

MEMORANDUM

TO: TOWN OF HIGHLAND BEACH ("TOWN")

FROM: NELSON MULLINS RILEY & SCARBOROUGH LLP
MICHAEL MARSHALL, ESQ.

DATE: MARCH 18, 2024

On behalf of Stephen and Marla Garchik, the owners ("Owners") of the real property located at 2474 South Ocean Boulevard, Highland Beach, Florida ("Subject Property"), the undersigned hereby submits an appeal of the Town staff's interpretation of the Town's Zoning Code. The instant appeal concerns an open-walled, roofed "accessory structure" that provides shade and protects the Owner's outdoor furniture and grill from rain, sun, and other natural elements. The accessory structure is located within the Subject Property's rear "yard."

Town staff has advised Owners that the accessory structure is not allowed in their "yard" because it is subject to same setback requirements as the principal structure (i.e., the Owner's single-family residence). The Owners thereafter provided Town staff with an explanation and legal analysis of how the Town Code may be interpreted to allow placement of the accessory structure within their rear "yard." Town staff thereafter responded by rejecting the Owner's interpretation. The Owners' interpretation and Town Planner response are attached hereto as Exhibit A. The Owners' appeal now follows.

Based on the foregoing, the Owners respectfully request, pursuant to Section 30-4(p) of the Town Code, for a review by the Town's Board and Adjustment and Appeals ("Board") of Town staff's determination that the Owner's accessory structure may not be placed in the Owner's "yard." Moreover, the Owner respectfully requests that the instant appeal be placed on the next available Board agenda.

Sincerely,

Michael Marshall, Esq.

Exhibit A

Michael Marshall

From: Ingrid Allen <iallen@highlandbeach.us>
Sent: Monday, March 4, 2024 3:12 PM
To: Michael Marshall
Cc: Marshall Labadie; Jeff Remas
Subject: RE: 2474 S. Ocean

External Source/Sender notice

Use caution responding or clicking links/attachments.

Michael:

The Building Official and myself met with the Town Manager regarding your email below and determined that the property owner either submit for a variance (which I had previously suggested to you) or pursue an appeal of interpretation as provided in Section 30-40 (p). Staff finds that the proposed structure is not comparable to the encroachments referenced in Section 30-68(c)(2) to include fences, walls, vegetation, poles, pool decks (Note that pool decks have a setback which is provided in Section 30-68(f)(1)), ornaments, and furniture. Therefore, such a structure is not considered a “customary yard accessory.”

Sec. 30-68(c)(2)Encroachments. Fences, walls, vegetation, poles, and other customary yard accessories, pool decks, ornaments, and furniture may be permitted in any yard subject to height limitations and visibility requirements.

Again, you can appeal staff’s interpretation of a “customary yard accessory” which requires consideration by the Board of Adjustment and Appeals.



Sincerely,
Ingrid Allen
Town Planner

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From: Michael Marshall <Michael.Marshall@nelsonmullins.com>
Sent: Thursday, February 22, 2024 1:00 PM
To: Ingrid Allen <iallen@highlandbeach.us>
Subject: 2474 S. Ocean

Hi Ingrid. Thanks again for calling me yesterday. Please know that I wasn't trying to convince you of anything over the phone, but only wanted to explain our interpretation of the Town Code as it relates to the structure at issue. I also wanted to better understand whether this issue is truly one of code interpretation only (which is our understanding), or whether something else is driving the setback comment.

Anyway, the purpose of our analysis is two-fold: (1) define the "structure" – that is, how to properly identify it according to the terms in the Code, and (2) what if, any, setback requirement applies to this "structure." Please note, the terms that appear in "quotation marks" are terms that are specifically defined in the Town Code (and in some instances, that definition is given in the discussion below).

As you know, the Subject Property is located along the Intracoastal Waterway within the RS zoning district. Town Code Section 30-64 requires a minimum rear "setback" of 20 feet for structures in the RS district. The "principal structure" on the Subject Property is the Owners' single-family dwelling, which is placed 20.16 feet from Subject Property's rear lot line. As such, a "rear yard" that exceeds the minimum required 20 feet has been provided.

The Subject Property also features various "improvements" within the "rear yard," which is typical for a property situated along the Intracoastal Waterway. There is a swimming pool and paved pool deck/patio with a table for outdoor dining, an outdoor grill, countertop, and an open-walled "accessory structure" that provides shade and protects the outdoor furniture from rain, sun, and other natural elements.

We submit the "structure" at issue is a free-standing "accessory structure." The Code defines "accessory structure" as "a detached building or other improvement which is clearly incidental to the principal structure, and is subordinate in area, extent, size, or purpose and serves only the principal structure." As to what kind of "accessory structure," we further submit that it is either a typical "gazebo", or at the very least, a "common yard accessory" identified in Code Section 30-68.

But when applying Code Section 30-66(c)(1) to conclude that a 20-foot rear setback is applicable to the Owners' "accessory structure," Town staff assumes that it is part of the "principal structure" and more narrowly characterized as a pergola. Please know that we realize the Owner's initial permit application referred to the structure as a pergola, but the Owner also realizes now that this characterization was erroneous and done in haste without consideration of the terms and phrases that are relevant for purposes of the Town Code. This was truly unfortunate because Town planning staff has explained that since the word "pergola" does not appear in Section 30-66(c)(1), then the pergola cannot be a permitted encroachment. Essentially, the interpretation means that a pergola (even a free-standing pergola that is clearly an "accessory structure") must satisfy the same minimum rear setback that applies to a "principal structure" (i.e., 20 feet).

First, we respectfully submit that the "accessory structure" at issue is not a pergola. The Town Code does not even utilize the term pergola, and so the Town Code does not include a definition of term. It is well established Florida Law that "municipal ordinances are subject to the same rules of construction as are state statutes." *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973). Thus, when interpreting the Town Code, one must start with "the plain and ordinary meaning of the words employed." However, "[w]hen a term in the Code lack[s] definition, then one must 'turn[] to the dictionary meaning to find the plain and ordinary meaning of undefined terms.'" *Town of Longboat Key v. Islandside Property Owners Coalition, LLC*, ___ So.2d. ___, (Fla. 2d DCA 2012) (citing *Baker Cnty. Med. Servs., Inc. v. Aetna Health Mgmt., LLC*, 31 So.3d 842, 845 (Fla. 1st DCA) ("[W]hen a statute does not define a term, we rely on the dictionary to determine the definition."), *review denied*, 44 So.3d 1177 (Fla. 2010)).

According to the Merriam-Webster Dictionary, a *pergola* is "a structure usually consisting of parallel colonnades supporting an **open roof of girders and cross rafters**." (<https://www.merriam-webster.com/dictionary/pergola>) (emphasis supplied). Moreover, synonyms of *pergola* include *trellis* or *arbor*, which are similarly defined as "a frame of latticework used as a screen or as a support for climbing plants," or "a shelter of vines or branches or of latticework covered with climbing shrubs or vines," respectively. (*Id.*) The Owners' "accessory structure" is not comprised of lattice work, not intended to support climbing plants, and does not have an open roof of girders and rafters. Therefore, it is the not a pergola.

Secondly, we do not believe the "structure" at issue is part of the "principal structure" and thus, we do not believe that a determination of the required setback can be based on Code Section 30-66(c)(1). Section 30-66(c)(1) is concerned with elements of a "principal structure," such as roof overhangs, bay windows, awnings, balconies, and screen enclosures that extend, or encroach into the adjacent "yard" for some specified distance. Section 30-66(c)(1) also allows for electrical and mechanical equipment, such as electrical meters, fuse boxes, air conditioning units, and tankless water heaters to be mounted onto a "principal structure" even though they encroach into the adjacent "yard." Additionally, walkways, paved surfaces, steps, and staircases that lead to the principal structures are (quite naturally) allowed to encroach into the adjacent "yard" pursuant to Section 30-66(c)(1). If the "yard" is adjacent to a "waterway, canal, or lake," then the paved and hard surfaces may extend all the way across the "yard" to the rear property line (i.e., no setback requirement applies).

Significantly, the very next section, Section-66(c)(2), is concerned with accessory structures, such as "fences" and "walls," and the subsection begins by expressly stating "**unless otherwise provided in the Code**, the following structures are allowed in front, side or rear required setbacks as set forth herein." (emphasis supplied). Given that Section 30-66(c)(2) expressly states that the Town Code may "otherwise provide" with respect to "accessory structures" necessary means that the analysis does not begin and end with Section 30-66(c). The question, therefore, is whether the Code otherwise provides for the placement of "accessory structures" within a required "yard." The answer is yes.

More specifically, Town Code Section 30-68 includes a list of supplemental regulations that apply to "structures" and "improvements" that are **not** mentioned in Section 30-66(c)(1) or (c)(2). Such "accessory structures" include swimming pools, cabanas, docks and related marine structures, dune walkover structures, gazebos, and "other customary yard structures."

For instance, Section 30-68(f)(1)(c) allows for alternative setbacks for a swimming pool and pool deck, which may be placed anywhere within the yard with the approval of the building official and planning and zoning board. Also, Section 30-68(f)(3) provides that a “cabana”, which is defined as “an accessory single-level structure customarily associated with ocean or freshwater bathing” has no specific locational requirements, but “shall comply with the following requirements: (a) single story; (b) not to exceed one-hundred fifty (150) square feet; (c) facilities for independent living, cooking, eating, or sleeping are prohibited; and (d) water, electricity and facilities for sanitation are permitted.” Section 30-68(f)(3), *Town Code*. Notably, the Owners’ “rear yard” also features a swimming pool and thus a “cabana” associated with the pool would be allowed. That is, if the same type of single-level structure as the accessory structure (that does exceed 150 square feet) were used for bathing, rather than outdoor dining, then it may be placed in the exact same location as the structure at issue if approved as such.

The fact that certain accessory structures do not have a specific setback requirement is particularly true when the yard abuts the beach or a waterway, like the Subject Property. Code Section 30-68(i)(2) & (3) states that the building official may waive setback requirements for a “dune walkover structure” where doing so minimizes impacts on the dune and vegetation, even if that places the “accessory structure” on the rear property line with no “setback” provided. Of course, the Owners’ “accessory structure” is not a “dune walkover” either, but interestingly, the Town Code also refers to “dune walkovers and gazebos” in the subsection (m) of Section 30-68. Subsection (m) is concerned with “temporary” structures and provides that “dune walkovers and gazebos” are considered “expendable” structures not subject to temporal limitations (like “temporary” structures) and require a building permit. However, there is nothing in subsection (m) that detracts from the ability to approve a “dune walkover,” which apparently may include a “gazebo,” that has no “setback” from the rear property line.

Indeed, the mention of “gazebo” in Section 30-68(m) is highly relevant to the instant case. The Town Code does not use the term “gazebo” in any other provision, except to provide the following definition: “an open-styled, single-level accessory structure having floor and roof, but no full walls, which may or may not be provided with electrical service.” Section 30-131, *Town Code*. The definition of “gazebo” is remarkably descriptive of the Owners’ “accessory structure,” and while the Town Code appears to contemplate “gazebo” as something that is provided as a “dune walkover” (or in conjunction with a “dune walkover”), “gazebos” are extremely common “accessory structures” and often seen in the “yards” of properties, even those that do not front along ocean dunes.

In the final analysis, whether the Owner’s “accessory structure” is called a “pergola,” “gazebo,” or some other common “accessory structure” that is not specifically defined in the Town Code, then it must fall within the catch-all “customary yard accessory” structure that is identified in Code Section 30-68. Specifically, Section 30-68(c) states that “customary yard accessories ... may be permitted in any yard subject to height limitations and visibility requirements.” While the term *customary* is not defined in the Town Code, the term is typically used as an adjective meaning “commonly practiced, used, or observed.” (<https://www.merriam-webster.com/dictionary/customary>). The Owner submits that it is extremely common in South Florida for an outdoor dining area to have a cabana, or gazebo, or some open-walled structure that provides shade and protection from the elements (and not used only for bathing or as a dune walkover). Given that this “customary yard accessory” is not violating any height limitations or visibility requirements, located within a rear yard that fronts the Intracoastal Waterway, and has been built in the least obtrusive means possible to provide covering essential for Owners’ enjoyment of their outside dining area, the Owners further submit that the “accessory structure” should be permitted (subject to a complete permit review) in its current location.

Please let me know once you have had the chance to review.

Thank you!

Michael

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