

TOWN OF PALM BEACH

Office of The Town Clerk

MINUTES FROM THE TOWN COUNCIL ZONING WORKSHOP HELD ON WEDNESDAY, MARCH 23, 2005

I. CALL TO ORDER AND ROLL CALL

The meeting was called to order at 9:30 a.m. by President William J. Brooks. On roll call, the following Elected Officials were found to be in attendance:

President William J. Brooks
President Pro-Tem Norman P. Goldblum
Councilman Denis P. Coleman
Councilman Richard M. Kleid
Councilman Allen S. Wyett

Absent from the meeting:

Mayor Jack McDonald

Also attending for all or part of the meeting were:

Assistant Town Manager Thomas G. Bradford
Town Attorney John C. Randolph
Zoning Consultant William Brisson
Assistant Building Official Harry Ackerman
Deputy Town Clerk Susan Eichhorn
Town Clerk Mary A. Pollitt

Via conference call from San Francisco, California:

Robert L. Moore, Director of Planning, Zoning and Building
Veronica Close, Assistant Director of Planning, Zoning and Building

II. INVOCATION AND PLEDGE OF ALLEGIANCE

Deputy Clerk Eichhorn gave the invocation and President Brooks led the pledge of

Post Office Box 2029 • 360 South County Road • Palm Beach, Florida 33480
Telephone (561) 838-5416 • Facsimile (561) 838-5417
E-mail: townclerk@townofpalmbeach.com • Website: www.townofpalmbeach.com



Minutes From the Town Council Zoning Workshop Held on March 23, 2005

allegiance.

III. APPROVAL OF AGENDA

Councilman Coleman made a motion to approve the agenda. The motion was seconded by Councilman Kleid and carried 5-0 on roll call.

IV. PRESENTATION OF THE REPORT ENTITLED, "VARIANCES AND SPECIAL EXCEPTIONS AS A TOOL FOR ZONING FLEXIBILITY IN THE TOWN OF PALM BEACH: HISTORY, ISSUES FOR DISCUSSION, AND IDEAS FOR REFORM", PREPARED BY SIEMON AND LARSEN, P.A., FOR THE PALM BEACH CIVIC ASSOCIATION, JANUARY 2005.

[Charles Siemon and Todd Messenger]

President Brooks said Mr. Siemon and Mr. Messenger would deliver the presentation with staff, including Mr. Moore and Mrs. Close who were listening on a conference call from San Francisco, delivering their comments, followed by the Town Council and members of the public.

Mr. Siemon presented the following report. His comments follow the presentation.

The following is the full report prepared by Siemon and Larsen for the Civic Association.

**VARIANCES AND SPECIAL EXCEPTIONS AS A TOOL FOR
ZONING FLEXIBILITY IN THE TOWN OF PALM BEACH:
HISTORY, ISSUES FOR DISCUSSION, AND IDEAS FOR REFORM**

Prepared by Siemon & Larsen, P.A. for the Palm Beach Civic Association
January 2005

CONTENTS

<u>CONTENTS</u>	i
<u>EXECUTIVE SUMMARY</u>	ii
<u>A. Variances</u>	ii
<u>B. Special Exceptions</u>	iii

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

<u>I. A SHORT HISTORY OF ZONING</u>	1
<u>II. VARIANCES</u>	2
<u>A. The Early Role Of The Variance.</u>	2
<u>B. The Variance In Florida And In Palm Beach.</u>	3
<u>1. Historical Roots.</u>	3
<u>2. Use and Area Variances.</u>	5
<u>3. Evolution and Interpretation of Variance Criteria.</u>	6
<u>4. Practical Realities.</u>	15
<u>C. Findings of the Empirical Study of Variances.</u>	15
<u>1. Methodology.</u>	15
<u>2. Findings.</u>	17
<u>3. Analysis.</u>	18
<u>D. Implications For The Town Of Palm Beach.</u>	24
<u>E. An Alternative Approach.</u>	25
<u>1. Setbacks.</u>	25
<u>2. Lot Coverage, Cubic Content Ratio, and Open Space.</u>	29
<u>3. Height.</u>	33
<u>4. Other Standards for Variances.</u>	37
<u>F. Conclusions Regarding Variances.</u>	40
<u>III. SPECIAL EXCEPTIONS</u>	40
<u>A. In General.</u>	40
<u>B. Special Exceptions in Florida.</u>	43
<u>C. Special Exceptions in the Town of Palm Beach.</u>	48
<u>D. Empirical Analysis.</u>	50
<u>E. An Alternative Approach.</u>	51
<u>1. Potential Procedural Reforms.</u>	51
<u>2. Potential Substantive Reforms.</u>	52
<u>3. Potential Structural Reforms.</u>	53
<u>F. Conclusions Regarding Special Exceptions.</u>	53

EXECUTIVE SUMMARY

The Palm Beach Civic Association retained the law firm of Siemon & Larsen to conduct an empirical study of the use of variances and special exceptions in the Town of Palm Beach. Siemon & Larsen examined seven years of Town Council minutes pertaining to variances and reviewed summary data from a parallel seven-year study conducted by the Town with respect to special exceptions in order to:

- + **Determine how many variances and special exceptions were being processed;**
- + **Determine how variances and special exceptions were being used;**

- + Identify whether the controlling legal standards were being strictly applied; and
- + Provide concepts for how the variance and special exception processes might be reformed to more effectively accomplish the Town's objectives.

**A.
Variances.**

With regard to variances, the empirical data show that during the period from January 1997 to December 2003, a total of 398 applications were filed, of which 356 were approved, thirty-nine were denied, and three were approved in part and denied in part. On average, every month the Town Council heard four or five applicants make one or more requests for varying individual provisions of the Town's zoning code.

Many applications included more than one request for a variance. Thus, during the study period, there were, on average, 1.8 variance requests per application, or 701 in the aggregate. Of the 701 individual variance requests, 632 (90%) were approved, 68 (10%) were denied, and one was deferred to a date beyond the cutoff date of the study (less than 1%). Typically, every month seven or eight requests for a right to depart from the strict command of the zoning code in some manner were granted by the Town Council. If challenged in a timely manner, only a handful of the 701 variance requests would have been likely to have survived judicial scrutiny.

Approximately half of all variance requests related to setbacks, lot coverage, cubic content ratio, or open space. Add in height-related requests (buildings, walls, fences, and gates), and lot size requests, and the list accounts for three out of four variance requests. The remaining requests related to a variety of code provisions, including length of docks, parking requirements, view angles, building demolition and reconstruction, and signage.

During the survey period the Town Council approved:

- + 96 percent of all variance requests related to lot dimensions (width, depth, and area);
- + 93 percent of all variance requests that involved setbacks (of those, 25 percent were for distances of less than one-fifth of the total required setback, and more than 50 percent were for distances of less than two-fifths of the total required setback);
- + 91 percent of all requests that involved building height (height and point of measurement), a large number of which involved lots with steep grades in relation to the crown of the road;
- + 90 percent of all requests that involved development footprints, some of which involved additions to existing already nonconforming buildings; and

- + 83 percent of all requests that involved the height of walls, fences, and gates, a large number of which involved lots with steep grades or proximity to nonresidential uses or busy streets.

In Siemon & Larsen's view, the empirical data suggest that the Town's zoning code could be amended to address commonly requested variance applications. Such amendments would create flexibility that is, at once, standard-based and faithful to the essential purposes of the Town's existing zoning code.

If Palm Beach desires a degree of flexibility in one or more of those areas where variances are most commonly sought, Siemon & Larsen recommends that the Town develop and adopt specific standards to guide decision-making in those areas. For example, applications for buildings that encroach into a required yard would be approved if they meet specific standards protecting public safety, privacy, community character, and quality design (all things that yard setbacks are supposed to protect). Specific standards would also allow for more predictable (and defensible) decision-making.

In addition, legally, every variance must be based on an "unnecessary and undue hardship" test set out in the Town's zoning code. However, the empirical data reveal that Palm Beach routinely grants variances which do not appear to meet this standard. Although the Town is in no way unique in this respect, the combined effect of such actions undermines the Town's overall zoning plan.

To address this concern, the stringent "unnecessary and undue hardship" standard could be replaced with the less restrictive "practical difficulties" standard that more accurately reflects the current state of variance administration in the Town.

B. Special Exceptions.

Siemon & Larsen reviewed summary-level data compiled by Town staff, which recently conducted a study of special exception applications processed from 1997 to 2003. According to the data provided by the Town, 213 requests for special exceptions were decided by the Town Council between 1997 and 2003. Two hundred five of them, or 96 percent, were approved. Eight, or 4 percent, were denied. The Town's summary-level data indicates that thirty-one, or 15 percent, of the requests would no longer be necessary today because the zoning code sections upon which they were based have been repealed.

About 74 percent of the applications (158) involved the use of land, as opposed to the height of a building or the placement of a gate, or some other physical development parameter. One-third of these 158 applications (50) were made by retailers to satisfy the "town-serving" requirement applicable to commercial establishments with more than 2,000 square feet of gross leasable space (e.g., Town's zoning code, §134.1109(a)(11) (C-TS district); §134-1159(a)(9) (C-WA district)). The other two-thirds involved approvals or

modifications of approvals for uses such as restaurants, nightclubs, churches, schools, private clubs, real estate offices, outdoor seating, tennis courts, hotels, and financial institutions. On average, the Town Council decided one or two use-oriented special exception applications per month during the study period.

The remaining 55 applications were related to the physical aspects of development. These applications included such things as development of substandard lots for permitted uses, or locating gates closer than 18 feet to the edge of a cul-de-sac. The frequency of these types of special exception applications over the study period was fairly low: approximately one every other month.

There are opportunities for procedural, substantive, and structural reforms of the Town's special exception provisions. The Town may wish to consider:

- + Delegating a number of what are currently special exception decisions to the staff level, subject to discrete standards and a "safety valve" that would allow staff to refer the application to a Town board or the Town Council;**
- + Barring successive special exception applications;**
- + Developing additional specific standards for those existing special exception categories that are amenable to such standards but are presently only subject to general standards;**
- + Amending its regulations to allow as-of-right certain uses that are currently allowed only as special exceptions;**
- + Reorganizing the special exception provisions into a more intuitive structure; and**
- + Studying whether the Town's existing specific provisions for special exceptions are adequately serving the Town's planning and community character objectives.**

I.
A SHORT HISTORY OF ZONING

Zoning flowered suddenly in the United States, precipitated by three important events that occurred within a brief ten-year period. First, in 1916 New York City passed the first widely publicized comprehensive zoning ordinance. Second, in 1921 U.S. Secretary of Commerce Herbert Hoover convened a committee that in 1922 promulgated the first version of the Standard State Zoning Enabling Act (SZEa), which was re-promulgated in 1926. Finally, in 1926 the Supreme Court sustained the constitutionality of the principle of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

The ordinances contemplated by the SZEa divided communities into districts. The SZEa provided for a delegation of power to municipalities to "regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land." A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (U.S. Dept. of Commerce 1926) (reprinted in David Callies, *et al.*, *CASES AND MATERIALS ON LAND USE*, 3d ed. (West Group, 1999), at 36). The SZEa continues:

All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from the regulations in another. *Ibid.*

Forty-three states adopted some version of the SZEa by the time the final version was released in 1926. *Id.*, at 39. The ordinances that the local governments enacted pursuant to this newly delegated power typically specified the permitted uses of land and buildings on the land, and established minimum standards that must be met by every lot, tract of land, or structure in a given zoning district. *Id.*, at 36. These standards dealt with such things as setbacks of buildings from property lines, and the size (bulk) of buildings (e.g., lot coverage and height). *Ibid.* As zoning evolved, more sophisticated measures of building bulk (e.g., floor area and cubic content ratios), sign and parking standards, design standards, landscape standards, performance standards, and the like were introduced.

II. VARIANCES

A. The Early Role Of The Variance.

The drafters of the SZEa recognized that no set of fixed rules could apply logically and fairly in all situations. The drafters feared that unique circumstances could arise in which otherwise beneficial zoning regulations could cause an unanticipated deprivation of the right to property. To deal with such situations the SZEa provided authority for local governments to create a board of adjustment, which would be empowered to grant variances from the zoning ordinance in specific cases in order to avoid "unnecessary hardships." *Id.*, at 38.

If strict application of a general zoning code to a particular piece of property worked an unreasonable hardship that did not serve a corresponding public purpose, the drafters of the SZEa feared that the unreasonable hardship could put the zoning ordinance at risk of being adjudicated unconstitutional "as applied." See generally *id.*, at 40. The board of adjustment was thus empowered to hear individual cases, and:

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

U.S. Department of Commerce, STANDARD STATE ZONING ENABLING ACT, §7 (1922), reprinted in 5 Kenneth H. Young, Robert M. Anderson, Alan C. Weinstein, *ANDERSON'S AMERICAN LAW OF ZONING*, 3d ed. (New York: Clark Boardman Callahan, 1997), §32.01. The SZEa also conferred authority to the board of adjustment to grant requests for special exceptions if they were permitted by the zoning ordinance itself. *Ibid.* Thus, speaking historically, both variances and special exceptions are creatures of the SZEa.

The variance is often confused with the special exception because they were both historically approved by the board of adjustment. The highest New York court has provided the following distinction:

A variance is an authority to a property owner to use property in a manner forbidden by the ordinance while a special exception allows the property owner to put his property to a use expressly permitted by the ordinance.

North Shore Steak House, Inc. v. Board of Appeals of Incorporated Village of Thomaston, 30 N.Y.2d 238, 243, 282 N.E.2d 606, 609, 331 N.Y.S.2d 645, 649 (N.Y. 1972); see also *Mayflower Property, Inc. v. City of Fort Lauderdale*, 137 So.

2d 849, 852-53 (Fla. Dist. Ct. App. 1962). Put another way, the variance is an approval to do something that the land development regulations do not otherwise allow. By contrast, the special exception is a procedure by which a property owner can gain approval for something that is allowed, but only according to the special exception standards that are set out in the land development regulations.

B.

The Variance In Florida And In Palm Beach.

1.

Historical Roots.

A modified SZEAs was ultimately adopted in Florida and codified as Section 163.225, Florida Statutes. Section 163.225(3)(a) retained an approach that was similar to the SZEAs, but provided specified detail with regard to the criteria for granting variances to zoning regulations (§163.225(3)(a), Fla. Stat. (repealed in 1985)):

1. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures or buildings in the same zoning district;
2. That the special conditions and circumstances do not result from the actions of the applicant;
3. That granting the variances requested will not confer on the applicant any special privilege that is denied by this ordinance to other lands, buildings, or structures in the same zoning district;
4. That literal interpretation of the provisions of the ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of the ordinance and would work unnecessary and undue hardship on the applicant;
5. That the variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure;
6. That the grant of the variance will be in harmony with the general intent and purpose of the ordinance and that such variance will not be injurious to the area involved or otherwise detrimental to the public welfare.

Section 163.225, Florida Statutes was supplanted in 1975 and repealed in 1985, when the state enacted comprehensive growth management legislation (see the Local Government Comprehensive Planning Act of 1975 (1975 Fla. Laws, ch. 75-257)); this law was substantially strengthened in 1985 by the Growth

Management Act (1985 Fla. Laws, ch. 85-55)). The Growth Management Act of 1985, codified as amended at §§163.3161-163.3215, Fla. Stat., required local governments to adopt comprehensive plans and implement land development regulations. It required the plans and regulations to include certain subject matters, but left the substance of the plans and regulations to the local governments. See §§163.3177, 163.3202, Fla. Stat. After 1985, the State of Florida no longer imposed uniform standards with regard to the issuance of variances—local governments were left to decide for themselves how to deal with “hardship” and matters of zoning flexibility.

¹ The state imperative was limited to a requirement that the zoning regulations (and the development orders issued under them) be consistent with the comprehensive plan. See §163.3194(1)(a), Fla. Stat.

Like many other Florida municipalities, the Town of Palm Beach zoning code had already incorporated the repealed statute’s variance criteria, including the “unnecessary and undue hardship” language, by the time the Growth Management Act of 1985 became law. Section 134-201 of the Town’s zoning code (Town of Palm Beach, Fla., *CODE OF ORDINANCES* (“Town Code”)) provides in relevant part:

- (a) The town council may authorize upon appeal such variance from the terms of this chapter as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of this chapter will result in unnecessary and undue hardship. In order to authorize any variance from the terms of this chapter, the town council must and shall find the following:
 - (1) Special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures or buildings in the same zoning district.
 - (2) The special conditions and circumstances do not result from the actions of the applicant.
 - (3) Granting the variance requested will not confer on the applicant any special privilege that is denied by this chapter to other lands, buildings or structures in this same zoning district.
 - (4) Literal interpretation of this chapter would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms

¹ The variance provisions that were common prior to the repeal of Section 163.225 are still ubiquitous among local government land development regulations. Accordingly, Florida courts continue to interpret them in the same way.

of this chapter and would work unnecessary and undue hardship on the applicant.

- (5) The variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure.

* * *

- (7) The grant of the variance will be in harmony with the general intent and purpose of this chapter, and such variance will not be injurious to the area involved or otherwise detrimental to the public welfare.

* * *

- (b) * * * No nonconforming use of neighboring lands, structures or buildings in the same zoning district and no permitted use of lands, structures or buildings in other zoning districts shall be considered grounds for the authorization of a variance."

2.

Use and Area Variances.

Before examining how the courts have interpreted the separate criteria of the Town's variance-standard, a brief discussion of the distinction between use and area variances is presented in order to highlight and explain the subtle differences in those cases that address particular types of variances. Although zoning statutes do not usually make this distinction explicitly, the courts have always distinguished use from area variances. The following judicial distinction is typical:

As the name indicates, a use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed "area variances."

Matthew v. Smith, 707 S.W.2d 411, 413 (Mo. 1986).

In other words, a "use variance" is one that allows a use in a zoning district in which it wouldn't otherwise be permitted by the zoning code; in contrast, an "area variance" is one that allows land to be used in a manner which is not allowed by the dimensional or physical requirements of the zoning ordinance. In many ways, the "use variance" is the antithesis of the special exception.

Use variances tend to be more controversial than area variances because the widespread granting of use variances can be the functional equivalent of rezoning without going through the required procedures. In 1957, the Florida Supreme Court appeared to place a blanket prohibition on use variances on the theory that a use variance is a rezoning that cannot be decided by an administrative body like a board of adjustment. See *Josephson v. Autrey*, 96 So. 2d 784, 788 (Fla. 1957) (reversing a decision which upheld a use variance, holding, "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.").

² In 1975, the Court narrowed the holding of *Autrey*, allowing use variances when the enabling legislation provides meaningful standards that limit the discretion of the decision-making board. See *Clarke v. Morgan*, 327 So. 2d 769, 772 (Fla. 1975).³ Although disfavored by most zoning commentators, and specifically disallowed by many zoning codes, see, e.g., the Town Code, §134-2 (definition of "variance") and City of Naples, Fla., *CODE OF ORDINANCES*, §86-205(c)(3)c., the use variance is very much alive in some places in Florida, most notably Miami-Dade County. See *Elwyn v. City of Miami*, 113 So. 2d 849, 852 (Fla. Dist. Ct. App.), *cert. denied*, 116 So. 2d 773 (Fla. 1959); *Miami-Dade County v. Brennan*, 802 So. 2d 1154, 1154 n.1 (Fla. Dist. Ct. App. 2001) (Fletcher, J., concurring).

3.

Evolution and Interpretation of Variance Criteria.

Unnecessary and undue hardship. The preamble and the second clause of the fourth criterion of Section 134-201(a) of the Town Code provide that a variance shall not be issued unless it is necessary to alleviate "unnecessary and undue hardship." The classic statement of the unnecessary hardship test appears in a New York case, *Otto v. Steinhilber*, 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (N.Y. 1939):

Before the Board may . . . grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in

² At the time *Autrey* was decided, rezonings were a legislative matter. Since *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993) was decided, site-specific rezonings have been considered quasi-judicial matters, just like variances which are heard by boards of adjustment. In other words, the problem of delegation of legislative authority is no longer as significant an issue as it was before *Snyder*.

³ When use variances are controlled by discrete, meaningful standards, they are strikingly similar to special exceptions, which are routinely used to allow certain uses within a zoning district, subject to the satisfaction of specific preconditions set out in the zoning ordinance.

question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions of the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Florida courts strictly construe the "unnecessary and undue hardship" requirement if it is included in the local code. In *Brennan*, Judge Fletcher listed a dozen Florida opinions which addressed the topic, and summarized them by observing that, "Unnecessary hardship" has generally been defined as a non-self created characteristic of the property in question which renders it virtually impossible to use the land for the purpose or in the manner for which it is zoned." *Brennan*, 802 So. 2d, at 1155 n.2 (Fletcher, J., concurring).

One of the cases cited by Judge Fletcher in *Brennan* was *Bernard v. Town Council of the Town of Palm Beach*, 569 So. 2d 853 (Fla. Dist. Ct. App. 1990). In *Bernard*, a neighbor challenged the Palm Beach Town Council's grant of a variance to a property owner that allowed her to add a master bedroom and den that were not otherwise permitted due to setback restrictions and prohibitions on third-floor construction. See *id.*, at 854.

In support of the variance request, the applicant stated that the master bedroom suite was "need[ed] desperately," and that it could not be constructed elsewhere on the lot because the lot was "odd shaped." *Ibid.* In opposition to the variance, the neighbor argued that "not being permitted to have a thirty-five to forty foot master bedroom simply was not a "hardship." *Ibid.* The trial court upheld the variance, holding, "hardship is in the eye of the beholder." *Id.* at 855.

The Florida District Court of Appeals reversed the trial court, holding that the hardship standard is not that subjective—rather, "unique hardship" does not exist "unless no reasonable use can be made of the property without the variance." *Ibid.* Put another way, "the hardship must be such that it renders it virtually impossible to use the land for the purpose for which it is zoned." *Ibid.* (quoting *Town of Indian Lantic v. Nance*, 485 So. 2d 1318, 1320 (Fla. Dist. Ct. App.), rev. denied, 494 So. 2d 1152 (Fla. 1986)). Accordingly, in a variance proceeding, it is the applicant's duty to provide competent substantial evidence to prove that "no reasonable use could be made of the property absent the variance." *Ibid.*

The requirement adopted in *Otto v. Steinhilber*, that the applicant for a use variance must show a unique hardship to his property restates the rule that a variance is not proper when other forms of relief from the zoning ordinance are available. See 282 N.Y., at 75, 24 N.E.2d, at 852. As the New York court stated in *Otto*:

[T]he fault may lie in the fact that the particular zoning restriction is unreasonable in its application to a certain locality. . . . In . . . [this] situation, the relief is by way of direct attack upon the terms of the

ordinance.

This requirement is codified in the first criterion of Section 134-201(a) of the Town Code. The Town Code allows a landowner to apply for an amendment of the zoning ordinance in this situation.

Quite often the existence of unnecessary hardship depends upon whether the landowner can establish that without the variance the property cannot yield a reasonable return. "Reasonable return is not maximum return." *Curtis v. Main*, 482 A.2d 1253, 1257 (Me. 1984); see also *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985). Rather, the landowner must demonstrate that he will be deprived of all beneficial use of the property under any of the permitted uses.

Most courts agree that mere conclusory and lay opinion concerning the lack of any reasonable return is not sufficient; there must be actual proof, often in the form of dollar and cents evidence. See *Nance*, 485 So. 2d, at 1320. Furthermore, the "no reasonable return" rule means that the variance is an alternative to litigation that claims the zoning restriction on the land is an as-applied unconstitutional taking under the Fifth Amendment to the U.S. Constitution. See *Village Bd. of Fayetteville v. Jarrold*, 53 N.Y. 2d 254, 258, 423 N.E.2d 385, 386-87, 440 N.Y.S.2d 908, 909-10 (N.Y. 1981). Florida courts generally require a landowner to seek a variance before bringing an as-applied constitutional challenge, on the theory that a property owner must exhaust administrative remedies before asking the court for relief. See *Wood v. Twin Lakes Mobile Homes Village, Inc.*, 123 So. 2d 738, 741 (Fla. Dist. Ct. App. 1960).

4

The "no reasonable return" rule means that a landowner does not make a case for a variance simply by showing that his property could be used for a more profitable use if the variance were granted. The typical judicial point of view in this type of case is illustrated by *Carbonneau v. Town of Exeter*, 119 N.H. 259, 263, 401 A.2d 675, 678 (N.H. 1979), where an applicant for a variance had been using the bottom floor of his home as a funeral business, which was an established nonconforming use. He applied for a variance to operate a beauty parlor on the bottom floor of a barn located on his property. See *id.*, at 676. The court held that a desire to make a more profitable use of the property did not justify a variance. See *id.*, at 678. Accord *Graziano v. Board of Adjustment*, 323 N.W.2d 233, 237 (Iowa 1982); *State ex rel. Pitts v. Board of Zoning Adjustments of the City of New Orleans*, 327 So. 2d 140, 145 (La. Ct. App. 1976); *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 631, 307 N.E.2d 316, 321 (Mass. 1974); *Anon v. City of Coral Gables*, 336 So. 2d 420, 423 (Fla. Dist. Ct. App. 1976) (reversing quashal of a variance, observing, "in both the *Elwyn* decision and in the

⁴ Landowners, however, are not required to seek variances before challenging a quasi-judicial order by bringing a petition for writ of *certiorari* in the circuit court. See *Carol City Utilities, Inc. v. Dade County*, 143 So. 2d 828, 829 (Fla. Dist. Ct. App. 1962).

Josephson decision, the property owners could have other uses for the lands if the variance was denied, but in the case under consideration the unique hardship is not the loss of a better or more profitable use, but rather a complete denial of the use of the owner's property."); *Thompson v. Planning Comm'n of City of Jacksonville*, 464 So. 2d 1231, 1238 (Fla. Dist. Ct. App. 1985).

A common misconception about variances is that "financial" hardship justifies a variance. As noted earlier, the variance is supposed to alleviate a hardship that is inherent in the piece of land, not a hardship created by the owner's error in paying too much for the parcel. See *Maturo v. City of Coral Gables*, 619 So. 2d 455, 456 (Fla. Dist. Ct. App. 1993) (holding, "the hardship must arise from 'circumstances peculiar to the realty alone, unrelated to the conduct or to the self-originated expectations of any of its owners or buyers.'" quoting *Coral Gables v. Geary*, 383 So. 2d 1127, 1128 (Fla. Dist. Ct. App. 1980)). Financial hardship, therefore, is rarely an appropriate consideration in variance review unless it relates to the physical characteristics of the land. See *Metropolitan Dade County v. Reineng Corp.*, 399 So. 2d 379, 381 (Fla. Dist. Ct. App. 1981).

Self-created hardship.

The application for a variance permit recognizes the basic validity of the ordinance and seeks the grant of a variance purely on the basis of some hardship peculiar to his particular property. When the owner himself by his own conduct creates the exact hardship which he alleges to exist, he certainly should not be permitted to take advantage of it.

Autrey, 96 So. 2d, at 789.

Under the second criterion of Section 134-201(a) of the Town Code, a variance is not available if the hardship is self-created. In other words, the self-created nature of the claimed hardship forecloses the grant of a variance.

Self-created hardship usually arises in one or more of the following ways:

- (1) The applicant subdivides a tract to create a lot that will be difficult or impossible to develop in conformity with the applicable zoning restrictions, see, e.g., *Baker v. Board of Adjustment of Rehoboth Beach*, 488 A.2d 1303, 1308 (Del. 1985) (landowner sought a variance from the lot size restrictions of the zoning ordinance); *Johnson v. Township of Robinson*, 420 Mich. 115, 126, 359 N.W.2d 526, 532 (Mich. 1984); *In re Appeal of Volpe*, 384 Pa. 374, 378, 121 A.2d 97, 99-100 (Pa. 1956).
- (2) The applicant develops the property in violation of applicable zoning restrictions, see, e.g., *Town of Ponce Inlet v. Rancourt*, 627 So. 2d 586, 588 (Fla. Dist. Ct. App. 1993).
- (3) The applicant purchases the property with actual or imputed knowledge

that it is not feasible to develop the property without a variance.

Denial of a variance is understandable in the first two classes of cases. See, e.g., *Amco Dev., Inc. v. Zoning Bd. of Appeals*, 185 A.D.2d 637, 638, 586 N.Y.S.2d 50, 51 (N.Y. App. Div. 1992) (owner who subdivided parcel into four lots, one of which was primarily wetlands, had created his own hardship); *Alexander v. Town of Hempstead*, 129 N.H. 278, 281, 525 A.2d 276, 285 (N.H. 1987) (homeowner who built second story on house in area zoned for one-and-a-half stories not entitled to variance because "a property owner cannot benefit from his knowing violation or disregard of the law"); see also, *Chapman v. Board of Adjustment of City of Mobile*, 485 So. 2d 1161, 1163 (Ala. 1986); *Farrington v. Zoning Bd. of Appeals*, 177 Conn. 186, 189-90, 413 A.2d 817, 819 (Conn. 1979); *Foxhall Community Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 524 A.2d 759, 761-62 (D.C. Ct. App. 1987); *Clarke*, 327 So. 2d, at 773.

Some courts hold that landowners should also be denied variances in the third class of cases—those in which the applicant has merely *bought* into a hardship situation. See, e.g., *Wolfson v. Curcio*, 150 A.D.2d 586, 587-88, 541 N.Y.S.2d 243, 245 (N.Y. App. Div. 1989) (denial of variance appropriate where owner admitted that he purchased the property knowing of the zoning restrictions and took a "gamble"). However, there are important nuances in the purchase situations that lead to different results. Such cases should be divided into three categories:

- (1) those in which the prior owners themselves could not have obtained variances, see, e.g., *Duval Productions, Inc. v. City of Tampa*, 307 So. 2d 493, 493 (Fla. Dist. Ct. App. 1975) (where prior owner was paid severance damages when a portion of his lot was condemned, the subsequent purchaser could not seek a variance on the basis that the lot was substandard and could not be developed under existing zoning);
- (2) those in which the purchaser paid a premium for the property with the expectation of developing it in a certain way (when other ways that were in compliance with the zoning code were possible)—even though a variance would be necessary in order to satisfy the purchaser's expectations, see *Thompson*, 464 So. 2d, at 1238 (observing that this hardship was "self-created" when "[b]efore purchasing the property, the owners were fully aware of its shape and size, but still designed a building which was too large for the lot, leaving insufficient room for code-required parking"); *Autrey*, 96 So. 2d, at 789; and
- (3) those in which the prior owner would have been entitled to a variance, but did not seek one. See *Geary*, 383 So. 2d, at 1128 (holding, "It is undisputed that the appellee's predecessor in title, who held the property when the restrictions were initially imposed, would then have been entitled to the variances in question. * * * The 'self-imposed' hardship doctrine thus does not apply."); see also, *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995) (hardship found where applicant had purchased from

a seller who had obtained a variance but had let the variance expire); *Hoberg v. City of Bellevue*, 76 Wash. App. 357, 362, 884 P.2d 1339, 1342 (Wash. Ct. App. 1994) (applicant "can stand in the shoes of the original owner with respect to a variance, so long as the claimed hardship does not arise out of the purchase itself"). See generally, Osborne M. Reynolds, Jr., *Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One But Himself to Blame?*, 20 URB. LAW. 1 (1988).

The third set of circumstances often applies in the case of nonconforming lots. Nonconforming lots are lots which existed prior to the zoning ordinance (or a change in the ordinance) and are not in conformity with its provisions, generally in terms of dimensions, frontage, or lot area. See, e.g., the Town Code, §134-2(b) (definition of "nonconforming land"). In mature communities like Palm Beach, which contain many nonconforming properties, circumstances which call for flexibility in the application of the zoning ordinance are fairly common.

For example, development of a lawfully pre-existing lot of 9,500 square feet in a zone requiring a 10,000 square foot minimum lot size may require a variance, which in most cases should be granted. Cf. *City of South Miami v. Shirley Homes, Inc.*, 291 So. 2d 40, 42 (Fla. Dist. Ct. App. 1974); *Bell v. City of Sarasota*, 371 So. 2d 525, 527 (Fla. Dist. Ct. App. 1979). Similarly, development of an odd-shaped pre-existing lot often requires a variance, which is generally justified if the use of the land for the purposes set forth in the zoning district is virtually impossible without the variance. See *Geary*, 383 So. 2d, at 1128 (holding, "It is, of course, well-recognized that the irregular shape or other peculiar physical characteristic of a particular parcel constitutes a classic 'hardship' unique to an individual owner which justifies, and in some cases requires the granting of a variance."); compare *Duval Productions*, 307 So. 2d, at 493-94.

Special conditions. The language of Section 134-201(a)(1) of the Town Code is a verbatim copy of the corresponding paragraph of the repealed Section 163.225, Florida Statutes: "Special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures or buildings in the same zoning district." Special conditions means that the conditions that give rise to the variance request cannot be conditions that generally affect the neighborhood. See *Nance*, 485 So. 2d, at 1319-20 (holding that a zoning authority may not grant a variance because of conditions general to the neighborhood).

The reason for the special conditions requirement is that in situations where the "hardship" is generally experienced by properties in the same zoning district, the problem is not with the properties involved, but with the zoning regulations themselves:

[D]ifficulties or hardships shared with others in the area go to the reasonableness of the zoning generally, and will not support a variance. If the hardship is one which is common to the area the remedy is to seek a change of the zoning for the neighborhood

rather than to seek a change through a variance for an individual owner.

Elwyn, 113 So. 2d, at 851.

Special privileges. *Otto v. Steinhilber* noted that “the use to be authorized by the variance . . . [must] not alter the essential character of the locality.” 282 N.Y., at 76, 24 N.E.2d, at 853. *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 410 A.2d 1138 (N.J. 1980) illustrates a judicial application of this negative criterion. A landowner requested a variance to build a house on an undersized lot. *Id.*, at 1141. The court noted that “if the size and layout of the proposed house would have adversely affected the character of the neighborhood . . . a board may justly conclude that a variance should not be granted.” *Id.*, at 1145. Other courts implement the negative criterion by balancing the hardship to the property owner against detrimental impacts on the surrounding area.

The second clause of the seventh criterion of Section 134-201(a) of the Town Code incorporates the more stringent version of this test, that is, a variance is foreclosed if it confers any special privileges denied to other landowners in the neighborhood.

Thus, the grant of a variance that allows the applicant to exceed the zoning code’s maximum lot coverage or to reduce the rear yard setback so that a resident might add a room to his house for his recently widowed mother violates the third and seventh criteria of Section 134-201(a) of the Town Code. Compare *Bernard*, 569 So. 2d, at 854 (rejecting the argument that it is hardship “to live in [the subject] house without an addition of a master bedroom and den which they need desperately”). This rule is usually justified on the premise that it is the responsibility of other people or agencies to deal with social and personal hardships. By granting variances to appease personal interests, it is said, the zoning authority confers a special privilege on that property. See generally, *Chapman*, 485 So. 2d, at 1164.

Common enjoyment of rights. The first clause of Section 134-201(a)(4) of the Town Code provides that a variance should be issued if, in addition to the other requirements of Section 134-201(a), the strict interpretation of the Town’s zoning code would deprive the applicant of rights commonly enjoyed by other property owners in the same zoning district. The language is, in effect, the flipside of the rule that a variance cannot confer upon an applicant “special privileges” which are not available to others in the same zoning district. It is also, in a sense, a bridge between the special privileges ban and the requirement that the applicant demonstrate unreasonable hardship as a basis for the variance.

Minimum variance required. Section 134-201(a)(5) of the Town Code limits variances to the “minimum variance” that is required to achieve “reasonable use” of the property—presumably alleviating the hardship. “Reasonable use” should neither be the very best nor the very worst use.” *City of Ormond Beach v. State ex rel. Del Marco*, 426 So. 2d 1029, 1032 n.6 (Fla. Dist. Ct. App. 1983).

Under Section 134-201(a)(5), if "reasonable use" can be achieved with a three-foot setback variance, for example, then a six-foot variance would not be justified.

Harmony, spirit and intent. Section 134-201(a)(7) of the Town Code requires that variances must:

be in harmony with the general intent and purpose of this chapter, and . . . not be injurious to the area involved or otherwise detrimental to the public welfare.

The second clause of the seventh criterion of Section 134-201(a) of the Town Code contains an additional provision that requires the Town Council to consider the impact of the variance on the surrounding area. The clause is closely tied to the language of the SZEa that authorizes variances so long as the "spirit" of the ordinance is observed, that is, the variance is "in harmony with the general intent and purpose of" the Town's zoning code.

There is some guidance in the Florida decisional law regarding "spirit and intent" clauses in variance regulations. In the early case of *State ex rel. Landis v. Valz*,

⁵ the Florida Supreme Court suggested that decisions made pursuant to provisions which allowed variances upon findings that they are "in harmony with the general purpose and intent of the Ordinance so that the public health, safety and general welfare may be secured and substantial justice done" were not subject to judicial review:

The duty imposed upon the commissioners involves a non-justiciable subject-matter. It is not a judicial nor legislative process. They deal with a matter within the purview of the ordinance, within the general purpose and intent of it to the end that substantial justice may be done not inconsistent with the public safety, health, and general welfare. It is a discretionary power usually vested in zoning commissions to interpret and apply the provisions of the ordinance in harmony with its general purpose.

117 Fla. 311, 315, 320, 157 So. 651, 652, 654-55 (Fla. 1934). The suggestion in *Valz* that decisions regarding whether a particular application is within the "general purpose and intent of the Ordinance . . ." are immune from judicial review was not long-lived. In *Troup v. Bird*, the Florida Supreme Court changed course and did its own examination of the evidence regarding "harmony with 'the spirit, intent, purpose or general plan' of the zoning regulations":

we have examined the exhibits which show the contemplated

⁵ The procedural holding of *Valz* regarding the role of the writ of *quo warranto* was subsequently superseded by statute. See *State ex rel. Watson v. Dade County Roofing Co.*, 22 So. 2d 793 (Fla. 1945).

improvements and the aerial photographs of the area in which appellants' property is located and have concluded that the proposed improvements are consistent and in harmony with 'the spirit, intent, purpose or general plan' of the zoning regulations . . .

53 So. 2d 717, 722 (Fla. 1951). After *Troup*, the majority of cases that involved "spirit and intent" language arose from application of Miami-Dade County's "use variance" regulations. Unlike regulations that allow variances from bulk and area requirements, use variances allow uses that are not otherwise permitted by the zoning district.

⁶ Still, the interpretations of the Third District Court of Appeals in "use variance" cases are instructive concerning the significance of the "spirit and intent" language:

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

Metropolitan Dade County v. Betancourt, 559 So. 2d 1237, 1239 (Fla. Dist. Ct. App. 1990) (quoting *Elwyn*, 113 So. 2d, at 851-52); see also, *Reineng Corp.*, 399 So. 2d, at 381; accord *Belanger v. City of Nashua*, 121 N.H. 389, 393, 430 A.2d 166, 169 (N.H. 1981).

More recent decisions of the Third District Court of Appeal suggest that reliance on "spirit and intent" language as a basis for decision-making is a risky proposition. In *Brennan*, Judge Fletcher expressed the view that "spirit and intent" language does not provide sufficient limits on discretion to satisfy constitutional due process requirements:

When analyzed, it becomes clear that this non-use variance language is nothing more than an abbreviated restatement of the basic intent and general purpose of zoning. The language is too indefinite to suffice as a standard for boards to apply in reaching their decisions. * * * The non-use variance code provision is thus unconstitutional as lacking sufficient guidelines.

802 So. 2d 1154, 1156-57 (Fla. Dist. Ct. App. 2001) (Fletcher, J., concurring). The concurring opinion in *Brennan* regarding non-use variances was adopted as part of the holding of the Court in the subsequent case of *Miami-Dade County v. Omnipoint Holdings, Inc.*, 811 So. 2d 767, 770 n.8 (Fla. Dist. Ct. App. 2002). However, because the constitutional question had not been properly presented to the District Court, the *Omnipoint* decision was ultimately quashed by the Florida

⁶ Use variances are generally disfavored. See the discussion of "Use and Area Variances" above in part II B.2 of this memorandum.

Supreme Court on jurisdictional grounds, and the case was remanded for a decision which did not address the constitutional question. See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003).

4.
Practical Realities.

Despite rules such as those prohibiting the grant of variances except in the case of undue hardship, zoning authorities frequently grant variances in contravention of the rules, especially when the application is unopposed. See Richard F. Babcock, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (Madison: University of Wisconsin Press, 1966). Another prominent commentator summarized the practical realities of variance administration this way:

If the variance is the "safety valve" of zoning, then, according to several prominent commentators, the "safety valve" has "ruptured into a steady leak." Most applications for variances are granted. Unless one assumes that most applications for variances are meritorious, a risky assumption at best, one would have to conclude that the local zoning boards of adjustment are not strictly applying variance law. Further, boards of adjustment frequently overrule their own planning staffs' recommendations on disposition of variance applications.

3 Arden H. Rathkopf, *THE LAW OF ZONING AND PLANNING*, 4th ed. (Minn.: West Group, 1997), §58:2, pp. 58-8 - 58-9 (citations omitted).

C.
Findings of the Empirical Study of Variances.

1.
Methodology.

The Palm Beach Civic Association commissioned a study of variance applications that were heard by the Town of Palm Beach during the seven-year period between January 1997 and December 2003. The survey examined the number, nature and extent of variances requested, granted, and denied, and the justification presented for each of the requested variances. The purpose of the survey was to identify patterns in the requests, approvals, and denials, to provide a clearer view of the existing state of flexible administration of the Town's zoning code, which could be used as a basis for subsequent policymaking.

The survey was conducted by reviewing Town Council minutes for every Town Council meeting in which a variance application was considered. Reviews were entered into a spreadsheet for summary-level statistical analysis and cross-tabulation. Justifications were reviewed and catalogued by a professional planner for further review by planning attorneys.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

The data were organized in a manner that responds to the nature of the development approval process. That is, any particular application for development approval (a "case") may include requests for a number of different approvals, which may include one or more variances. Therefore, in order to determine which sections of the Town Code are under the greatest pressure from variance applications (and with what frequency the Town grants each type of variance), cross-tabulation of the type of variance requested against the frequency of approval requires "cases" to be parsed into their individual "requests." At the level of detail of "request," the subject matter of individual variances can be identified and analyzed.

To illustrate, a property owner who wants to improve an existing home might file an application for development approval that includes a request for a variance from the required side yard setback, a request for a variance from the height limit of perimeter walls, and a variance from the required rear yard setback. Even though the property owner seeks three variances, the Town, in the interest of efficiency, would process the application as a single "case." If the Town approves the "case," it approves three "requests." Likewise, if the Town denies the "case," it denies three "requests." In some cases, the Town may also approve the "case" in part and deny it in part.

Not infrequently, individual cases were deferred, meaning that one "case" may have been heard at several different hearings before a final decision was rendered. For the purpose of this analysis, "cases" (and therefore "requests") were only counted if and when they were decided. The purpose was to avoid skewing the results by over-counting those applications that were heard on several occasions before they were decided.

Consider the following example, which tracks fifteen hypothetical cases (labeled "A" through "O") through four public hearings:

Public Hearing	Approved	Denied	Deferred
First	A, B, C	D	E, F
Second	E, G, H, I, J	K	F
Third	F, L	none	M, N
Fourth	M, N	none	O
Totals:	12 approved	2 denied	6 deferred

If deferral were counted as "action" on the case, then in the above example, there would be twenty actions ($12 + 2 + 6$), notwithstanding the fact that there were only fifteen "cases." Moreover, an "approval rate" that included deferrals would be calculated as $12 \div 20$, or 60 percent. Yet five of the six deferred cases in the table were ultimately approved. Thus, in terms of cases actually decided, the approval rate was (number of approved cases divided by number of decided cases) $12 \div 14$,

or 86 percent. Note that Case "O," which was deferred at the Fourth hearing, would have fallen outside of the period of the study and would not have been considered because its

outcome is not known.

**2.
Findings.**

At the summary level of analysis, it is apparent that the Town of Palm Beach processes a large number of variances. Predictably (according to Babcock, Rathkopf, and others who have studied the issue in other jurisdictions), another pattern was also revealed: the Town approves variance applications in roughly nine out of every ten "cases." Of the 398 applications filed in the last seven years, 356 were approved, thirty-nine were denied, and three were approved in part and denied in part. Although many "cases" included only one "request," the average number of "requests" per "case" was 1.8. One of the "cases," which involved the reconstruction of an existing three-story multifamily building, included sixteen "requests" (all of which were granted).

From the beginning of 1997 to the end of 2003, the Town considered 398 "cases," that is, applications for variance approval, which in total represented 701 "requests" for variances. Put another way, on average the Town Council heard four or five applicants make one or more requests for varying individual provisions of the Town's zoning code every month.

Of the 701 individual variance requests included in the 398 variance cases, 632 (90%) were approved, 68 (10%) were denied, and one was deferred to a date beyond the cutoff date of the study (less than 1%). Thus, on average, every month, seven or eight requests for a right to depart from the strict command of the zoning code in some manner were granted.

In terms of what types of variances are being requested:

- + **setback variances (front, side, and rear) were the most popular, accounting for 41 percent of all requests;**
- + **variances related to development footprints (expressed as lot coverage, cubic content ratio, and required open space) accounted for 11 percent of all requests;**
- + **variances related to building height (building height, expressed as either point of measurement or building height limitations) accounted for 9 percent of all requests;**
- + **variances related to wall, fence, and gate height accounted for 8 percent of all requests;**
- + **variances related to lot width, lot depth, and lot size requirements accounted for 4 percent of all requests.**

In sum, half of all variance requests related to setbacks, lot coverage, cubic content ratio, or open space. Add in height-related requests (buildings, walls, fences, and gates), and lot size requests, and the list accounts for three out of four variance requests. The remaining requests related to a variety of code provisions, including length of docks, parking requirements, view angles, building

demolition and reconstruction, and signage.

During the survey period the Town Council approved:

- + 96 percent of all variance requests that related to lot dimensions (width, depth, and area);
7
- + 93 percent of all variance requests that involved setbacks (of those, 25 percent were for distances of less than one-fifth of the total required setback, and more than 50 percent were for distances of less than two-fifths of the total required setback);
- + 91 percent of all requests that involved building height (height and point of measurement), a large number of which involved lots with steep grades in relation to the crown of the road;
- + 90 percent of all requests that involved development footprints, some of which involved additions to existing already nonconforming buildings; and
- + 83 percent of all requests that involved the height of walls, fences, and gates, a large number of which involved lots with steep grades or proximity to nonresidential uses or busy streets.

Staff recommendations appear to have some statistical relationship to the outcome of the variance proceedings. Over the last seven years, the Town Council did not deny any application that had a staff recommendation of approval, even if the neighboring landowners objected to it. However, in three out of four cases when the request carried a staff recommendation of denial, the Town Council granted the requests anyway. Even in cases where staff and the neighbors objected, the Town Council granted two applications for each one that it denied.

3. Analysis.

Generally. Although many of the presentations made by property owners demonstrated that strict compliance with the Town's zoning code would be very difficult to achieve with a practical, quality design, the survey revealed few applications that appeared to demonstrate the degree of hardship that is required by the controlling case law that interprets the traditional SZEa-based hardship language—case law that includes *Bernard v. Town Council of the Town of Palm Beach*:

⁷ The Town “grandfathers” pre-existing undersized lots in the R-AA (see §134-793(b), Town Code), R-A (see §134-843(b), Town Code), and R-B District (see §134-893(b), Town Code), but not in the R-C, R-D(1), and R-D(2) Districts. Section 134-446 requires a variance prior to development of nonconforming lots in the latter three districts.

the hardship must be such that it renders it *virtually impossible* to use the land for the purpose for which it is zoned.

569 So. 2d 853, 855 (Fla. Dist. Ct. App. 1990) (quoting *Nance*, 485 So. 2d, at 1320) (emphasis added). The survey found that in many cases, applicants argued that the unnecessary and undue hardship was the zoning code's inflexibility. Such "zoning code-based hardship" arguments were especially prevalent in applications that involved the alteration of existing buildings, or (in cases that involved building or wall height) the development of lots with steep slopes. Rathkopf, a leading commentator on zoning law, points out that the argument that "the provisions of the zoning ordinance are outmoded or ill-fitting" has been rejected by the New Jersey courts. 3 Arden H. Rathkopf, *THE LAW OF ZONING AND PLANNING*, 4th ed. (Minn.: West Group, 1997), §57:20, p. 57-49.

In the Town of Palm Beach, the number of variance requests, and the outcomes of those requests, is neither novel nor surprising. The first-generation zoning codes that were modeled on various statewide implementations of the SZEAs were primarily aimed at controlling the development of large areas of vacant and developing property. Palm Beach's zoning code, originally adopted on March 5, 1929, has many characteristics of the popular first-generation model.

In addition to adopting its first zoning code, in 1929 Palm Beach also undertook the preparation of a long-range general plan for the physical development of the Town.

⁸ Unlike many of the newer municipalities in South Florida, Palm Beach's zoning code was adopted after a significant number of lots had been platted.⁹ Also unlike other South Florida municipalities, old buildings in Palm Beach have retained and increased their value over time. In other words, while most of the rest of South Florida redevelops in a tear-down and rebuild mode (because the existing buildings do not have continuing value), much of the redevelopment in Palm Beach is accomplished through reconstruction, rehabilitation and expansion of existing buildings. As such, the combination of two forces appears to produce a large number of variance requests on lots with existing buildings:

1. The existing development on many lots took place before the existing zoning regulations that control the development of the lot were adopted, resulting in nonconformities

¹⁰; and

⁸ In order to protect the Island from negative effects of growth, the Garden Club of Palm Beach underwrote the Town's first "master plan," which was accepted at a public meeting in December 1929. See *GARDEN CLUB OF PALM BEACH—ABOUT Us*, available at

<http://www.gardenclubpalmbeach.com/about.htm> (last visited Oct. 6, 2004). This guide, among other things, envisioned the following general land use goals:

One attractive and well managed public bath and beach, the concentration of general traffic upon a limited number of streets, beautification without special reference to main arteries of travel, and a system of leisurely and convenient byways free from automobiles, punctuated with gardens; this is a plan which will localize recreation seeking crowds, discourage trespassing, and provide safety and quiet for residents of Palm Beach.

PALM BEACH MEDIA ASSOCIATES, INC.—PALM BEACHES COM: HISTORY OF PALM BEACH SOCIETY, available at

http://www.palmbeaches.com/palm_beach_society.php (last visited Oct. 6, 2004).

⁹ For example, Floral Park was platted in 1912, Floral Park Addition # 01 in 1913, Orange Grove Park in 1915, Poinciana Park in 1916, Ocean Park H.W. Robbin's Addition in 1917, and Poinciana Park Addition # 03 in 1922.

¹⁰ When zoning first gained momentum in the 1920s, its application to existing municipalities inevitably created many nonconforming uses, despite the tendency of officials to draw zoning boundaries to legitimize existing uses. During the early years of zoning, officials hoped that these nonconforming uses would slowly wither away. To expedite this process, most zoning ordinances placed limitations on the expansion and alteration of such uses. Because natural withering was expected and was less controversial politically than imposition of a cutoff date, many municipalities also declined to pursue mandatory phase-out programs.

2. Even when the existing development conforms to the zoning code, sometimes there is little room for expansion in a manner that conforms with the strict requirements of the Town Code.

Absent regulations with standards that provide flexibility with regard to particular traditional bulk regulations, the operation of these two forces puts the Town in the position that it must either approve variances (on whatever theory might be presented, colorable or not) or tell property owners that they will not be permitted to upgrade and expand existing buildings. Many times the upgrades are aesthetically and functionally desirable, or at the very least, harmless to the neighbors and the community's character.

In cases that involve tear-down-and-rebuild projects or the development of vacant land, property owners will commonly seek to maximize the economic return of a parcel by maximizing its floor area or number of units. Not surprisingly, the building which is designed to provide the maximum floor area allowable under the applicable district regulations often does not "fit" into the desired architectural character of the Town. Accordingly, in order to achieve desired design objectives, the property owner applies for one or more variances to push the building envelope further (either vertically, horizontally, or both) in order to accommodate, for example, building articulation, while retaining the floor area that the zoning code would have otherwise allowed. In cases like this, it is difficult to imagine a set of circumstances in which the *Bernard* standard of hardship could be satisfied. However, the practical reality is that the Town usually wants the improved design, and is willing to accommodate the additional floor area (which is often an important part of the developer's *pro forma*).

Case Study: Society of the Four Arts. The Society of the Four Arts, a non-profit organization, was founded in 1936 by a prominent group of Palm Beach residents to meet the cultural needs of the growing resort community. Its mission is to encourage an appreciation of art, music, drama and literature through the presentation of notable exhibitions, concerts, lectures, films and the maintenance of a library. The Society of the Four Arts is a community treasure.

In early 2004, the Society of the Four Arts sought approval for a master plan for the Philip Hultar Sculpture Garden, located at the northwest corner of the intersection of Royal Palm Way and Cocoanut Row. The master plan was

In combination, these policies produced unexpected results. In practice, nonconforming uses seldom die—nor do they fade away. And when the owner of a nonconforming building seeks permission to modernize or expand, a local government faces a dilemma: on the one hand, the building's setbacks and bulk may not meet the requirements of the new zoning ordinance, but on the other hand, the modernized or expanded building may be more desirable than its existing condition. In such situations, granting the request may preserve the character of the neighborhood but perpetuate a use that is inconsistent with the zoning regulations.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

generally regarded as an improvement to the property. However, in order to be implemented, the master plan required five variances from the Town Code:

- + one to allow a portion of the proposed 1,782 square foot Garden House to encroach almost 19 feet into a required thirty-foot setback;**
- + one to allow a proposed perimeter wall and iron fence combination with decorative columns to be taller than the six-foot height limit;**
- + one to allow proposed gate posts to be 4.7 feet taller than the eight-foot maximum height;**
- + one to allow the wall and fence columns to have a horizontal cap that was 1½ feet wider than the three-foot maximum width; and**
- + one to allow less hedge material than the code required.**

The Society of the Four Arts' application was unanimously approved by the Town Council on May 11, 2004.¹¹ According to the minutes of the meeting, the Society's counsel



¹¹ We offer this illustration of a case that had widespread support, noting that an appeal of the case on its merits is now time-barred. See Fla. R. App. P. 9.100(c)

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

argued to the Town that the “hardship for the variances was the shape of the lot which presented a security issue.” The minutes of the meeting reflect that the Town Council found that “[t]he hardship was . . . the shape and size of the property as well as the security issues regarding the protection of the sculptures.” The relative size and shape of the property is indicated by the bold black line in the aerial photograph below:

The property, approved for use as a sculpture garden, is rectangular (almost square) with regular dimensions of approximately 310 feet by 300 feet (more than 2 acres). The property is of a size that provides a relatively large area for potential development.

The property is zoned R-B, which is a single-family residential zoning district. In addition to single-family homes (which are permitted as-of-right), the zoning district allows such special exception uses as academic schools, churches, synagogues and other houses of worship, nonprofit cultural centers, group homes with up to six occupants, and foster care facilities with up to six occupants. Museums are also permitted as special exceptions, provided that they occupy buildings of unique value as historical landmarks, for which it is demonstrated that no permitted use is economically viable.

The Town Council’s decision to grant the five variances to the Society of the Four Arts allowed for the improvement of an important civic asset. In other words, the decision produced what is widely believed to be a good and desirable result. However, as good as the result was, the process used to reach the desired result (the variance process) was not well-suited to produce it.

To illustrate, imagine a “variance computer,” that is, a machine that is programmed to process variance applications according to the strict rules of the Town Code as interpreted by the court in *Bernard*. When an application is fed into the “variance computer,” the machine compares the application to the Town’s rules and reports “yes” or “no” with regard to whether each rule is satisfied by the application. If the computer answers “no” with regard to any rule, the variance is denied—regardless of the nature of the project or its likely impacts or potential public benefits. The “variance computer” is concerned only with applying rules, not with obtaining popular or desirable results.

Programmed strictly to evaluate whether individual variance criteria are satisfied, the “variance computer” would almost certainly have denied the Society of the Four Arts’ application. This is so because the hardships that were presented would almost certainly not have survived rigid application of the standard for legal “hardship” set out in *Bernard*, that is, “the hardship must be such that it renders it virtually impossible to use the land for the purpose for which it is zoned.” *Id.*, at 855 (quoting *Nance*, 485 So. 2d, at 1320).

Simply stated, the “hardships” that served as a basis for the application were: (1) lot size; (2) lot shape; and (3) security issues with regard to the sculptures. In all likelihood, the unforgiving “variance computer” would have processed the application as follows:

(2004).

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

INPUT: Variance Requested	ANALYSIS: by variance justification			OUTPUT: Granted or Denied
1 Garden house setback	1. Lot size Large lot provides enough room for proposed building	2. Lot Shape Lot shape provides enough room for proposed building	3. Security Concerns Location of building closer to school site either compromises or does not affect security	Denied (not "virtually impossible" to use property for a permitted use - no hardship)
2 Taller fence	Lot size does not relate to taller fence	Lot shape does not relate to taller fence	Taller fence could enhance security; however, property could be put to another use that did not need taller fence	Denied (no hardship)
3 Taller gate posts	Lot size does not relate to taller gate posts	Lot shape does not relate to taller gate posts	Even if taller gate posts could enhance security, property could be put to another use that did not need taller gate posts	Denied (no hardship)
4 Wider fence and post caps	Lot size does not relate to wider fence and post caps	Lot shape does not relate to wider fence and post caps	Wider fence and post caps do not enhance security	Denied (no hardship)
5 Less hedging	Lot size does not relate to less hedging	Lot shape does not relate to less hedging	Less hedging could compromise security; even if security enhanced by increased visibility, property could be put to another use that did not require less hedging	Denied (no hardship)

D.

Implications For The Town Of Palm Beach.

Two key forces operate against the uniform application of the strict standards of the Town's zoning code. First, many of the Island's existing lots are nonconforming with respect to width, depth, and/or area. Second, the Island's existing buildings, many of which also do not conform to the Town's area and bulk regulations (setbacks, floor area, lot cover, etc.), tend to retain their value, and are often rehabilitated, reconstructed, and expanded instead of demolished and rebuilt with something entirely new. The community needs flexibility with regard to the administration of the zoning code in order to accommodate these forces.

The Town's zoning code does not meet this need. Although three-quarters of the variances issued in the Town of Palm Beach involve impacts that are fairly well understood in the planning and architecture community, there are no specific standards in the Town Code to guide lay decision-makers in how to balance the interests of property owners, neighbors, and the community at large. And without guidelines, the zoning code offers little to provide consistency in decision-making.

This is so because the Town's variance standards do not include any meaningful

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

criteria beyond alleviating “unnecessary and undue hardship.” Cf. *Brennan* 802 So. 2d, at 1156-57 (Fletcher, J., concurring). Accordingly, the use of variances to provide flexibility in an otherwise inflexible code may appear in the short run to be the “path of least resistance,” but it may undermine the very purpose of the zoning code—planned, orderly evolution. The variance allows the property owner to solve his immediate practical difficulties (by deviating from the requirements of the zoning code) without having to address systemic problems. By routinely granting the variances, the Town Council puts the work of addressing the systemic problems off for another day. That procrastination is not without consequence. As one question-and-answer publication on the topic puts it:

[I]t isn't the effect of any single unwarranted variance that matters, but the cumulative effect of many of them. If such a variance is granted, others are sure to follow.

The desire to help, even if it means stretching the law, is strong. Richard Babcock, a nationally known zoning attorney and author, has said that ninety-five percent of the zoning variances granted in this country are illegal. Herbert Smith in his book, *THE CITIZEN'S GUIDE TO ZONING*, says: ‘The greatest single cause for the failure of zoning to effectively guide land use development . . . has been the misuse of the variance technique’

COMMON QUESTIONS ABOUT PLANNING IN ARIZONA, Issue 3, at 2 (June 1992), available at

<http://www.commerce.state.az.us/pdf/commasst/cqiss3.pdf> (last visited June 25, 2004).

E.

An Alternative Approach.

One alternative the Town could consider is to offer alternative, flexible development standards that allow a departure from the standard district requirements in key areas that are common subjects of variance applications.

1.

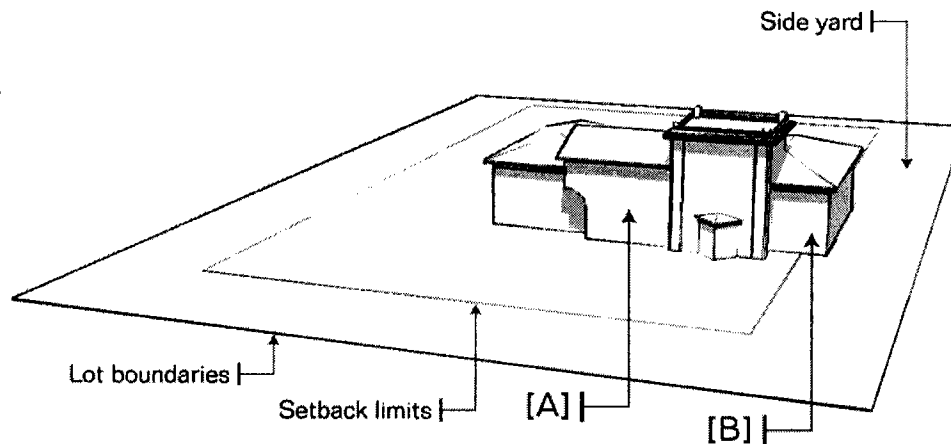
Setbacks.

Purpose of Setback Regulations. Setback regulations have been a part of zoning regulations since the very early days of zoning. In general, they provide for front, side and rear yards in which no building is supposed to be constructed. The original purpose of these regulations was to provide for fire safety and minimal levels of air circulation and some access to light between buildings and on the public street. Setbacks may also be established to provide for privacy, private recreation areas, and separation of buildings from traffic. Setbacks may affect the character of an area as perceived from neighboring properties and public rights-of-way.

Pressure For Flexibility With Regard To Setbacks. The empirical evidence shows that there is great pressure for flexible administration of setback regulations in the Town.

Minutes

Indeed, 41 percent of all variance



requests during the study period involved setbacks. Speaking generally, the Town Council was sympathetic toward applicants who requested flexibility with regard to setbacks: 93 percent of the setback variance requests during the study period were granted.

The Town already provides a limited degree of flexibility with regard to setbacks in its residential zoning districts. First, if an existing building encroaches into the required setbacks, the building may still be improved and expanded, without a corresponding requirement to remove the encroaching part of the building, if:

- + **The new construction (e.g., additions, modifications) complies with the setback regulations and all other applicable bulk regulations;**
- + **The new construction does not result in a building (new construction plus existing construction) that has more floor area than would be allowed for an entirely new building on the lot if it were vacant; and**
- + **No more than 50 percent of the volume of the existing building is demolished in preparation for expansion or alteration.**

See §§134-794, 134-844, 134-894, 134-949, 134-1005, and 134-1060, Town Code.

Second, certain architectural features, such as chimneys, bay windows, balconies, trellises, awnings, overhangs, pergolas, and arbors, are generally permitted to encroach into required setbacks in residential districts. See §§134-795, 134-845, 134-895, 134-950, 134-1006, and 134-1061, Town Code.

The Town Code allows existing buildings that encroach into setbacks to remain there, but it does not provide any flexibility to allow enclosed additions that would invade required setbacks. Plans for improving properties that include building additions that encroach into required yards may only be approved through the variance process. In other words, a property owner who seeks to locate even a modest addition, along the same plane, to a home that now invades the required setback must generally demonstrate legal hardship to the Town Council first.

To illustrate, in the diagram above, if the section of the building marked [B] (which encroaches into a required side yard) is already there, the Town Code would let the property owner add the section labeled [A] without removing section [B]. However, if the situation is reversed, and section [A] is the section that is already there, the Town Code would not let

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

the property owner build section [B] without a variance. That is so even if the location of section [B] is the most practical and aesthetically appealing location for the addition, and even if it complied with the Town Code in every other respect and did not have any impact on fire safety, air circulation, privacy, recreation, separation of buildings from traffic, or community character.

As such, the property owner is left with three choices: (1) do not make the improvement; (2) make a less desirable improvement; or (3) demolish the home and build something new that does not require a variance. Often, the remaining choices are less desirable than the proposed improvement that encroaches into the required setback. In the first instance, the improvement might have also entailed restoration of an existing building that would enhance the community character. In the second instance, the improvement that is ultimately undertaken is less desirable than that which would have required a variance. In the third instance, the property owner often pushes the building volume limit in order to achieve a project that is expected to produce a reasonable return on his investment (as the owner did in the photograph to the right, which was taken in another jurisdiction):



Creating Flexibility With Regard to Setbacks. At present when the Town Council considers variances to the setback regulations, we believe that it is likely that considerations of the impact of the proposed variance on public safety, neighboring properties, and community character as perceived from the public realm play an important role in the decision-making process. Yet the variance standards do not directly capture these considerations. In order to provide flexibility with regard to setbacks without requiring variances, the Town could amend its code to allow modified setbacks upon demonstration that certain specific criteria are satisfied.

The challenge is to create criteria that provide the same protections that the setback standards themselves are supposed to provide, while also providing flexibility for property owners who wish to construct well-designed improvements. The idea is to allow proposed improvements within required setbacks which do not have any negative impact on fire safety, air circulation, privacy, recreation, and separation of buildings from traffic, and which maintain or improve the community character. In some circumstances, these improvements may actually be more desirable than improvements that strictly comply with the setback requirements.

For example, instead of the current variance criteria (which include “hardship”), an

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

applicant could be allowed to build within required side yards upon satisfactory proof that:

The proposed encroachment:

- (1) will not reduce open space on the lot to less than that required by the underlying district regulations;
- (2) will not result in a building that has more volume or floor area than permitted by the underlying district regulations;
- (3) will not compromise fire safety;
- (4) will not affect traffic safety;
- (5) will not cast more shadow on adjacent property than would be cast if development within the building envelope of the parcel proposed for development were maximized; and
- (6) will not materially affect air circulation between the parcel proposed for development and adjacent property; and either:
 - (a) The building is already nonconforming with regard to setbacks and is a historic building or landmark and the new construction:
 - (i) will not extend further into a required yard than existing construction located in the same required yard; and
 - (ii) is designed and configured to preserve, restore, or enhance the existing historic character of the building; or
 - (b) The neighboring property owners and community character will not be materially affected, because that portion of the building that encroaches on the setback:
 - (i) is landscaped such that the appearance of mass is mitigated;
 - (ii) is designed so that its windows and doors are not directly across from the neighboring home's windows and doors;
 - (iii) if added onto an existing building, is designed to be architecturally integrated into the existing

Protects community character; requires compliance with Town Code

Protects public safety

Protects light and air for adjacent properties

Allows additional flexibility for existing landmarks

Reduces visual impact

Promotes privacy

Protects architectural character

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

building (in terms of its roofing, color, building materials, architectural detail, and doors and windows);

- (iv) does not include mechanical equipment that generates noise at levels that would interfere with the use of the neighbor's lot; and
- (v) either:

Protects neighbors

- (A) the portion of the building that encroaches upon the setback is not visible from public streets; or

Protects community character

- (B) the rhythm of solids and voids along the segment of street where the subject property is located is not materially interrupted by the changed setback.

If the Town considers adding flexibility with regard to setbacks, it may consider allowing applications that involve less than a certain percentage of the required setback to be determined administratively, while applications for greater setback encroachments would be heard by a review board or the Town Council. For example, the regulations could provide that requests that seek to vary the required setback by less than 20 percent could be subject to staff-level review and approval, while requests from 20 to 100 percent could be subject to Town Council review and approval.

2.

Lot Coverage, Cubic Content Ratio, and Open Space.

Purpose of Lot Coverage, Cubic Content Ratio, and Open Space Regulations.

In general, the purpose of lot coverage, cubic content ratio, and open space regulations is to regulate the magnitude and character of development.

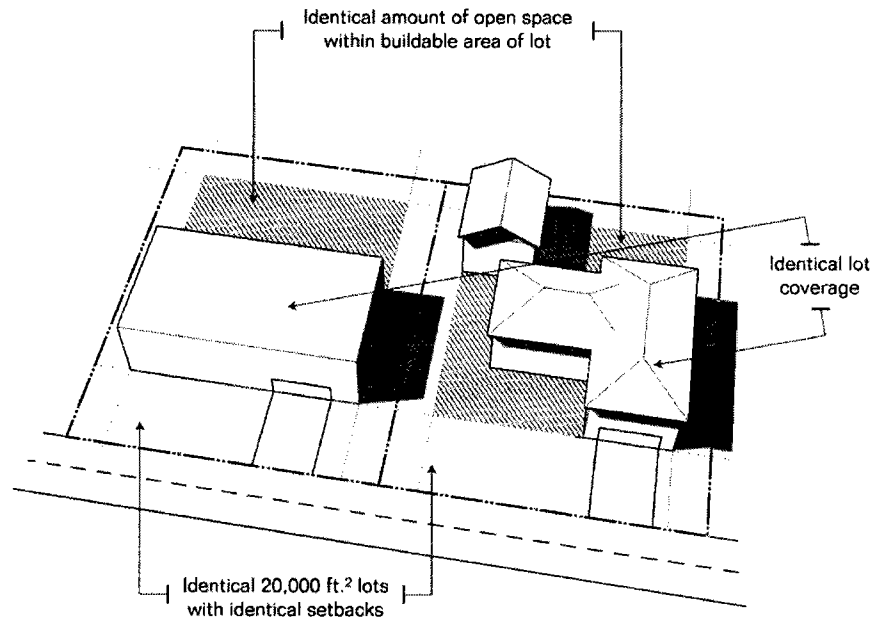
¹² The various mathematical formulae that are characteristic of these types of bulk regulations are very rough proxies for certain components of development that in terms of perception are actually more qualitative than quantitative. That is, lot coverage regulations, in theory, prevent the development of buildings that occupy all of the area of a lot between the setback lines. Cubic content ratios limit the volume of buildings to some established relationship to the size of the parcel on which they are located. Open space regulations generally require a minimum amount of area to be used for landscaping.

In many jurisdictions, lot coverage, cubic content ratio, and open space regulations

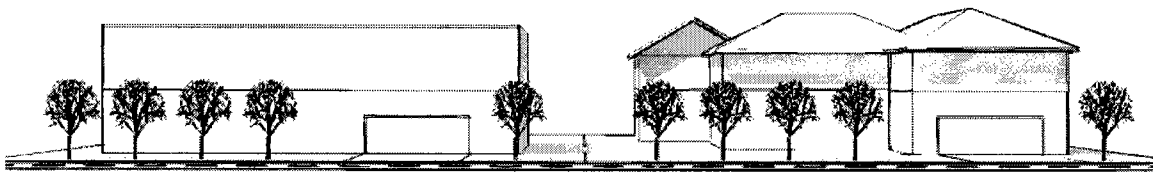
¹² The amount of impermeable surface on a lot may affect storm runoff, but drainage and runoff treatment are directly regulated by engineering standards.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

are enacted at different times. Additional layers of regulation are added when the existing regulations do not appear to function as well as was desired. The Town's zoning code reflects this common experience. *See MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON JANUARY 6, 2003 REGARDING THE ZONING COMMISSION'S REPORT, at 3.*



The two 20,000 square foot lots depicted in the above illustration are both developed with 25 percent lot coverage and a maximum permitted height of 25 feet, plus an additional 5 feet for the flat roof and 10 feet to the peak of the sloped roof. The two lots are exactly the same in terms of lot size, lot coverage, and open space. Both are developed as two-story homes with 10,000 square feet of floor area (5,000 square feet of lot cover x 2 stories). Yet the two lots look quite different from across the street:



Pressure For Flexibility With Regard to Lot Coverage, Cubic Content Ratio, and Open Space. The empirical evidence shows that there is a fair amount of pressure for flexible administration of lot coverage, cubic content ratio, and open space regulations in the Town. Slightly more than one in ten requests for a variance during the study period involved one of these requirements. Evidently, there was much solicitude for these types of variance requests: during the study period, nine out of ten of them were granted by the Town Council.

Creating Flexibility With Regard to Lot Coverage, Cubic Content Ratio, and Open Space. If the Town Council wishes to provide flexibility with regard to increasing lot coverage or cubic content ratio, or decreasing open space, the Town could amend its zoning code to allow such modifications upon demonstration that certain specific criteria are

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

satisfied.

The first step is to determine whether the existing regulations protect the desired community character. For example, imagine that a set of hypothetical land development regulations set a maximum lot coverage at 25 percent, and minimum landscaped open space at 45 percent of lot area. If most homes in the neighborhood have been developed with a lot coverage of 12.5 percent, and with landscaped open space that amounts to 75 percent of their respective lots, then the amount of building area in the neighborhood could double and the amount of landscaping could be substantially diminished as the homes are expanded over time. In such a situation, the expansion of homes over time would almost certainly change the neighborhood's character.

If the regulations generally approximate the existing development pattern, then there may still be room for increases in lot coverage and/or cubic content ratio, and/or for decreases in open space, on individual lots on a case-by-case basis. That is, just because building area is maximized on a particular lot does not mean that additional building on the lot would *per se* change the character of the neighborhood or interfere with the use or enjoyment of a neighbor's lot. As illustrated on the preceding page, the design of a building can make a big difference in terms of its effect on the character of the community. It follows that a sensitively designed building that exceeds the lot coverage, cubic content ratio, and/or open space standards of the zoning district may actually "fit in" to the neighborhood better than a poorly designed building that complies with all of the district standards.

Additionally, in terms of their potential effect on community character, not all lots are created equally. That is, *context is everything*: factors like street patterns, traffic levels, adjoining and nearby uses, topography, landscaping, lot size and dimensions, and local landmarks can emphasize development on certain lots and de-emphasize development on others.

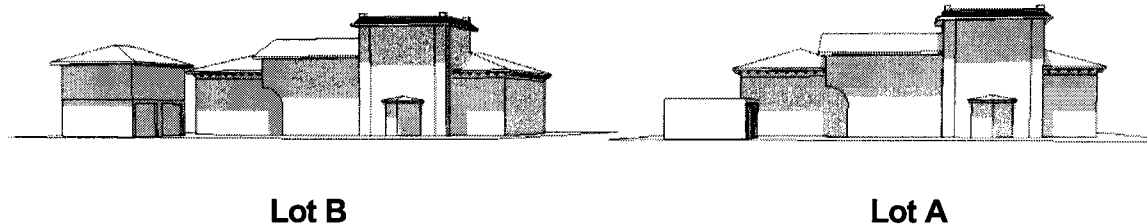
To illustrate, consider two hypothetical lots:

- + **Lot A is located in the middle of a quiet residential street where the majority of the homes are as large as the Town Code allows. Lot A backs up to a shopping center's loading area. Lot A is fairly wide, densely landscaped, and its rear yard is fenced-in.**
- + **Lot B is an oceanfront lot that is located at a corner in a well-traveled street. All of the lots around Lot B are residential, and few of them have exploited all of the building volume that is available to them. Lot B is a relatively narrow, sparsely landscaped lot compared to its neighbors, and its elevation is generally higher than the abutting street.**

Both hypothetical lots are developed to the maximum floor area permitted by the Town Code. Both lot owners want to add a 600 square foot room to their homes. The owner of Lot A wants to build the room as a one-story extension from the back of the house (invisible from the street and barely visible from neighboring property). The owner of Lot B wants to build the room as a second floor on an existing detached garage located in front of the house (visible from the street). The additional floor area on Lot B has a far greater potential to impact community

character than the additional floor area on Lot A.

Even if all else were equal, the difference in street-level view that results from placing the room in the front of the house on top of the garage is substantial:



Before flexibility is offered with regard to lot coverage, cubic content ratio, and open space requirements, Siemon & Larsen recommends that the Town study the existing condition to determine whether the regulations are serving their intended objectives. If they are, then flexibility, if offered, should be provided in a way that protects the character of the neighborhood in which the flexibility is applied.

Put another way, flexible standards should force building expansions to respect and harmonize with the context in which they exist. That is, additions to buildings that are already at the limit for lot coverage or cubic content ratio should be designed so that, at least:

- + they have the same architectural character and quality as the building to which they are added, and should be constructed so that the building looks like it was built all at the same time;
- + they do not create the appearance of significant additional mass when viewed from neighboring properties or public rights-of-way;
- + they are screened by dense landscaping that is appropriate for the site;
- + they do not result in the destruction of any significant trees;
- + they do not result in significant storm drainage onto neighboring properties;
- + any associated air conditioning, generation, or pump equipment does not create any additional noise on neighboring residential lots, and only low levels of noise on nonresidential lots; and
- + they do not cast substantial shadows on neighboring properties or block significant vistas.

3. Height.

Purpose of Height Regulations. Like lot coverage, cubic content ratio, and open space regulations, the purpose of height regulations is generally to regulate the appearance of development, that is, its apparent intensity. Also like lot coverage, cubic content ratio, and open space regulations, height regulations

are a rather imprecise way to quantitatively regulate a qualitative aesthetic. Height regulations regulate the vertical dimension of the three-dimensional area known as the "building envelope,"

¹³ and the visual impact of perimeter walls and fences. As such, in combination these regulations are a form of geometric control, or, as many consultants complain, a "zoning envelope" that dictates the shape of the building by prescribing its outer measurements. Many modern zoning ordinances are trying to break through this rigid dictation of size in order to permit the greatest possible flexibility in protecting neighborhood character and in satisfying individual needs and architectural design.

Pressure For Flexibility With Regard to Height. The empirical evidence shows that there is some pressure for flexible administration of height regulations in the Town of Palm Beach. Slightly less than one in ten requests for a variance during the study period involved some kind of height restriction. The Town Council showed considerable willingness to vary the strict height restrictions contained in the Town Code: during the study period, slightly more than nine out of ten requests for height variances were granted.

Creating Flexibility With Regard to Building Height. The real impact of height regulations on particular projects and properties depends as much on how height is measured, that is, where the "bottom" and the "top" of the building or structure are for the purposes of the measurement, as on what the maximum permitted height is. With regard to buildings, the Town measures "building height" in several different ways, depending upon the location and physical characteristics of the lot and the roof structure of the building, as summarized in the table below:

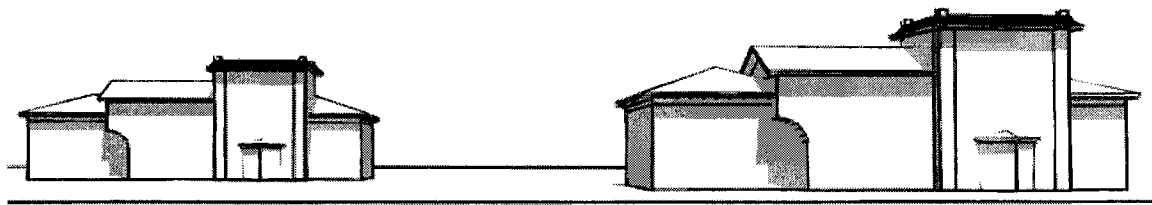
¹³ The "building envelope" is the three-dimensional area in which a building can be constructed. The horizontal dimensions are typically set by other types of bulk regulations, such as setbacks and lot coverage limits. Some jurisdictions (including the Town) also use cubic content ratio, which regulates mass in the vertical and horizontal planes.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

Area	For flat or pitched roof styles, measure <u>from</u> . . .	For flat roof styles, measure <u>to</u> . . .	For pitched roof styles, measure <u>to</u> . . .
R-B Zoning District	the top of the floor slab or 18" above the crown of the road abutting the lot, whichever is lower ¹	the plane where the ceiling meets the wall	the plane where the bottom of the top chord of the roof framing member meets the wall
Not in R-B Zoning District	the highest point of the crown of the road abutting the lot *		
Lots west of S. Ocean Blvd., between Via Agape and Sloan's Curve in the R-AA Zoning District, where the lot is lower than the crown of the abutting road	the minimum flood elevation or the natural grade of the lot, whichever is higher		

One way building height regulations might create legal hardship is when they are applied to lots on which the combination of topography and environmental conditions or regulations result in a building envelope in which the building code does not permit construction of a habitable structure (for example, because the ceiling would be too low). See, e.g., *FLORIDA BUILDING CODE*, §1203.2.6 (2003). A previous study by the Town revealed that there are three areas in the Town where the top of the dune is 20 to 23 feet above grade, a condition that limits the permitted height of homes on the dune to 14 to 17 feet above ground level. See *MINUTES FROM THE SPECIAL TOWN COUNCIL MEETING HELD ON JANUARY 6, 2003 REGARDING THE ZONING COMMISSION'S REPORT*, at 13.

That said, *legal* hardship might not be the only reason why the Town would want to allow some flexibility with regard to building height. First, in certain contexts, additional height may have little or no negative impacts—and may even be desirable. This is so because the perception of building height differs depending upon such factors as how close the building is to the viewer (see illustration, below), the height, density, and character of intervening landscaping, topography, building design, and the height and proximity of surrounding buildings.



The two buildings above are identical. The one on the left is set back 150 feet further from the road than the one on the right. Accordingly, the impact of the height of the building on the left is diminished.

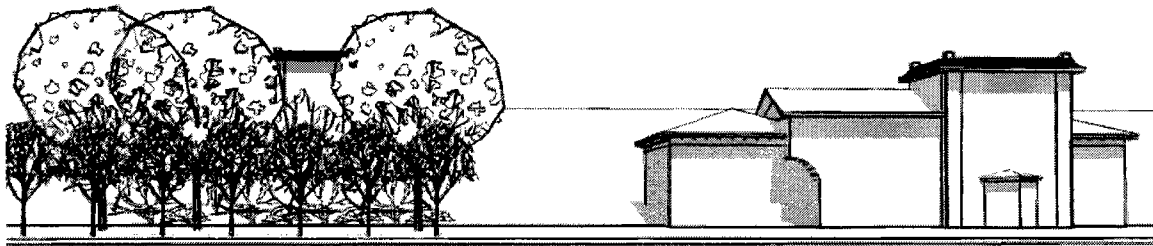
Second, some existing buildings with historic value have a ground floor that is lower than current Federal Emergency Management Agency ("FEMA") requirements would permit

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

for new construction. When these buildings are renovated and the cost of renovation exceeds half of their value, they must be raised to a minimum elevation in order to comply with the federal rules. As a consequence, for those buildings that are at or near the height limit before such renovations, the most desirable course of action from a community character perspective is often to grant a height variance. That is so because the alternatives are either to force the property owner to keep the property in its existing condition or to demolish the building and start over.

14

Third, the Town may wish to allow adjustments to its point of measurement rules to allow homes to be constructed on a high point of an oceanfront lot, especially if the lot is deep and heavily vegetated along the street, and state or federal regulations require a minimum floor height that is above the Town's point of measurement guidelines. *See, e.g., Special Exception No. 19-2002 with Site Plan Review and Variance (Oct. 8, 2002).* In such a case, the visual impact of the house may actually be reduced, compared to a two-story house that is built closer to the street:



The two buildings above are also identical. The one on the left is constructed on higher ground than the one on the right, but is set back considerably further from the road and is buffered by extensive landscaping. Accordingly, the impact of the height of the building on the left is diminished.

Creating Flexibility With Regard to Wall, Fence, and Gate Height. In the context of the Town of Palm Beach, it is difficult to imagine perimeter wall, fence, and gate regulations that create “legal hardship,” that is, that could make it “virtually impossible to use the land for the purpose for which it is zoned.” This is so because, while such walls, fences and gates may be very desirable for the Town's residential uses, it is not “virtually impossible” to build and use a home that does not have walls, fences, and gates.

15

¹⁴ For example, Variance No. 7-99 (April 13, 1999) involved an existing home that was built in 1925. The owner planned extensive renovations to the home, which triggered FEMA requirements. The home had to be raised 2 feet 9 inches, which made it taller than the permitted height in the zoning district. The Town Council granted the variance in order to allow the existing home to be renovated instead of demolished or left as is.

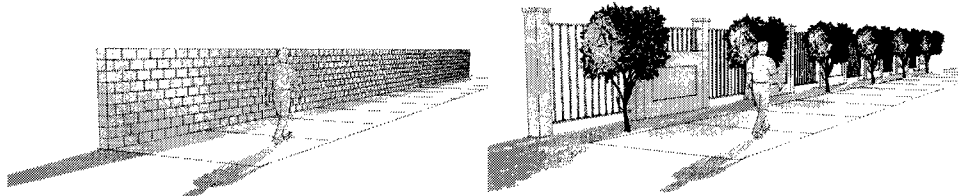
¹⁵ Indeed, there are only a relatively small number of agricultural, institutional, and heavy commercial/industrial uses which would be “virtually impossible” to conduct without perimeter fencing: uses like horse or cattle farms, prisons, salvage yards, and solid waste transfer stations. There are no zoning

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

Yet it is not so difficult to imagine circumstances in which flexibility with regard to the height of walls, fences, and gates would be desirable. First, flexibility may be desirable when a property owner wants to replace an existing wall, gate, or fence that is comparable to others in the neighborhood in terms of its location and dimensions. In such cases, it is likely that the Town already places significantly greater emphasis on the actual character of the surrounding properties than on the presence or absence of “legal hardship” when deciding to grant applications for increases in height.

For example, in 2003 an oceanfront property owner sought a variance to replace existing gates with new ones that were the same size. The variance was needed because the topography of the oceanfront lot made the existing gates nonconforming with regard to height (which is measured from the crown of the road). Indeed, the applicant submitted evidence that the gates would have been in compliance with the height restriction if the lot had been level with the road. The Town Council approved the application unanimously. *See* Variance No. 24-2003 (July 8, 2003).

Second, flexibility may be desirable when the applicant mitigates the imposition of mass of a taller wall, fence, or gate through such techniques as sensitive design, strategic placement, and/or appropriate landscaping. For example, a six-foot high blank concrete block wall that is set right next to a public sidewalk may be more imposing (and correspondingly less desirable) than an eight-foot high articulated wall with a quality finish, substantial penetrations, and appropriate, attractive landscaping:



The two illustrations above are from the same vantage point. The wall in the left illustration is constructed of unfinished concrete block and is six feet in height. The wall in the right illustration is constructed of finished concrete and metal and is eight feet in height—25 percent taller than the wall in the left illustration. The design (finished surfaces, substantial penetrations, and articulation) and landscaping (understory trees located between the wall and the sidewalk) of the wall in the right illustration mitigate what additional apparent mass may have otherwise been created by its additional height.

Indeed, in the Society of the Four Arts case study (presented on page 21 *et seq.*, *supra*), four out of five variances were related to the perimeter wall. The result, in terms of the design principles used, is similar to the right illustration in the above rendering. That is, a high wall with penetrations (iron fencing) creates transparency and thus reduces the wall’s apparent mass, especially when combined with a reduction in required hedging so that those penetrations continue to be visible.

districts in Palm Beach that permit *only* uses that are virtually impossible to conduct without perimeter walls.

4.

Other Standards for Variances.

The Practical-Difficulties Standard for Area Variances. In addition to providing flexible standards with regard to regulations that are commonly the subject of variance requests, the Town may wish to consider amending its variance standards to delete the "hardship" requirement. The Town could replace the "hardship" requirement with the "practical difficulties" standard that is used in several states. *See, e.g., Marriott Corp. v. Concord Hotel Management*, 578 A.2d 1097 (Del. 1990). The rationale for this approach is that an area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use that is not permitted by the ordinance. The Supreme Court of Ohio describes its version of the practical-difficulties standard as follows:

The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of practical difficulties

The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (*e.g.* water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

Duncan v. Village of Middlefield, 23 Ohio St. 3d 83, 86, 491 N.E.2d 692, 695 (1986).

Except for variances to increase density (building bulk requirements, for example), some commentators argue that it makes sense to impose a lower standard for area variances than "unnecessary and undue hardship." Here are some examples of other non-hardship standards:

In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (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

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

to pursue, other than an area variance; (3) whether the requested area 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 board of appeals, but shall not necessarily preclude the granting of the area variance.

N.Y. Village Law §7-712-b.3.(b) (McKinney 2004); *see also* N.Y. Town Law §267-b.3 and 4 (McKinney 2004).

###

The [board of zoning adjustment] shall have the power . . . to grant variances from the requirements of this chapter, provided that it specifically finds that:

- (a) Special and unique conditions exist which are peculiar to the petitioner's case and which are not generally applicable to the property located in the zoning district.
- (b) The special and unique conditions are not directly attributable to the actions of the petitioner.
- (c) The literal interpretation of this chapter, as applied to the petitioner, would deprive the petitioner of rights commonly enjoyed by the owners of other property in the zoning district.
- (d) The variance granted is the minimum variance necessary for the petitioner to make reasonable use of the property.
- (e) Granting the variance is not detrimental to the public welfare, or injurious to property or improvements in the zoning district or neighborhood involved.
- (f) Granting the variance is not contrary to the objectives of the comprehensive plan of the city.

In no event shall the board grant a variance which has the effect of:

- (a) Increasing the density and the number of dwelling units to be allowed on residential property as defined in the applicable sections of this chapter;
- (b) Increasing the maximum allowable height of a structure in any zoning district; * * *

City of Boca Raton, Fla., *CODE OF ORDINANCES* §28-130 (2004) (contains most of the "traditional" variance requirements, but the "unnecessary and undue hardship" requirement is conspicuously missing).

The advantage of the "practical difficulties" standard is that it provides additional flexibility for variances in those areas for which specific alternative standards are not developed, and that it provides a standard for decision-making which has been accepted by courts in other states. The disadvantage of the "practical difficulties" standard is that Florida courts could find that it is not sufficiently specific to pass constitutional scrutiny, especially if there are no objective limits on the degree of variance which can be granted. *See Brennan*, 802 So. 2d, at 1156-57 (Fletcher, J., concurring).

F.

Conclusions Regarding Variances.

If the claimed “hardship” is not peculiar to the property that is the subject of the variance request, then the proper means for alleviating the hardship is to change the zoning. See *Otto v. Steinhilber*, 282 N.Y., at 75, 24 N.E.2d, at 852. Adding discrete standards for the administration of flexibility in the zoning code accomplishes that objective. It also helps to improve the consistency of decision-making and to insulate the Town’s land use decisions from legal actions.

Empirical study reveals that the Town of Palm Beach routinely grants variances which do not appear to comply with the standard for “unnecessary and undue hardship” which was set out in *Bernard*. Although the Town is in no way unique in this respect, the combined effect of such actions undermines the Town’s overall zoning plan. The empirical study commissioned by the Palm Beach Civic Association, which has identified the most commonly requested variances, could serve as a basis for amendments to the Town’s zoning code in areas under the most pressure. Such amendments would offer a degree of flexibility that is, at once, standard-based and faithful to the essential purposes of the Town’s existing zoning code.

III.

SPECIAL EXCEPTIONS

A.

In General.

Special exceptions were originally conceived to provide for flexible administration with regard to “types of land use which are necessary and desirable, but which are potentially incompatible with uses usually allowed in the particular district.” 3 Arden H. Rathkopf, *THE LAW OF ZONING AND PLANNING*, 4th ed. (Minn.: West Group, 1997), §61:7 (Rel. 9 2004). That is, “they cannot be categorized as permissible as of right in any given use district without the danger that in some locations therein they would pose serious problems.” *Ibid*.

Like variances, special exceptions were creatures of the Standard State Zoning Enabling Act. Section 7 of the SZEa provided authority to the board of adjustment to, “in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the [zoning] ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.”

¹⁶ A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT

¹⁶ Section 7 also provided that “[t]he board of adjustment shall have the following powers: . . . To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance”

The term “special exception” is vague and unclear, and was an unfortunate choice and many jurisdictions have discontinued the use of the phrase in an attempt to more accurately describe the nature of the regulation.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

ZONING REGULATIONS (U.S. Dept. of Commerce 1926) (reprinted in David Callies, *et al.*, *CASES AND MATERIALS ON LAND USE*, 3d ed. (West Group, 1999), at 37).

Function. The function of the special exception is explained in *Zylka v. City of Crystal*, 167 N.W.2d 45, 48-49 (Minn. 1969):

Provisions such as the one contained in defendant city's ordinance providing for special-use permits, sometimes called "special exception permits" or "conditional use permits," were introduced into zoning ordinances as flexibility devices. They are designed to meet the problem which arises where certain uses, although generally compatible with the basic use classification of a particular zone, should not be permitted to be located as a matter of right in every area included within the zone because of hazards inherent in the use itself or special problems which its proposed location may present. By this device, certain uses (*e.g.*, gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable for the community, but which should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending upon the facts and circumstances of the particular case. Unlike a variance provision which permits particular property to be used in a manner forbidden by the ordinance by varying the terms of the ordinance, a special-use provision permits property, within the discretion of the governing body, to be used in a manner expressly authorized by the ordinance. In theory, if not in practice, provisions authorizing the issuance of special-use permits are intended to provide more flexibility in land use control than provisions authorizing a variance. While the administering body, be it the council itself or a planning commission to which power to act is delegated, has broad discretionary power to deny an application for a special-use permit, it cannot do so arbitrarily.

Often the phrase is replaced with "conditional use." 3 Arden H. Rathkopf, *THE LAW OF ZONING AND PLANNING*, 4th ed. (Minn.: West Group, 1997), §61:9. The term "conditional" or "special" use or permit is more frequently used in zoning ordinances nationally and in Florida, and the courts often use both terms interchangeably. Experience shows, however, that in many jurisdictions the phrases "special exception" and "conditional use" are often associated with an amorphous and poorly understood notion of "compatibility"—regardless of what the enumerated standards of the zoning code say.

Therefore, some local governments have abandoned the labels "special exception" and "conditional use" in order to emphasize the individual standards for flexible approvals and to remove the gloss of outmoded precedents, traditions and lore from the application of updated flexible regulations. When the commonly used language of "special exception" or "conditional use" is removed from the zoning code and replaced with something else (like "alternative development standards" or "level 2 approvals") the enumerated standards come into sharper focus. This is so because the new name for the flexible approval process does not carry the baggage of any commonly held understanding that is not actually written in the zoning code.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

Thus, the traditional “special exception” is different from the “variance.”

¹⁷ As such:

A special exception is a misnomer in that it really is not an exception at all; it is a legislatively granted entitlement contained in a zoning ordinance. A special exception is a *permitted use* to which an applicant is entitled if the applicant can demonstrate compliance with the specific objective requirements detailed in the ordinance.

McGinty v. Zoning Bd. of Adjustment of City of Pittsburgh, 717 A.2d 34, 36 (Pa. Commw. Ct. 1998) (emphasis added); *see also Redner v. City of Tampa*, 827 So. 2d 1056, 1059 (Fla. Dist. Ct. App. 2002) (observing, “In the absence of a specific provision of law requiring it, one need not show unusual hardships to secure an exception. An ordinance granting the power to make exceptions must contain proper standards or rules of guidance, and under such circumstances, the Board is not rezoning or usurping legislative power.”).

In contrast to the traditional special exception, the variance is intended to provide relief from *any* provision of the zoning code when the provision works an unnecessary and undue hardship on the applicant. Accordingly, while the focus of the special exception inquiry is on the proposed development’s compliance with the standards of the zoning code, the focus of the variance inquiry is whether the zoning code is fundamentally unfair to the applicant in light of special conditions inherent in the applicant’s land.

B. Special Exceptions in Florida.

Like variances, special exceptions were authorized in Florida’s implementation of the SZE:

Board of adjustment; powers and duties. — The board of adjustment shall have the following powers and duties:

* * *

(2)(a) To hear and decide such special exceptions as the board of adjustment is specifically authorized to pass on under the terms of the zoning ordinance; to decide such questions as are involved in the determination of when special exceptions should be granted; and to grant special exceptions with

¹⁷ “Traditional,” in this sense, means as conceived by the drafters of the SZE. Although many “traditional” provisions still remain in local zoning codes (including the Town Code), local governments are now free to adopt whatever flexible zoning tools suit their needs, provided: (1) the tools are constitutional (that is, they have adequate standards that limit the discretion of the decision-maker, they do not run afoul of the First Amendment, and they do not take property without substantially advancing a public purpose or providing just compensation to the property owner), and (2) the tools are not contrary to state law, including the Growth Management Act of 1985, which requires land use decisions to be consistent with the Town’s adopted comprehensive plan (§163.3194(1)(b), Fla. Stat. (2004)).

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

appropriate conditions and safeguards or to deny special exceptions when not in harmony with the purpose and intent of this part or any ordinance enacted under the authority of this part.

(b) In granting any special exception, the board shall find that such grant will not adversely affect the public interest.

(c) In granting any special exception, the board of adjustment may prescribe appropriate conditions and safeguards in conformity with this part and any ordinance enacted under it. Violation of such conditions and safeguards, when made a part of the terms under which the special exception is granted, shall be deemed a violation of the ordinance.

(d) The board of adjustment may prescribe a reasonable time limit within which the action for which the special exception is required shall be begun or completed or both.

(e) The zoning ordinance shall require that the board of adjustment shall confer with the planning commission in all cases involving requests for special exceptions.

§163.225, Fla. Stat. (1973) (repealed).

Unlike the variance provisions of former Section 163.225, the special exception provisions did not enumerate standards for boards of adjustment to apply to applications for special exceptions. Instead, the legislature left it to local governments to adopt standards that were appropriate in their jurisdictions. *See* the first sentence of §163.225(2)(a), Fla. Stat. (1973) (repealed). Although the legislature did not *specifically* direct local governments to adopt special exception procedures and standards, the power to grant special exceptions could not be exercised unless they did. *See Mayflower Property, Inc. v. City of Fort Lauderdale*, 137 So. 2d 849, 853 (Fla. Dist. Ct. App. 1962).

Standards.

Standards for discretionary development review provide both fair notice to interested parties and a basis for judicial review of the arbitrariness of zoning decisions. The transformation of traditional . . . zoning by more flexible zoning techniques and discretionary development review too often has not been accompanied by establishment of specific decisional criteria related to land use plans and community development policies. Discretionary development review too often involves the ad hocery that Richard Babcock has described as “trial by neighborism.”

1 Arden H. Rathkopf, *THE LAW OF ZONING AND PLANNING*, 4th ed. (Minn.: West Group, 1997), §11:4 (citations omitted).

Zoning ordinances usually contain a provision that details the standards for all special exceptions, and provisions in each zoning district that set out the uses and development that

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

are permitted by special exception. Many local governments have relatively nebulous “public interest” standards for granting special exception—often some variant of a “promote the general welfare” test. Judicial reaction to such standards is a mixed bag. On the one hand, Florida courts have repeatedly struck down regulations that do not adequately put applicants on notice as to what will be required of them.

[T]he law of Florida is committed to the doctrine of the requirement that zoning ordinances and their exceptions must be predicated upon legislative standards which can be applied to all cases, rather than to the theory of granting an administrative board or even a legislative body the power to arbitrarily decide each case entirely within the discretion of the members of the administrative board or legislative body, or to shift a particular parcel of property arbitrarily from one zoning classification to another, whether by “variance”, “exception” or “special use”.

Alachua County v. Eagle’s Nest Farms, Inc., 473 So. 2d 257, 259 (Fla. Dist. Ct. App. 1985) (quoting *City of Homestead v. Schild*, 227 So. 2d 540, 543 (Fla. Dist. Ct. App. 1969)). Put another way:

An applicant . . . must be in a position to determine the requirements and must be afforded an opportunity to comply with them. The requirements must be of uniform application. * * * Any standards, criteria or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality.

Effie, Inc. v. City of Ocala, 438 So. 2d 506, 508 (Fla. Dist. Ct. App. 1983) (quoting *ABC Liquors, Inc. v. City of Ocala*, 366 So. 2d 146, 149 (Fla. Dist. Ct. App. 1979), *cert. denied* 376 So. 2d 69 (Fla. 1979)).

On the other hand, Florida courts have also held that the language “compatible with the surrounding area” is sufficiently precise to withstand constitutional challenge, without providing guidance as to what “compatible” or “surrounding area” mean.

¹⁸ *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779, 781 (Fla. Dist. Ct. App. 1992). Remarkably, the same court that held that zoning regulations cannot stand if they grant the “power to arbitrarily decide each case entirely within the discretion of the members of the administrative board,” held that the following regulation was not unconstitutionally vague:

No relief may be granted or action taken under the terms of this Section unless such relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the Alachua

¹⁸ Although Florida courts have upheld “compatibility” standards against constitutional challenges, in Siemon & Larsen’s experience, specific factors that affect “compatibility” (e.g., traffic flow, character, context, apparent mass, hours of operation, landscaping, and public safety) are generally not well understood, assimilated, or processed by people who are elected or appointed to decide special exception applications. Accordingly, compatibility requirements more often than not tend to devolve into determinations of whether the decision-maker likes the project or not.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

County Comprehensive Plan or these Regulations.

Eagle's Nest Farms, 473 So. 2d, at 259.

19

In the final analysis, whether any particular set of indefinite public interest standards for special exceptions would survive a constitutional attack is less significant than the impact that the application of such indefinite standards may have on community character over time. That is, if a local government's development approval standards were subject to markedly different interpretations (as "public interest" standards usually are), then as the composition of the decision-making bodies changes, there would be no continuity in the character of development approvals. Accordingly, the community's evolution would be guided by the personalities of the decision-makers and the political and legal skills of the applicants' advocates, not by reasonably certain rules that implement collective community character preferences.

Burden of Proof and Judicial Review. The initial burden of proof is upon the landowner to demonstrate that his application for a variance or special exception complies with the comprehensive plan and satisfies the requirements contained in the zoning ordinance, but once the landowner has met that burden, the burden shifts to objectors to prove that the evidence presented on behalf of the property owner is insufficient or wrong. *See, e.g., Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986); *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.*, 857 So. 2d 202, 204 (Fla. Dist. Ct. App. 2003).

Variance and special exception decisions are subject to review by *certiorari*, a limited appellate review of the record that was before the decision-maker. *See, e.g., Baker v. Metropolitan Dade County*, 774 So. 2d 14, 16 (Fla. Dist. Ct. App. 2000). When such a petition for a writ of *certiorari* is filed in the circuit court, the court must determine whether: (1) the parties received due process of law; (2) the decision meets the essential requirements of law; and (3) the decision is supported by "competent substantial evidence." *See, e.g., Education Development Center, Inc. v. City of West Palm Beach*, 541 So. 2d 106, 108 (Fla. 1989); *Haines City Community Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995).

Competent substantial evidence is a standard of appellate review, not a burden of proof. "Competent evidence" is evidence that is relevant and material to the ultimate determination. *Miami-Dade Charter Foundation, Inc.*, 857 So. 2d, at 204; *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "Substantial evidence" means such "evidence as will establish a substantial basis of facts from which the fact at issue can reasonably be inferred [or] . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *DeGroot v. Sheffield*, 95 So. 2d, at 916; *see also, Town of Indian Land v. Nance*, 400 So. 2d 37, 40 (Fla. Dist. Ct. App. 1981); *Universal Camera v. NLRB*, 340 U.S.

¹⁹ Judge Fletcher, who sits on Florida's Third District Court of Appeal, would likely have written a vigorous dissent had he been on the panel in *Eagle's Nest Farms*. In Judge Fletcher's opinion, "spirit and intent" language does not provide constitutionally sufficient guidelines for decision-making. *See Brennan*, 802 So. 2d, at 1156-57 (Fletcher, J., concurring).

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951). The U. S. Supreme Court has explained that “[s]ubstantial evidence is more than a mere scintilla.” *Universal Camera*, 340 U.S., at 477 (quoting *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L.Ed. 126 (1938)). While “substantial evidence” is more than a scintilla, it does not require a preponderance of evidence.²⁰

Although there are legal standards for what is and what is not competent substantial evidence (e.g., fact-based lay testimony is competent substantial evidence, as is expert testimony, but general statements of opposition are not competent substantial evidence), courts sitting in their *certiorari* review capacity are not permitted to evaluate the credibility of the evidence or reweigh it. See, e.g., *Miami-Dade County v. Walberg*, 739 So. 2d 115, 117 (Fla. Dist. Ct. App. 1999). However, the court can and will examine whether there is competent substantial evidence in the record that supports each requirement of the Town Code. Cf. *Metropolitan Dade County v. Sportacres Dev. Group, Inc.*, 299 So. 2d 657, 658-59 (Fla. Dist. Ct. App. 1997).

Differences in Judicial Review. In practice, objecting neighbors almost always prevail when they challenge the grant of variances in court. This is so because the body of law that evolved from the standards that were set out in Florida’s version of the SZEA regarding variances is fairly cohesive. The *Bernard* case spells out the core principle—“hardship” is an objective standard that is not just “in the eye of the beholder.” *Bernard*, 569 So. 2d, at 854. Accordingly, courts are usually unable to find competent substantial evidence in the record to support the landowner’s case for “unnecessary and undue hardship.” In addition, courts often find that the decision-maker “applied the wrong law” or “failed to follow the essential requirements of law” by lowering the bar for “hardship” below the standard that is mandated by case law. See *id.*

By contrast, objecting neighbors generally do not have a significant litigation advantage when a special exception is granted. This is so because although many local jurisdictions have similar special exception standards, no particular standards were set out in the SZEA, and consequently the courts have not developed a consistent body of law interpreting them. Instead, courts generally view the special exception as a use that is “allowed . . . absent any fact or circumstance negating the presumption.” *Irvine v. Duval County Planning Comm’n*, 466 So. 2d 357, 364-65 (Fla. Dist. Ct. App. 1985) (Zehmer, J., dissenting) (quoting 3 Emmett Clinton Yokley, *ZONING LAW AND PRACTICE*, 4th ed. (Charlottesville, Va.: Michie Co., 1979), § 20-1, pp. 212-213, 219-220), *quashed and remanded*, 495 So. 2d 167 (Fla. 1986), *opinion set aside and dissent adopted as opinion and judgment*, 504 So. 2d 1265 (Fla. Dist. Ct. App. 1986). Each case is decided based on whether the competent substantial evidence supports the local government’s decision according to the standards that are present in its zoning code. As a consequence, if there is

²⁰ “To establish by a preponderance of evidence means to prove that something is more likely so than not so.” I. E. Devitt and C. Blackman, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (3d ed. 1977). This is generally understood as implying a threshold degree of certainty just above 50 percent. Preponderance of evidence stands in sharp contrast to the other main legal standard of “proof beyond a reasonable doubt” found in criminal proceedings. It also differs from the intermediate standard of “clear and convincing evidence” used by courts in some cases.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

competent substantial evidence in the record that supports both sides of a special exception request, then the local government's decision—whatever it may be—will generally withstand judicial review.

C.

Special Exceptions in the Town of Palm Beach.

The Town defines special exceptions as follows:

Special exception. Special exception uses are allowable as conditional uses authorized in a zone only under the specific conditions . . . but which use cannot be located in a zone as a matter of right and which may be revoked if any of the required conditions to approval and operation are violated.

Special exception structure means a structure approved as a special exception
....

Town Code, §134-2.

Echoing Florida's former enabling statute, the Town Code provides that "[t]he town council shall hear and decide special exceptions, decide such questions as are involved in determining if and when special exceptions should be granted, and grant special exceptions with appropriate conditions and safeguards or deny special exceptions when not in harmony with the purpose and intent of this chapter." Town Code, §134-226(a).

The Town Code sets out a number of criteria that apply to *all* special exceptions:

Sec. 134-229. Requirements for granting.

The requirements for granting a special exception use under this chapter are as follows:

- (1) The use is a permitted special exception use as set forth in article VI of this chapter.
- (2) The use is so designed, located and proposed to be operated that the public health, safety, welfare and morals will be protected.
- (3) The use will not cause substantial injury to the value of other property in the neighborhood where it is to be located.
- (4) The use will be compatible with adjoining development and the intended purpose of the district in which it is to be located.
- (5) The use will comply with yard, other open space, and any special requirements set out in article VI for the particular use involved.
- (6) The use will comply with all elements of the comprehensive plan.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

- (7) The use [*sic* will] not result in substantial economic, noise, glare, or odor impacts on adjoining properties and properties generally in the district.
- (8) Adequate ingress and egress to property and proposed structures thereon and off-street parking and loading areas will be provided where required, with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.
- (9) Signs, if any, and proposed exterior lighting with reference to glare, traffic safety, and economic impact shall be compatible and in harmony with properties in the district.
- (10) Location, availability and compatibility of utility service for the use shall be satisfactory to ensure health and safety.
- (11) Refuse and service areas for the use shall not adversely affect automotive and pedestrian safety and convenience, traffic flow and control, or access in case of fire or catastrophe.
- (12) The proposed use will not attract the principal portion of its customers/clients from off-island locations. The applicant shall submit evidence satisfactory to the town council that not less than 50 percent of the customers of the proposed use will be townpersons. Evidence submitted in support of this contention shall include credible data or information suitable for review by the town to determine its credibility and the appropriateness of the applicant's conclusions. The submittal shall include a description of the types of information used and the methodology employed to arrive at the conclusion. Information used shall include, but shall not be limited to, lists of customer/client addresses or certification thereof by an independent certified public accountant approved by the town, market studies prepared by independent professional firms, or data from similar operations under the control of the applicant.
- (13) If historic/specimen trees are located on the subject property, the location of said historic/specimen trees shall be identified on a signed and sealed survey. In addition, adequate landscaping, screening and barricade protection of historic/specimen trees shall be demonstrated to be provided as required in this chapter.
- (14) The proposed use will not place a greater burden than would be caused by a permitted use on municipal police services due to increased traffic or on fire protection services due to the existence of or increased potential for fire/safety code violations.

Town Code, §134-229.

The Town Code also sets out additional criteria in certain instances where a special

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

exception is required. For example, in several zoning districts, the Town allows property owners to exceed the generally applicable height limit by special exception. *See* Town Code, §§134-897 (R-B district); 134-1004(8)d. (R-D(1) district); 134-1059(8)d. (R-D(2) district); 134-1113(8)d. (C-TS district); 134-1163 (C-WA district); and 134-1212(8)d. (C-OPI district) (2004). These increases in height are subject to the fourteen standards of Section 134-229, plus additional standards that are set out in the individual district regulations.

D. Empirical Analysis.

There is a widespread belief in the Town that an inordinate number of special exception applications are being processed. Accordingly, the Palm Beach Civic Association asked Siemon & Larsen to review data compiled by Town staff, which recently conducted a study of special exception applications processed from 1997 to 2003. The analysis that follows is based upon Siemon & Larsen's review of summary-level data from the Town's study.

According to the data provided by the Town, 213 requests for special exceptions were decided by the Town Council between 1997 and 2003. Two hundred five of them, or 96 percent, were approved. Eight, or 4 percent, were denied. The Town's summary-level data indicates that thirty-one, or 15 percent, of the requests would no longer be necessary today because the Town Code sections upon which they were based have been repealed.

About 74 percent of the applications (158) involved the use of land, as opposed to the height of a building or the placement of a gate, or some other physical development parameter. One-third of these 158 applications (50) were made by retailers to satisfy the "town-serving" requirement applicable to commercial establishments with more than 2,000 square feet of gross leasable space (*e.g.*, Town Code, §134.1109(a)(11) (C-TS district); §134-1159(a)(9) (C-WA district)). The other two-thirds involved approvals or modifications of approvals for uses such as restaurants, nightclubs, churches, schools, private clubs, real estate offices, outdoor seating, tennis courts, hotels, and financial institutions. On average, the Town Council decided one or two use-oriented special exception applications per month during the study period.

The remaining 55 applications were related to the physical aspects of development. These applications included such things as development of substandard lots for permitted uses, or locating gates closer than 18 feet to the edge of a cul-de-sac. The frequency of these types of special exception applications over the study period was fairly low: approximately one every other month.

According to the data provided by the Town, it does not appear that an "inordinate" number of special exceptions were decided during the study period. It also does not appear that there is a material advantage to pursuing a special exception as opposed to some other sort of use and approval process. Indeed, the empirical evidence shows that the variance is the principal tool for making adjustments to or obtaining relief from the strict terms of the Town's zoning code.

E.

An Alternative Approach.

Even though the number of special exception applications processed by the Town Council is relatively small, Siemon & Larsen submits that several procedural and substantive reforms should be considered in order to enhance efficiency without compromising the regulatory objectives of the Town's existing zoning code.

1.

Potential Procedural Reforms.

At the procedural level, the empirical data suggests that some of the Town's special exceptions could be decided at the staff level without compromising the Town's regulatory objectives. For example, authority could be delegated to staff to review special exceptions that involved the "town-serving" requirement. The empirical data show that 98 percent of the 50 "town-serving" special exception applications decided during the study period were approved. In cases where compliance with the standards is not obvious, staff could be empowered to refer the application to a board or to the Town Council. Assuming that most, if not all, of the approved applications were readily determined to be in compliance with the Town's requirements, nearly 33? percent of the total number of special exceptions decided during the study period could have been granted without the time and expense of a public hearing.

In addition, modifications to approved special exceptions require a hearing before the Town Council that is conducted as if the application were for a new special exception. Many nonresidential uses (*e.g.*, restaurants, private clubs and churches) tend to expand over time.

²¹ Once again, the Town could avoid many special exception hearings by providing an administrative process by which, within specified boundaries, staff could approve modifications to a special exception use. For example, for restaurant expansions, staff could approve increases in seating up to a certain number of seats, provided that parking requirements are satisfied and traffic flow on adjacent streets is not adversely affected. As with the previous example, staff might have the option to refer the case to a board or to the Town Council if in staff's opinion the potential impact of the project justified the referral.

The Town may also wish to consider barring consideration of a special exception application within three years of the approval of another special exception application on the same property.²² The new provision would compel property owners to ask for all special exceptions at one time (at least for a period of three years). This would prevent property owners from filing successive special exception applications and arguing that a recent previous special exception approval constitutes a basis for another special exception

²¹ For uses with complex activities, this can result in many prolonged, *de novo* hearings before the Town Council wherein every change, from modest to major, must be comprehensively evaluated for compliance with special exception standards.

²² At present, denial of an application operates to bar consideration of a substantially similar application for one year.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

approval. There could be exceptions to this requirement in certain limited circumstances (e.g., when a property changes hands and is put to an entirely new use).

2.

Potential Substantive Reforms.

One problem that many communities face with regard to special exceptions is that over time, the number and range of approvals that are subject to special exception standards grows, but the standards for granting special exceptions are not amended or supplemented to mitigate the likely impacts of the new special exceptions. In this respect, the Town has done better than many by providing specific standards for particular classes of special exceptions. For example, increases in height are subject to the general special exception standards of Sections 134-229 to 134-233 of the Town Code, and to the specific standards for increases in height (which relate to the impacts of increases in height) that are provided in the applicable district regulations.

Still, a few items remain that do not relate well to the general standards of Sections 134-229 to 134-233 of the Town Code, and are not subject to specific standards. For example, tunnels under A-1-A are permitted as a special exception in the R-AA, R-A, R-B, R-C, and R-D(2) districts, subject only to the general standards. It is difficult to imagine a set of circumstances in which a tunnel that is intended for private use would not be permitted based on the general standards. Tunnels generally have very little (if any) impact on neighboring properties or community character and, therefore, barring them as a matter of right should be re-evaluated.

23

Supplemental parking is a special exception in several districts. The Town may wish to consider allowing a certain amount of supplemental parking as-of-right. Some other jurisdictions have implemented parking regulations that provide for a range of parking: a minimum and maximum number of spaces per unit of analysis (e.g., square feet of floor area, seat, employee, etc.). If the principal concern is the aesthetics of expansive parking lots, then a limit on the number of parking spaces, combined with specific design, location, and landscape requirements for parking lots, could be implemented in a manner that would allow greater efficiency in administration, and perhaps a more consistent and desirable result at street level.

Development of small, unplatted lots in the R-AA, R-A, and R-B districts is by special exception. See Town Code, §§134-793(b), 134-843(b), and 134-893(b). The Town may wish to consider adopting thresholds for imposing the special exception requirement. For example, small pre-existing lots that are not less than 90 percent of the minimum lot size and not less than 90 percent of the minimum lot width and lot depth requirements of the underlying zoning district could be approved for development without a special exception

²³ Of course, tunneling would still be subject to environmental and engineering standards and approvals by other governmental entities with jurisdiction over roadways and coastal construction activities. Setback requirements could also be applied to tunnels.

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

(like a platted substandard lot). Small pre-existing lots that do not meet these requirements could still be approved by special exception.

3.

Potential Structural Reforms.

Finally, the Town may consider re-evaluating the existing standards for special exceptions as follows:

- General standards that are provided in Section 134-229 should be revised and reorganized so that *all* general standards will apply to *all* special exceptions (*e.g.*, Section 134-229(1), (2), (3), (4), and (6) have general applicability).
- Specific standards should be moved to sections that apply only to specific types of special exceptions (*e.g.*, Section 134-229(12), a standard that only relates to commercial uses, should be moved to a section that deals only with commercial uses).
- Specific standards, wherever they are currently located, should be evaluated to determine whether they are accomplishing their intended purpose. In some instances, the Town may wish to revise or refine its standards to more closely tailor them to the community's planning objectives and aesthetic preferences.

F.

Conclusions Regarding Special Exceptions.

Although there is a perception in Palm Beach that too many special exceptions are being processed and granted, the empirical evidence indicates that the frequency with which special exceptions are heard and approved in Palm Beach is fairly unremarkable. That said, there are opportunities for procedural, substantive, and structural reforms of the Town's special exception provisions.

First, many applications that are currently subject to public hearing could likely be decided with equal effectiveness at the staff level, subject to discrete, objective standards and a "safety valve" that would allow staff to refer the application to a Town board or the Town Council if it appears that it involves issues that should be addressed at a public hearing.

Second, the Town could consider barring successive special exception applications.

Third, although the Town already has some specific standards that apply only to certain types of special exceptions, the Town may wish to consider developing additional specific standards for the remaining special exceptions that are amenable to such standards.

Fourth, the Town may wish to consider amending its regulations to allow as-of-right certain development that is now allowed only by special exception. In most cases, such amendments should include design standards that would address the types of concerns that would otherwise have been considered during special exception review. Amendments could

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

also include thresholds that would allow some types of development as-of-right, but would trigger special exception review if the threshold is exceeded.

Fifth, the Town may wish to consider reorganizing its special exception provisions so that requirements that are specific to a certain type of application are not applied to other types of applications.

Finally, the Town may wish to consider whether its existing specific provisions for special exceptions are adequately serving the Town's planning and community character objectives.

End of Report

Mr. Moore, speaking from San Francisco via telephone, said the staff did not disagree with the issue that the Civic Association asked Siemon and Larsen to look at, the issue of granting variances based upon the standards that exist in the Code. He questioned if the methodology they are suggesting has had any legal tests similar to the Snider or Bernard cases?

Mr. Siemon responded he understood Mr. Moore's question as: 'Are the kind of process and the kind of standards that we have described – have they been successfully defended in Florida?'

He said the answer is 'yes', because a case was decided approximately three years ago in Dade County that invalidated all of Dade County's regulations due to inadequate standards according to the Court. He continued, that in response to that case, a large number of local governments in the Dade County area undertook to revise their codes and to create those kinds of standards, and those standards are working successfully and being defended routinely.

Mr. Moore said the answer has to be in some form of revision to the Code that would allow for the existing zoning to protect the nonconformities and the homes that no longer conform to the present ordinances. He added he thought Mr. Siemon's approach was good and hoped to have the same presentation before the Planning and Zoning Commission meeting on March 29th.

Mr. Siemon mentioned that the City of Clearwater's Code was challenged by the sign industry, and under the strict scrutiny of the First Amendment, the District and the Circuit Court of Appeals sustained the revised standards, both procedurally and substantively to allow the exercise of discretion in the judgmental areas.

Councilman Kleid questioned if having a flexible approach would increase the amount of variances brought before the Town Council?

Mr. Siemon replied that the nonconforming structures would be responsible for increased activities, but if the regulations were drafted in a discipline fashion, the realities will be understood and the staff will respond to the realities but not go further than is necessary so as to stimulate additional activity. He concluded that if a good job of drafting the ordinance is done, there should

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

not be an onslot of variance applications, and the process may inspire creativity.

Mr. Messenger added that a discipline needs to be developed along with the changes in the ordinance to be in line with the changes from the former need to prove a hardship.

Responding to Councilman Wyett's questions regarding the number of court cases related to zoning in the last ten years, Attorney Randolph replied the Town has been taken to court primarily by property owners who objected to the variance and in most instances they were successful. He recalled one or two court cases by property owners who were denied variances and were not successful, because they could not prove they had met all of the standards since he has represented the Town.

Mr. Siemon said his experience has not indicated that more court cases are caused by shifting from the variance device to more specific reasons, and, in fact, the inverse has been true. He said the economic decisions the Town Council renders are significant creating some motivation, and the experience has not been to have an increased number of court cases working in unique communities where significant land and property values are at issue.

President Brooks, noting the preponderance of requests for setback variances, said an intelligent analysis of the problem is an optimistic approach especially in the older districts of Town.

Mr. Siemon replied that many codes now include as many as five different types of setbacks based on depth, landscaping, fences or other characteristics, and a number of ways the desired objectives may be achieved could be identified.

Councilman Coleman said, although he shared Councilman Wyett's concerns regarding litigation, he would like to approve a process that would improve the situation.

Councilman Kleid said he agreed that the present system is not working, and the Town has to move toward a different system; however, the legal challenges may increase if the Town moves toward a more subjective standard. He requested Mr. Siemon respond to the question if new changes would have more instances for challenge than the present arbitrary code would have?

Mr. Siemon responded that, in the main, a well crafted ordinance with reasonable standards that are apparently consistent with the requirements of law and an orderly process for making decisions, would be a deterrent to litigation; although attorneys will always take cases with limited prospects for success.

Councilman Goldblum asked if different practical standards could be established for different zoning districts and would those be challenged in the courts?

Mr. Siemon answered those could be established and as long as a rationale was connected to the Town's goals and policies of the Comprehensive Plan, it was his opinion that the differential treatment is not only legally defensible but is appropriate.

Mr. Siemon, responding to Councilman Coleman's questions regarding relief or

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

compensation related to law suits, said the practical remedial actions in the State of Florida are in the form of a writ of certiorari which requests the court overturn the decision made by the governing body.

Councilman Wyett pointed out the applications account for less than 2% of the actual properties in Town for the last seven years with fewer applications coming in during the last two or three years. He said he would like to see the Code revisited, spelling out as much as possible, but keeping the rule in the Code that the land must have a defect.

Bill Guttman, Chief Executive Officer of the Palm Beach Civic Association, requested Mr. Siemon address the potential Constitutional problems with the practical difficulties test.

Mr. Siemon responded the practical difficulties concept reflects the Town's practices and to be Constitutional, it would have to be translated into meaningful standards by which an applicant would be guided and the decision maker would be fettered, and if those standards existed, the law would allow the Town the flexibility to grant relief in circumstances referred to as practical difficulties provided that it is fettered by those standards. He continued that the uniformity requirement that controlled early zoning has given way, in the courts, to a recognition that preset regulations often lead to unintended consequences and undesirable limitations, and the courts have recognized over the last 40 years that grants of discretion, not previously expected to be sustainable, are appropriate, but under Florida State law only if adequate standards are in place to guide the courts.

Mr. Guttman observed that if the Town adopted a standard base regime of flexibility, an element of some subjectivity will be there, although the goal is to make it as objective as possible. He continued that since those standards would act as guidelines in a specific case, it would be far less subjective than the actions for the past seven years plus, namely making decisions on an ad hoc basis, defining hardship empathetically or by other ambiguous standards.

Mr. Guttman, referring to the Staff's report regarding setbacks, noted the staff returned to elements of mathematical proxies, i.e. 10 ft. maximums, 2.5 feet, or 2 story structures, etc. He questioned if those numbers were empirically based, their origins, and requested Mr. Siemon to comment on the issue of accomplishing the goal of preserving the character of the community if rigid mathematical rules were in place.

Mr. Moore responded the 10 ft. setback rule was arbitrarily established years ago and the mathematical formula was derived to assist the staff to have some flexibility utilizing a hard mathematical number, and it was developed with Mr. Brisson's assistance.

Mrs. Close added the staff report was a proposal to provide samples of numbers that could be used, and in the examples given, the intent was to show a minimum distance between structures, not a set number to allow a flexible approach.

Mr. Siemon stated his experience was that no matter how quantitative criteria was applied, every problem will not be addressed. He added he has used a ten ft. setback which can be deviated by 2 ft. under certain circumstances not requiring the exercise of significant discretion, but if a

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

greater setback is justified under the standards, that should also be available. He said that all the codes he has been involved with contain an intermediate area of flexibility that has a quantitative base so it cannot exceed more than a 2 ft. deviation under the rule without going through a public hearing process.

Mr. Guttman questioned the staff report's recommendation regarding areas in which flexibility ought to be incorporated in the Code where, initially, flexibility would be limited to setbacks and not deal with heights of walls, etc. He said if the Town Council adopted flexibility, the flip side would be when and when not variances for undue hardship would be granted.

Mr. Guttman clarified with Mr. Moore that he was not opposed to the creation of flexibility standards for the height of walls and for some of the other matters addressed in the Siemon and Larsen report as long as the issues (walls) are amongst the standards that the decision makers are requested to address.

Mr. Moore replied that was a correct assumption.

Mr. Guttman, referring to a staff report item regarding landmarked structures, questioned if encouragement should also exist for non-landmarked structures that were non-conforming in terms of the present Code to encourage home owners for those types of homes to expand their homes in a manner that remained faithful to what character standards were developed so as not to discourage demolition of such structures by the home owners.

Mr. Moore responded the staff did believe it was better to remodel than to demolish and the landmarked structures should be given some extra consideration.

Deedy Marix read David Barton's comments into the record: (Mr. Barton was unable to attend the meeting)

Context is essential. Today's agenda suggests there is a simple remedy to the issues at hand. Not so. The very words, variances and exceptions, are perceived to be not in the public interest. Think of it this way – when a town fosters a public interest, it is the town that stands tall. When a town fosters a special interest, it is no town at all. So, perception is a major problem to be solved, and it cannot be done when it is addressed out of context of how the town plans to preserve its character.

So, to believe variances and exceptions are merely a tool for zoning flexibility is to ignore the bigger question of land use planning and overarching town policies. Needed is a panel to review the status of the town's land use planning, zoning and building regulations. Context is essential.

Former Councilman Samuel C. McLendon recalled a conversation two years ago regarding proving hardships for variances including Attorney Randolph who was to develop a recommendation that would be an alternative to many of the applications which would include a waiver process in lieu of a variance hearing.

Mr. McLendon, referring to the 'boxiness' of some new homes, suggested requiring 60% -

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

65% of the cubic content to be on the first floor with 35% - 40% on the second floor thus changing the box look of the houses.

Attorney Randolph said variances and special exceptions were addressed more than two years ago in the form of a letter he had written stating variances were almost impossible to meet and, if challenged, the variances granted by the Town Council would seldom be sustained. He added other ways of approaching the variances were suggested in the form of alternative development standards or special exceptions; however, this suggestion never was presented to the Zoning Commission. He mentioned that changes made to the current zoning ordinance including certain fill-in variances have changed to site plan reviews as opposed to variances. He said those were the types of things the Town Council needed to consider and cautioned that care should be given in analyzing the applications to develop alternative standards for them and also exercising changes to the variance standards.

Attorney Randolph said he would like to address all of the potential changes in the zoning at some later date; however, this meeting was for the presentation of the Siemon and Larsen report.

Responding to a question from Councilman Coleman regarding changing the Zoning Code back to its original form if the new changes did not work, Attorney Randolph said that could be done; however, the Town presently has a strong zoning code and one of the strengths of the Code was that the regulations were adopted prior to the adoption of the Bert Harris Property Rights Act; therefore because they existed prior to the Act, they cannot be challenged under the Act. He continued that once the Code was amended or weakened in some way, a new standard would be developed and the Bert Harris law would become viable for the new changes.

Wendy Victor, Secretary of the Landmarks Commission, Chairperson of the Zoning Committee for the Civic Association, recommended a variance board with land use specialists who would integrate the Strategic Plan with the Code and a Master to review and sort out the applications. She suggested the Town change the procedure for notification of neighbors regarding the variances in their areas to allow the average resident to understand the nature of the requests because currently the information sent out cannot be clearly understood by the residents.

Maia Farrish, Preservation Foundation, thanked the Civic Association for the report and questioned what experience the presenters had with districting for historical properties?

Mr. Siemon responded historical overlays were unique and if they were threatened, usually economic deficiencies were the cause. He said special rules are required to address the situations with reasonable standards.

Mike Stein, 227 Via Tortuga, President of the Phipps Homeowners Association, objected to the variance notification procedure as no specifics were given with the notification regarding the nature or height of the house, dimensions, etc. He said a notice came to his address during the summer months when he was not in Palm Beach, and the particular variance (on North Lake Way) was approved in the summer time when the majority of people are gone.

Mr. Stein said the process does not absolve the Town Council of its responsibility to protect

Minutes From the Town Council Zoning Workshop Held on March 23, 2005

the quality of the community and the architectural harmony of the neighborhood, and he was impressed by Mr. Siemon's suggestion that an alternate structure be installed where the Town Council delegates most of that authority with the proper structures and procedures in place.

Mr. Stein, speaking to the issue of few legal challenges, said the few challenges indicate that so many variances were granted that no one had complaints, and the fear of legal challenges should not mitigate the Council's determination or responsibility to protect the community.

Councilman Coleman suggested the staff review the method of notification regarding the level of detail included with the notices.

Mr. Moore acknowledged he heard Mr. Coleman's suggestion.

President Brooks thanked the participants for their involvement in the workshop and the Civic Association for sponsoring the report. He said the message for all was – especially for Planning and Zoning Commission members – the disciplined approach for standards will be critical as the topic of practical difficulties is worked out.

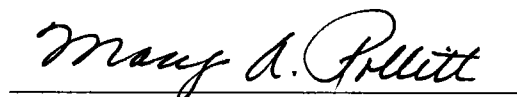
V. ANY OTHER MATTERS

There were no other matters.

VI. ADJOURNMENT

The meeting was adjourned at 11:30 a.m.


William J. Brooks, Town Council President


Mary A. Pollitt, Town Clerk