THE CITY OF KEY WEST
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Memorandum

To: Shawn Smith, City Attorney

From: Donald Leland Craig, AICP
Planning Director

Date: July 26, 2011

Reference: Variances – New Approach

Overview

As you are aware the present City Land Development regulations provide a procedure for the granting of variances which is both cumbersome in execution and administration and confusing to citizens because 99% of staff reports recommend denial of variance applications, while the Planning Board approves 98% of the variances requested. This all stems from the criteria listed in our code, a copy of which is attached, and the wording of the LDRS, which requires that all of the seven criteria be met in order to qualify for a granting of the requested variance.

When I first analyzed our difficulties with the ordinance, I assumed the solution would be to adopt new criteria similar to those found in the other jurisdictions in the county, i.e. Monroe County, the City of Marathon or the Village of Islamorada. I checked those ordinances and discovered that the criteria for granting variances were similar to the Key West Code and all required all of the criteria to be met in order to sustain an approval. The criteria from these jurisdictions include a "hardship" provision. The interpretation and application of the similar criteria here in the City yields only recommendations for denial of submitted applications. How the County's other jurisdictions recommend approval of variances, which I know they do, with provisions similar to ours is most likely based upon the fact that these jurisdictions do not process many variances , and if only denial recommendations from staff were received it would likely result in many variances being turned down. This in turn would not politically acceptable in those jurisdictions. The reason these jurisdictions have so few variances is related to their development pattern established largely in the 1950 and 60 is when suburban subdivision designs responsive to the growing dependence on the automobile and the need to accommodate them were prevalent. This occurred long after the platting and historic development patterns were created in Key West at a time when automobiles were not in widespread use and upland areas scarce for the large population in the City, thus resulting in small lots and mostly modest homes and businesses. Obviously most lots of record in the City are smaller than those in the remainder of the County but as a result of inaccurate planning at the time, and the state of Florida's insistence that the City adopt a Comprehensive Plan similar to the County's, the City was subsequently burdened by an LDR more appropriate to the other jurisdictions in the County.

Given the unique geography of the City and the history of compact dense urban development patterns, and LDR standards more appropriate to a suburban community, the City will continue receive numerous applications for variances in order to accommodate the improvements citizens want to make to their once modest homes. Here are some basic figures:

2010 Calendar year total applications heard by the Planning Board – 100 & number of variance applications – 15
2011 Jan. to date – 64 total applications heard by the Planning Board & number of variance applications – 23

The number of variances heard to date in 2011 is up 35%. The estimated number of variances the City will process in 2011 will be double that of 2010.

Additionally of late, the Planning Board has been receiving increasing comment from citizens about the number and type of variances being granted. This has resulted in several denials despite the fact that staff reports contained recommendations for "soft" denials. This is again troublesome because citizens see denials of some requests and approval of others with essentially the same staff report. Finally, with the increase in the number of variance applications being received and the limited amount of time the volunteer Planning Board is willing to spend at meetings, there has been an increase in the number of continuances of applications, often-frustrating citizen applicants.

Recommended Changes

In order to deal with these problems and the increasing number of variance applications it is suggested the City consider changing the LDRs in two significant but useful ways.

The first change is to institute administrative variances approved by the Planning Director. These should involve changes of no more than 30% of the following standards:

- Setbacks
- Building coverage
- Impervious surface ratio
- Improvements to residential and commercial buildings where more than 66% or 50% of value are being proposed when no other variances are required or meet the 30% threshold
- Parking

Transparency and public involvement in these variances would be assured by a process of notifying the applicant and those property owners within 300 feet of the project location that the Director intends to grant the variance. Any appeal after the notice would go to the Planning Board. The applicant could appeal a denial directly to the Board.

The second is probably the most important change and must, in some form, be coupled with the first change. Not so much in Florida, but in other states there is a distinct differentiation between the two major types of variances granted by local jurisdictions. The types are "use" variances and "area" variances. In the first type of variance the strict application of the traditional criteria is used to evaluate the proposed variance and the" hardship" test is the focus of all such applications because of the extent of the change that could be granted with the approval. Because the City nor any other jurisdiction in the County can by their own regulations grant a "use" or "density" variance , the City is left with criteria more appropriate to "use" variances when considering "area" variances in the densely developed island of Key West. If the City were to adopt criteria

more appropriate to “area” variances, it would fare better by having a more defensible position for either denying or granting variances.
With an “area” variance, the approach is one of” balancing” between the benefit to the applicant and the detriment to the community. It is fundamentally different from “use” variance criteria in that a failure to address certain criteria is not always fatal to the application.

The criteria the City could adopt are the following:

1. whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
2. whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
3. whether the requested variance is substantial ;
4. whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
5. whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Planning Board or Director, but shall not preclude the granting of the area variance.

I have reviewed those portions of Florida statutes 163 and 380 applicable to local planning administration and neither describes or requires the variance criteria found in our LDRs as presently written. From my review, it is the case law that has been derived from the application of the criteria as presently written which reinforces the continued use of the criteria.

I have further checked our Comprehensive Plan with which variance LDRs must be consistent and find no duplication of the criteria as written in the LDRs. The plan merely directs the City to develop LDRs and encourages innovative techniques.

Finally if the City does not amend the variance section of the LDRs in some way, it is my opinion that the only way to avoid the problems discussed above is to amend the standards of each of the zoning districts to lessen the number of variance requests to that limited number that will pass the hardship test and the straight face test by getting rid of “soft” denial recommendations..

I would like to discuss this approach with you when you return from vacation.

I have attached the following to this memorandum:

1. Copies of the LDRs relative to variances from Monroe County, Marathon and the Village of Islamorada.
2. A CLE course summary on variances by Ralf Brooks and Henry Morgenstern.

CC: Mark Finigan
Richard Klitinick

VARIANCES AND JUDICIAL REVIEW

A Continuing Legal Education (CLE) Program presentation by

Henry Lee Morgenstern, Attorney, Gainesville Florida
As updated by Ralf Brookes, Attorney (2004)

A. Introduction to Variances

A variance is, generally, permission for a landowner to go outside the limits of the zoning code, and to build something which would otherwise be illegal under the terms of the zoning code or land development regulations.

The reason or rationale behind the law allowing variances at all is that in some situations, the literal application of the zoning code would create such a "hardship", that it would not allow any use of certain parcels of property whatsoever.

Without the flexibility to allow some reasonable use of the property, such totally prohibitive zoning would constitute inverse condemnation, subjecting the zoning authority to liability for a "taking". Askew v. Gables-by-the-Sea, Inc., 333 So.2d 56 (1 DCA 1976). Thus, the legal justifications for variances, and the threshold criteria for determination of a "taking", are closely related. (See, below, criteria for granting variances, when is it a taking not to allow a variance).

A variance is sometimes mistakenly believed to be simply a tool for allowing a more intense use than would otherwise be allowed. As such, it needs to be distinguished from a special exception or conditional use.

A "special exception" or conditional use is specifically authorized in that zone, but will be allowed only if specific, listed criteria for that special exception or conditional use are met. A variance is specifically prohibited in that zone, but will be allowed only if necessary to prevent a "taking", i.e., if no authorized use is reasonably possible in its place.

Boards of adjustment have sometimes been unclear on this distinction, granting variances as a convenient expedient to avoiding the zoning and land development regulations. The criteria for obtaining variances are theoretically very strict, and the grounds for overturning illegal variances relatively easy to prove if sufficient facts and discussion of a legal hardship is not placed in the record.

An Applicant's variance request must be reviewed on its own merits, rather than on the basis of previously approved variances in the jurisdiction. See City of Jacksonville v. Taylor, 721 So.2d 1212 (Fla. 1st DCA 1998). Previously issued variances do not establish controlling precedent or constitute a basis to sustain other variance applications.

B. Criteria for Granting Variances - Generally

Ordinances authorizing variances may be worded in different ways, and you should always read your specific language carefully. The standards must be definite, City of Miami v. Save Brickell Ave., 426 So.2d 1100 (3 DCA 1983), and the criteria must be mandatory, and not permissive (i.e., "shall consider criteria" means "must comply with criteria"), id.; Drexel v. City of Miami Beach, 64 So.2d 317 (Fla. 1953).

In 1985, local governments were given express authority to adopt variance criteria in their codes (most City's and County's adopted codifications of the existing law of variances with slight modifications in each locality). The repeal and replacement of Florida's standard zoning enabling act in 1985 when Florida's Growth Management Act of 1985 was adopted[1] did not diminish or substantially change the authority of local government or Florida law regarding variances, in fact previous Florida Law was codified in many local governments by ordinance. Both before and after 1985, the courts have followed long-established Florida law that a variance cannot be granted for self-created actions – and this requirement is codified in most city and county codes in Florida. Even after 1985, the courts have been very strict in their review of the hardship required to obtain a variance.

Generally, a variance is authorized if due to circumstances **unique to the applicant's property itself** and not shared by other property in the area, there exists an undue and unnecessary hardship created by the zoning regulations

1. The hardship cannot have been self-created.

The hardship criteria found in variance provisions has a long line of cases and has been strictly construed by the courts. Josephson v. Autrey, 96 So.2d 784 (Fla. 1957).

The criteria has been interpreted to mean three things:

a. A mere economic disadvantage due to the owner's preference as to what he would like to do with the property is not sufficient to constitute a hardship entitling the owner to a variance. Burger King v. Metropolitan Dade County, 349 So.2d 210 (3 DCA 1977); Metropolitan Dade County v. Reineng, 399 So.2d 379 (3 DCA 1981); Nance, supra; Crossroads Lounge v. City of Miami, 195 So.2d 232 (DCA 1967). If, however, the only allowable uses are economically impossible, then a variance would be allowed. Nance II.

b. Neither purchase of property with zoning restrictions on it, nor reliance that zoning will not change, will constitute a hardship. Friedland v. Hollywood, 130 So.2d 306 (DCA 1961); Elwyn v. Miami, 113 So.2d 849 (3 DCA 1959).

c. If a purchaser buys land with a condition creating a hardship upon it, the owner

is only entitled to such variance as his predecessor in title was entitled. If the owner participated in an affirmative act which created the hardship (such as by purchasing only a substandard piece of a larger lot), then the hardship should be ruled self-created. Coral Gables v. Geary, 383 So.2d 1127 (3 DCA 1980).

The requirement that a variance hardship cannot be self-created is required by most codes and Florida case law. In Re Kellogg, 197 F. 3rd 1116, 1121 (11th Cir. 1999). Josephson v. Autrey, 96 So.2d 784 (Fla. 1957) (superceded by statute *on other grounds* in *Grace v. Town of Palm Beach* 656 So.2d 945 (Fla. DCA 1995); Town of Ponce Inlet v Rancourt, 627 So.2d 586, 588 (Fla. DCA 1993).

Case law, as well as the Land Development Regulations control the degree of showing needed to support the approval of a variance from the express requirements of local regulations. The days of the "weeping variance" have been replaced by strict interpretation of what is required to show entitlement to a variance from local Code provisions under the case law. Town of Indialantic v. Nance, 400 So.2d 37 (5 DCA 1981), affd. 419 So.2d 1041; appealed again at 485 So.2d 1318 (5 DCA 1986), rev. den. 494 So.2d 1152.

Post 1985, the First District Court of Appeals in City of Jacksonville v. Taylor, 721 So.2d 1212 (Fla. 1st DCA 1998) Bernard v. Town Council of Palm Beach, 569 So.2d 853 (Fla. 4th DCA, 1990); Metropolitan Dade County v. Betancourt, 559 So. 2d 1237; Town of Indiatlantic v. Nance, 485 So.2d 1318 (Fla. 5th DCA 1986), *and Town of Indiatlantic v. Nance ("Nance I"), 400 So.2d 2137 (Fla. 5th DCA 1981)*; Maturo v. City of Coral Gables, 619 So.2d 455 (Fla. 3rd DCA 1993); Herrara v. City of Miami, 600 So.2d 561 (Fla 3rd DCA 1992) rev. denied 613 So.2d 2 (Fla. 3rd DCA 1992). In Re Kellogg, 197 F. 3d 1116, 1121 (11th Cir. 1999).

Pre 1985 cases had similar holdings and include Blount v. City of Coral Gables, 312 So. 2d 208 (Fla. 3rd DCA 1975) ("Nor are the Blounts entitled to a variance from the above zoning ordinance...as the hardship was self-created because they knew of the restricted zoning ordinance.")(*citing other Florida cases on this issue*); Clarke v. Morgan, 327 So.2d 769 (Fla. 1975); Friedland v. Hollywood, 130 So.2d 306 (DCA 1961); Elwyn v. Miami, 113 So.2d 849 (3 DCA 1959); Coral Gables v. Geary, 383 So.2d 1127 (3 DCA 1980).

The purchase of property with zoning restrictions on the property will normally not constitute a hardship. Friedland v. Hollywood, 130 So.2d 306 (DCA 1961); Elwyn v. Miami, 113 So.2d 849 (3 DCA 1959). Namon v. DER *558 So. 2d 504 (Fla 3rd DCA 1990)* and the cases cited therein address cases where property is purchased AFTER adoption of prohibitory regulations. The court in *Namon* recognized such pre-existing notice as applied to takings analysis in Florida cases, as follows:

> "Appellants are deemed to purchase the property with constructive knowledge of the applicable land use regulations. Appellants bought unimproved property. A subjective expectation that the land could be developed is no more than an expectancy and does not

translate into a vested right to develop the subject property. *See Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1382, 1383* (Fla.), *cert. denied sub nom. Taylor v. Graham, 454 U.S. 1083, 102 S. Ct. 640, 70 L. Ed. 2d 618 (1981)*

'...[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which [injures] the rights of others." Namon at 505, (original citation omitted) *see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 104 S. Ct. 2862, 2874, 81 L.E.2d 815, 834 (1984).*

"A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need'"; Namon citing *Claridge v. New Hampshire Wetlands Board, 125 N.H. 745, 485 A.2d 287, 291 (1984)*

"A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights"; *cf. Elwyn v. City of Miami, 113 So.2d 849, 852* (Fla. 3d DCA) "One who purchases property while it is in a certain known zoning classification, ordinarily will not be heard to claim as a hardship a factor or factors which existed at the time he acquired the property.", *cert. denied,* 116 849 (Fla. 1959).

Case law also indicates that a mere economic "disadvantage" or the owner's mere preference as to what he would like to do with the property is not sufficient to constitute a hardship entitling the owner to a variance. Burger King v. Metropolitan Dade County, 349 So.2d 210 (3 DCA 1977); Metropolitan Dade County v. Reineng, 399 So.2d 379 (3 DCA 1981); Crossroads Lounge v. City of Miami, 195 So.2d 232 (DCA 1967).

Neither purchase of property with zoning restrictions on it, nor reliance that zoning will not change, will constitute a hardship. Friedland v. Hollywood, 130 So.2d 306 (DCA 1961); Elwyn v. Miami, 113 So.2d 849 (3 DCA 1959).

If the owner participated in an affirmative act which created the hardship (such as by purchasing a substandard size lot), then the hardship should be ruled self-created. Coral Gables v. Geary, 383 So.2d 1127 (3 DCA 1980).

2. Consistency with neighborhood and scheme of regulations.

Granting the variance must not adversely affect the zoning scheme as a whole. Granting of a variance is illegal, and beyond the authority of any local administrative body, where the proposed variance is not shown to be in harmony with, and not "in derogation of the spirit, intent, purpose, or general plan of [the zoning] regulations." Troup v. Bird, 53 So.2d 717 (Fla. 1951).

"A variance should not be granted where the use to be authorized thereby will alter the essential character of the locality, or interfere with the zoning plan for the area and with rights of owners of other property."

Elwyn v. Cityof Miami, 113 So.2d 849 (Fla. 3rd DCA 1959).

3. No reasonable legal use can be made of the property without the variance.

Some cases go so far as to say no variance can be granted if the property can still be used without the variance. This approach incorporates, to some extent, the law of taking of property without just compensation, i.e., a variance can be granted and will not be overturned if no other reasonable use can be made of the property without a variance.

"The requisite hardship may not be found unless there is a showing that under present zoning, no reasonable use can be made of the property." Thompson v. Planning Commission, 464 So.2d 1231 (1 DCA 1985). Herrera v. Miami, 600 So.2d 561 (3DCA 1992).

The hardship must be such that it "renders it virtually impossible to use that land for the purpose or in the manner for which it is zoned." Hemisphere Equity v. Key Biscayne, 369 So.2d 996 (3 DCA 1979).

It is the land, and not the nature of the project, which must be unique and create a hardship. Nance, supra; Ft. Lauderdale v. Nash, 425 So.2d 578 (4 DCA 1982) (many other common violations in the neighborhood do not constitute a hardship); City of Miami v. Franklin Leslie, 179 So.2d 622 (3 DCA 1965).

When is Denial of a Variance a Taking?

A reasonable use of the property under existing zoning, requiring a denial of the variance, does not mean the owner's preferred use, or a use that will bring the owner an economic return. All that is required is a use beneficial to the owner and consistent with the zone. Metropolitan Dade Co. v. Betancourt, 559 So.2d 1237 (3 DCA 1990).

An extensive discussion of similar coastal setback beach ordinances and denial of a variance for construction seaward of such a setback appears under two, separate McNulty takings cases – the federal takings case of McNulty v. Town of Indialantic, 727 F Supp 604 (M.D. Fla. 1989) and the state court takings case of Town of Indialantic v McNulty, 400 So. 2d 1227 (Fla. 5th DCA 1981). The cases share common facts, the Town of Indialantic denied McNulty a variance for a 12-unit condominium on the beach under a similar coastal setback provision to the

line at bar resulting in both state and federal review.

> "[A] diminution of property value does not, by itself, establish a taking .... Inability to use the property for production of an income stream or to make the highest and best use does not render the property without economically viable use". 727 F Supp 611.

The court found that when regulations seek to protect natural resources, the court should "hesitate to find a taking", comparing such regulations to "restraining... [a] public nuisance". 727 F Supp 614.

The McNulty state court decision noted that the "harm to be prevented [by beachfront construction] is substantial" and held that McNulty made an insufficient showing that a taking would occur if he were denied the variance. 400 So.2d 1227. In discussing the harm to be prevented, the state appellate court noted that:

> "Through sad experience Florida has learned the importance of the barrier sand dunes which face its "high energy" beaches. The 'high energy beach' is a shore fronting the open ocean and dominated by sand and dunal features." Maloney and O'Donnell, Drawing the Line at the Oceanfront, *30 Fla. L. Rev. 383, 385 n.19 (1978).* Sand beaches and dunes comprise a very small and unstable part of Florida's coastal zone.
>
> Forming a narrow band along the shores of the Atlantic Ocean and the Gulf of Mexico, they offer some of the state's most attractive and most hazardous locations for real estate development. Without adequate controls on construction and excavation, oceanfront development could destroy not only man-made structures but also beaches and dunes. Maloney and O'Donnell, Drawing the Line at the Oceanfront, *30 Fla. L. Rev. 383, 389 (1978).*
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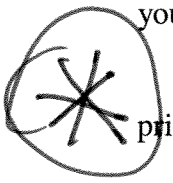
> Various local communities, like Indialantic, have adopted similar set back ordinances to protect the dunes, bluffs and natural vegetation of their beaches, and Chapter 161, Florida Statutes (1979), the "Beach and Shore Preservation Act," has as one of its stated purposes the protection and preservation of the "beach dune system. The "construction line" drawn pursuant to this State law was west or landward of the setback line of the Town as applied to McNulty's land. In any event, the State law contemplated that cities and counties could establish stricter setback lines than those set by the State. Sections *161.052(2)(b), 161.053(4),* Fla. Stat. (1979). See § 163.3177(6)(d), (f) and (g), Fla. Stat. (1979).
>
> There can no longer be any question that the "police power" may be exercised to protect and preserve the environment. Florida's Constitution expressly provides: It shall be the policy of the State to conserve and protect its natural resources and scenic beauty. Adequate provisions shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise. Art. V, § 7, Fla. Const. Other jurisdictions have reached a similar conclusion, without the benefit of an express constitutional provision.

The wetlands and coastal areas are places of critical concern because of their important role in protecting the inland regions against flooding and storm danger."

The leading case on regulatory takings for environmental purposes is Graham v Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981). It states six criteria for considering "[w]hether a regulation is a valid exercise of the police power or a taking", and specifically holds that protection of the environment is a legitimate use of the police power. 399 So.2d at 1380-1381.

Graham has recently been applied in Lee County v Morales, 557 So.2d 652, 655-656 (2 DCA 1990) (rezoning not a taking unless no beneficial and reasonable uses remain); and Namon v DER, 558 So.2d 504 (3 DCA 1990) (no taking where owner was aware of development restrictions [fill permit], even if no construction or economic use can be made of the property; "if you bought a swamp you must have wanted a swamp").



4. **Other Code criteria.** Various codes may also include the following criteria (See, e.g., prior F.S. 163.170(8), repealed 1985):

a. The granting of the variance will not accord applicant any special privileges;

b. The variance is the minimum one for the reasonable use of the applicant's land;

c. The grant of the variance will be harmonious and noninjurious to the surrounding land; and

d. The variance will not be contrary to the public interest.

Most court cases have focused on the hardship (whether it is the result of unique physical characteristics of the land in question or whether it is really an inpermissible self-created hardship). However, all variance standards must be met. The standards themselves must be definite, City of Miami v. Save Brickell Ave., 426 So.2d 1100 (3 DCA 1983), and the criteria must be mandatory, and not permissive (i.e., "shall consider criteria" means "must comply with criteria"), id.; Drexel v. City of Miami Beach, 64 So.2d 317 (Fla. 1953).

5. **Police Power Limits.** One case says that under the "arbitrary and unreasonable" test, where there is "no reasonably debatable relation to public health, safety or welfare" the court may be required to compel that a variance be granted. Metropolitan Dade County v. Reineng, 399 So.2d 379 (3 DCA 1981). The case's reasoning, moreover, is at odds with the clear holding of the Supreme Court one year later:

> T]he "fairly debatable" test should be used to review legislative-type zoning enactments, while a variance seeker must demonstrate a "unique hardship" in order

to qualify for a variance."

Nance v. Town of Indialantic, 419 So.2d 1041 (Fla. 1982).

Amendments to Regulations that no longer make sense.

If the land development regulation no longer has a valid public purpose, or should be changed, the proper method is to *amend the zoning code or land development regulations* rather than grant numerous variances from the offending provision. Therefore, in some instances amending (or a recommendation to amend) the code may be more appropriate than granting variances each time the issue comes up.

6. Consistency with Comprehensive Plan.

Granting of a variance is illegal, and beyond the authority of any local administrative body, where the proposed variance is not shown to be in harmony with, and not "in derogation of the spirit, intent, purpose, or general plan of [the zoning] regulations." Troup v. Bird, 53 So.2d 717 (Fla. 1951). All development orders, including variances, must be consistent with duly adopted Comprehensive Plan policies, objectives and goals under Florida Statutes 163.3215 (which also establishes procedures to challenge variances on the grounds of consistency with comprehensive plan policies). *Machado v. Musgrove*, 519 So. 629 (Fla. 3rd DCA 1987). And the remedy awarded by courts if a development order is found to be inconsistent with a comprehensive plan policy can include demolition of offending structures. *Pinecrest Lakes v Shidel*, 795 So. 2d 191 (Fla. 4th DCA).

C. Use-Variances vs. Non-Use Variances

Some codes distinguish between "use" variances, and "non-use" or "area" variances. A "use" variance would be one where application was made for a non-permitted use, while "non-use" or "area" variances would apply to a permitted use, but allow laxity of a height, setback, lot size, or other dimensional rule.

Use variances are often expressly disallowed by code.

Use-Variances

The Florida Supreme Court, sitting en-banc, clearly set the limits on use variances in Josephson v. Autrey, 96 So.2d 784 (Fla. 1957). The court held that, while zoning boards could make adjustments in height, setback, side lot, and other area problems unique to the parcel, use variances would be improper if they created a wholly inconsistent use in the zone:

> "To endow such a board with the authority to amend the zoning ordinance in particular instances by authorizing a use of property prohibited by the ordinance

> itself would be to convey to the appeals board the authority to enact legislation, nullify the decision of the municipal legislative body, and in effect destroy the beneficent results to be obtained by comprehensive zoning. When circumscribed by reasonable bounds the appeals board serves a valid and useful purpose. If granted unrestricted power to amend the zoning ordinance by changing completely the authorized uses of the particular land, the effect would be to transfer the legislative powers of the municipality to this non-legislative administrative agency."

Although the strictness of this position was questioned in Clarke v. Morgan, 327 So.2d 769,772 (Fla. 1975), Josephson still is good law. See Walgreen v. Polk, 524 So.2d 1119 (2 DCA 88).

The cases which have allowed use variances have abided by the Josephson admonition. In addition to other variance criteria applicable to all variances (discussed below), an applicant for a use variance must also show that the proposed use is basically consistent with the neighboring uses in the area. Troup v. Bird, 53 So.2d 717 (Fla. 1951) (a lake in a residential area did not change the residential character of the area); Josephson v. Autrey, 96 So.2d 784 (Fla. 1957) (filling station not a consistent use in a motel zone); Metropolitan Dade Co v. Reineng Corp, 399 So.2d 379 (3 DCA 1981) (liquor store would "harmonize" with neighborhood); Monterey Development Co. v. Stuart Marine Center, Inc., 305 So.2d 245 (4 DCA 1974) (dry-dock boat storage consistent with marine area); Dade Co. v. Pepper, 168 So.2d 198 (3 DCA 1964) (junkyard consistent with industrial area).

II - THE ADMINISTRATIVE PROCEEDINGS BEFORE LOCAL GOVENMENT

Typically, the applicant land owner will fill out a variance application. It will be reviewed by staff, and set for a hearing before whatever body is empowered to grant or deny variances in that jurisdiction, usually a Board of Adjustment.

A. Exhaustion of Administrative Remedies. To challenge a variance, someone with standing needs to appear and object, not only at the hearing on the variance application, but, if the variance is granted and being appealed, they must also object and use every "extra-judicial and administrative remedy which may provide the relief sought", or the later judicial appeal may be dismissed for failure to exhaust administrative remedies. City of Miami v. F.O.P, 378 So.2d 20 (3 DCA 1980).

Even parties with standing will lose their right to appeal if they do not personally appear and object at the administrative hearing. Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940 (5 DCA 1988). A written objection entered into the record should suffice.

The Applicant must also exhaust his administrative remedies by asking for a variance before claiming a taking. Mackay v DER. Under Herrera, this should mean that the owner needs to prove that he has been denied the minimum economically viable use.

. Burden of Proof. The burden to prove the existence of the required hardship and unique conditions is always on the applicant. Gomez v. City of St. Petersburg, 550 So.2d 7 (2 DCA 1989). Therefore, if the owner presents no evidence that the property cannot be used without the variance, there must be a denial. Herrera v. Miami, 600 So.2d 561 (3DCA 1992). The burden is more extensive than for a party seeking a permissible use by special exception. Cf. Gomez with Pollard v. Palm Beach City, 560 So.2d 1358 (4DCA 1990).

III- JUDICIAL REVIEW OF VARIANCE DECISIONS

A. Jurisdiction.

The Circuit Court has jurisdiction to review the action of the Board of Adjustment under the authority of Florida Constitution 1968, Article V, Section 5; Florida Rules of Appellate Procedure 9.030(c)(3) and 9.100; and Florida Rules of Civil Procedure 1.630.

B. Procedure.

A petition is filed under RAP 9.100 and RCP 1.630, within 30 days of the "rendition of the matter sought to be reviewed". "Rendition" is the date of the filing of the order of the zoning board in which it makes its findings, not the date of the hearing. RAP 9.020(g)

1. Petition. The Petition should contain:

a. Statement of Jurisdiction

b. Statement of Standing

c. Statement of facts, all of which must be in the record

d. Grounds of Objection

e. All authorities and arguments of law

f. Statement of relief sought

g. An appendix containing the record under Rule of Appellate Procedure 9.220 or the Rules of Civil Procedure 1.630 must be attached

2. Appendix. Must include everything from the record on which you will refer or rely. Nothing outside the record presented at the hearing may be included.

A challenger should also provide the Court with copies of all ordinances on which the ruling was based. The Court cannot take judicial notice of ordinances or of amendments which were not brought before the zoning board. Nichols v. FIDC, 315 So.2d 238 (4 DCA 1975). F.S. 90.202(10) allows the court to take judicial notice of ordinances, but they must be published or first presented to the zoning board. Hill v State, 471 So.2d 567 (1 DCA 1985).

3. Filing. The petition and appendix are simply filed with the Court, no hearing or notice is required. Submit along with it a Motion for Summons in Certiorari and Order to Show Cause and proposed order (see sample forms, infra.). If the Court finds you have made a prima facie case, it will issue what RCP 1.630(d) calls "a summons in certiorari", or RAP 9.100 calls an "order to show cause", giving the zoning board a reasonable time to respond. Oral argument may be request under RAP 9.100(d)(3), but it is not required.

Since this is an appeal, and not a new proceeding, there is no discovery. The Court will only review the record created below.

4. Briefs. RAP 9.100 provides for a response by the board, and then a reply by the appellant, with a supplemental index if desired.

C. Standards for Judicial Review.

1. Circuit Court. The circuit court's certiorari review of an administrative action reviews 3 components:

a. Whether procedural due process was followed;

b. Whether the essential requirements of the law have been followed;

c. Whether the decision was supported by competent substantial evidence. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982) However, the circuit court, like any other appellate court, may not reweigh the evidence or substitute its judgment for the administrative board's. If any competent substantial evidence was presented the decision must stand. Martin v. First Apostolic Church, 321 So.2d 471 (4 DCA 1975) [special exception to build church denied].

2. Court of Appeals. Vaillant holds that when the Court of Appeals reviews the circuit court (RAP 9.030(b)(2)(B)), it only may review the first two criteria. (a and b, above). The Court of Appeals theoretically may not reverse a circuit court on the basis of whether there was or was not competent evidence presented, so long as due process and the essential rules of law are followed. Gomez v. City of St. Petersburg, 550 So.2d 7 (2 DCA 1989).

3. Comprehensive Plan consistency. A challenge to a variance decision based on an alleged inconsistency with a particular comprehensive plan policy must be brought within 30 days pursuant to the statutory procedures set forth in Florida Statutes 163.3215. Comprehensive Plan inconsistency cases are held to different statutory procedures and a strict scrutiny standard.

e. Standing to seek judicial review of a variance in court

A person seeking to challenge a variance needs to show that the variance will have some effect on him different from the effect on the community at large, even if no different than upon others in his neighborhood. Carlos Estates v. Dade Co., 426 So.2d 1167 (3 DCA 1983). This has generally been held to mean landowners in the immediate neighborhood of the project. Hemisphere Equity v. Key Biscayne, 369 So.2d 996 (3 DCA 1979) (objectors have standing if they reside in "proximity" of project); Allapattah Community v. City of Miami, 379 So.2d 387 (3 DCA 1980) ("neighborhood" sufficient), but anyone in the same zoning district would seem to meet the Carlos Estates test.

Carlos Estates describes two subgroups in the Renard v. Dade County, 261 So.2d 832 (Fla. 1972) category 1 "special injury" classification (for standing to challenge violations of an existing zoning ordinance). Objections to variances (and special exceptions) follow the above rule. Objections to code violations by neighbors, however, according to Carlos Estates, requires "an impact unique to [the objector's] property". This distinction does not appear in Renard.

There is no rule that only landowners may object, thus a long term lease might suffice, but economic injury from business competition alone is not sufficient to create standing. Skaggs-Albertson v. Michels Pharmacy, Inc., 332 So.2d 113 (2 DCA 1976). But where the business is strictly regulated, such as with a liquor license, the economic injury does rise to the level of conferring standing. Skaggs-Albertson's v ABC Liquors, 363 So.2d 1082 (Fla. 1978).

The fact that someone is in the area required for notice is not conclusive as to standing. Battaglia Fruit v. Maitland, 530 So.2d 940 (5 DCA 1988).

Note that if you can find any grounds to challenge the variance as "void because not properly enacted", then any affected resident or citizen of the government unit has standing. Renard v. Dade County, 261 So.2d 832 (Fla. 1972); Upper Keys Citizens Coalition v. Wedel, 341 So.2d 1062 (3 DCA 1987); Save Brickell Ave., Inc. v City of Miami, 393 So.2d 1197 (3 DCA 1981).

Standing of Environmental and Citizens Groups.

In general, representative organizations have standing if they meet the criteria laid out in Florida Home Builders v. Dept of Labor, 412 So.2d 351, 353 (Fla. 1982):

a. a "substantial number of its members, although not necessarily a majority" would have standing in their own right,

b. the interests it seeks to protect are genuine to the organization's purpose, and

c. neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

d. The organization must have a "special injury" to a special interest that exceeds in degree the general interest in community good shared by the general public (i.e., inquire into what are the organizations special interests and what are the special impacts to those interests).

Upper Keys Citizens Assoc. v. Monroe Co., 467 So.2d 1018 (3 DCA 1985); Chabau v Dade County, 385 So.2d 129 (3 DCA 1980). An organization is often felt to be unable to meet the "special injury" requirement, which must still be followed. U.S. Steel Corp v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974). See Friends of the Everglades, 595 So.2d 186; Sailboat Key, 306 So.2d 616; Exchange Investments, 481 So.2d 1223.

Challenges to variances based on an alleged inconsistency with a specific Comprehensive Plan policy in circuit court must demonstrate a basis under the statutory standing requirements of Florida Statutes 163.3215. Putnam County Environmental Council v. Putnam County, 757 So. 2d 590(Fla. 5th DCA 2000).

----------ENDNOTES----------

[1] In 1985, the entire zoning enabling act was repealed (not just variances). Chapter 85-55 Laws of Florida, p. 235 Section 20 acknowledges that the Growth Management Act of 1985 repealed §§163.160 through 163.315, Florida Statutes and replaced it with §§ 163.3161 and 163.3215, Florida Statutes (making comprehensive plan consistency and concurrency requirements more stringent), but did not remove any of the previous zoning enabling authority:

> "Section 20. It is the intent of the legislature that the repeal of the sections 163.160 through 163.315, Florida Statutes, by this act shall not be interpreted to limit or restrict the powers of …county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land. It is further the intent of the legislature to reconfirm that sections 163.3161 and 163.3215, Florida Statutes, have provided and do provide the necessary statutory direction and basis for municipal and county officials to carry out their comprehensive planning and land development regulation powers duties and responsibilities."

The basic Florida Law of variances has not changed, as criteria for variances similar to Florida case law requirements has been incorporated into local Codes establishing similar variance criteria to be applied through slightly different procedures (Hearing Examiners v. Boards of Adjustment) for each County. But the ability to review and grant or deny variances, as well as the basic Florida law of variances, remains the same before and after 1985. *See, post-1985 cases cited above.* Since 1985, All development orders, including variances, must be consistent with duly adopted Comprehensive Plan policies, objectives and goals under the Growth Management Act of 1985, Florida Statutes 163.3215.