin Municipal Corporation, (3d Ed.), Section 24.62; 62 C.J.S. Municipal Corporations Section 281 (d). Yet, this is exactly with the City is attempting to do. Under the settled law, the City cannot compel Accardi to pay to build a seawall to

abate a nuisance created by the City. If the City wants a seawall, the City is free to build one on its own property and at its own expense. ←

B. MUNICIPAL ORDINANCE SECTION 151.04 IS UNCONSTITUTIONAL.

1. Federal and State Preemption.

Our scheme of constitutional government mandates the delegation of certain defined powers to federal control, state control or municipal control. Due to the provision of the United States Constitution that the Constitution and the laws passed pursuant thereto shall be the supreme law of the land, if a law passed by a state in the exercise of its acknowledged powers comes into conflict with an act of Congress, the state law must yield because the federal constitution declares the supremacy of the laws passed by the federal government. Sperry v. Florida, 373 U.S. 379 (1963). This fundamental principle that state laws must yield to acts of Congress is known as the doctrine of preemption.

Next in priority to the power of the federal government is the power of the state government. Thus, when a municipal ordinance conflicts with state law, the municipal ordinance must yield. City of Miami Beach v. Gleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972).

Our system of governance, thus, declares that the federal law is supreme, next in authority is the law of the state and last in authority is the law of local government. As a result, any municipal ordinance which conflicts with either

state or federal law is rendered invalid.

For this reason, no municipal ordinance which commands a citizen to perform an act which violates either state or federal law can pass constitutional muster. Thus, for example, a city cannot punish a citizen for refusing to obey a municipal ordinance that requires him to drive at a minimum speed of 75 miles per hour when federal law prohibits that citizen from driving at a speed in excess of 55 miles per hour.

When one applies the doctrine of preemption to Section 151.04 of the Municipal Ordinances of the City of Pompano, one is compelled to conclude that the Ordinance is invalid because it directly and expressly conflicts with both federal and state law. The ordinance expressly and unequivocally requires a violator to begin construction of a seawall within thirty days of the receipt of Notice of Violation and provides a mechanism for a discretionary extension of time for up to an additional fourteen days. Thus, a violator is required to begin construction of a seawall no later than forty-four days after receipt of a Notice of Violation. Unfortunately, the Ordinance ignores the fact that the act of seawalling and filling the Nancy Canal is subject to conflicting federal and state regulation. As a navigable stream, the Nancy Canal is subject to the jurisdiction of the Army Corp of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 USC Section 403, together with the rules and regulations promulgated thereunder. Additionally, the Nancy Canal is subject to the jurisdiction of the Florida Department of

Environmental Regulation pursuant to the provisions of the Florida Air and Water Pollution Control Act, Section 403.011 Fla. Stat. (1985) and the regulations promulgated thereunder. The effect of this overlapping federal, state and municipal regulation is that due to applicable federal and state statutes and regulations, it is impossible for any person, including Accardi, lawfully to begin constructing a seawall within the time frames set forth in Municipal Ordinance Section 151.04. The ordinance is, thus, unconstitutional. See, e.g., American Airlines, Inc. v. City of Audubon Park, Kentucky, 407 F.2d 1306 (6th Cir. 1969), cert. den. 396 U.S. 845 (1969).

2. Due process and equal protection of the laws.

Section 151.04 also violates that due process and equal protection guarantees of both the Florida and Federal Constitutions because the entire procedure for applying the ordinance is vague, indefinite, uncertain, arbitrary and subject to capricious whim. Mahon v. County of Sarasota, 177 So.2d 665 (Fla. 1965).

Section 151.04 is constitutionally vulnerable for a variety of reasons. First, the ordinance is vague and overbroad because it fails to set forth any standards for determining what constitutes a "public nuisance" or "a condition which is injurious to the health, safety or welfare of the neighborhood or community or dangerous to the navigability of any canal, stream or other body of water". Second, the application of the statute is made to depend upon the unbridled discretion of either the city building inspector or the city engineer. Third, the ordinance

denies the equal protection of the laws because it does not apply throughout the City of Pompano Beach. Rather, the ordinance is only activated and the administrative machinery set in motion "whenever it shall come to the attention of the city engineer or city building inspector" that any property requires the construction of a seawall to abate a nuisance.

C. THE CITY IS ESTOPPED TO APPLY THE ORDINANCE.

By virtue of the representations made to Mr. Accardi and Mr. Accardi's detrimental reliance thereon, the City is estopped to enforce Section 151.04 against him.

Respectfully Submitted

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By Robert S. Hackle
ROBERT S. HACKLEMAN

Brian Therrell & Lindsey Derby
924 SE 10th Ct
Pompano Beach, FL 33060

RE: Public Hearing of Variance for Pompano Beach Real Estate Investments,
P&Z# 23-11000016
zoning@copbfl.com

To whom it may Concern:

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I believe you are in receipt of a legal opinion, authored by Attorney Robert S. Hackleman for the defense of Mr. & Mrs. Edmund Acardi (The Acardi's). I have attached said opinion in the event you have not received it. The legal opinion, authored for the Acardi's, was presented to the City of Pompano Beach in defense of the City's action against The Acardi's compelling them to construct a seawall alongside the east side of the Nancy Canal, the canal that the variance is being requested.

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The of the ownership of the canal has been argued many times since the development of the Cypress Lakes Estates community. However, in the attached opinion, it is clear that the applicants knew and must know now, based on their own arguments from years prior, that their property is essentially "landlocked". It is the belief of many in our community that not only should the variance not be permitted, but that the constriction of ANY mooring structure from Pompano Beach Real Estate Investment property IS NOT permitted as they do not own the rights to the waterway. Any reference otherwise is fraudulent and an attempt to steal the rights to the Nancy Canal waterway.

The construction of this dock, as applied for, would SIGNIFICANTLY obstruct the ability of the property owners in the community who do indeed have rights to build docks along their properties and utilize the canal for access. Obstruction of this already limited canal will significantly reduce or negate our ability to navigate the canal. This presents irreparable harm and cannot be permitted.

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Lastly, a review of the wildlife and ecosystem has not been completed for the proposed area. The development of the proposed project in an area that has never been legally used for the purpose of water access by the eastern property would significantly alter the naturally developed ecosystem. Studies of the impact of the project would need to be done and reviewed before any construction begins.

In summation, the eastern property owners do not have water access and never have, by their own admission. The variance proposed would significantly obstruct the current residents' ability to navigate the Nancy canal and the development of the project would significantly harm the natural ecosystem that has developed over 50 years. The project is an attempt to claim property that is not owned by the eastern landowners of the Nancy Canal and must not be permitted.

I strongly oppose the variance requested and the project wholly. The City of Pompano Beach must protect its residents in this matter and ensure that the Nancy Canal remains navigable for generations to come.

Sincerely,

Brian Therrell & Lindsey Derby