County Staff Response to Variance Request; Supplement to County Staff Report

BCC Public Hearing Item #22—0090A; March 8, 2022 (6:00PM)

Introduction

This County Response supplements the formal County Staff Report (the "Staff Report") filed for Board of County Commissioners (the "Board") Public Hearing Agenda Item #22-0090A, which regards a variance request (the "Variance Request") (dated November 23, 2021) submitted by Kelly Lee McFrederick and Jack Rice (the "Owners") for docking facilities at the property (the "Property") located at 3612 E. Maritana Drive, St. Pete Beach. The Public Hearing—which has been duly noticed per Section 58-535 of the County Code (the "Code")—is scheduled for March 8, 2022 at 6:00 PM.

Pursuant to 58-539(a) of the Code, in order to grant a variance, the Board must make a positive finding of fact to each of criteria (a) through (h) set forth in Section 138-231. Said criteria are restated here for reference:

(a) *Special conditions.* That special conditions and circumstances exist which are peculiar to the land, structure, or building involved.

(b) *Unnecessary hardship.* That literal interpretation of the provisions of this Code would deprive or make it practically difficult for the applicant to achieve the same proportion of development potential commonly enjoyed by other properties in the same zoning district under the terms of this chapter. The hardship shall not be self-imposed.

(c) *Minimum code deviation necessary.* That the granting of the request is the minimum code deviation that will make possible the reasonable use of the land, building, or structure.

(d) *Consistency with the land development code.* That the granting of the request will be in harmony with the general intent, purpose, and spirit of this Code.

(e) *Consideration of rezoning.* That a rezoning of the property has been considered and determined not to be appropriate and/or determined not to meet the objective of the request.

(f) *Consistency with Comprehensive Plan.* That the granting of the request will be consistent with the intent and limits of the Comprehensive Plan.

(g) *Detriment to public welfare.* That such request will not be injurious to the area involved or otherwise detrimental to the public welfare.

(h) *Circumvent Board approval.* That the granting of the request does not circumvent a condition placed upon the subject property by the Board of Adjustment and Appeals and/or the board of county commissioners. This shall not apply to new variances reviewed by the same board that originally placed the condition.

Because the Property lies in the City of St. Pete Beach (the "City"), Staff does not feel that criteria (d) and (e) are applicable here. Therefore, from Staff's standpoint, the Board only needs to make a positive finding as to criteria (a), (b), (c), (f), (g), and (h).

At the outset, it must be emphasized that the burden is on the *Owners* to provide substantial, competent evidence that all criteria for the requested variance(s) are satisfied. If the Owners cannot provide substantial, competent evidence supporting any (applicable) criterion, the Board must deny the requested variance.

For the requested variance to Section 58-555(a)(5) (structure may not accommodate over two vessels for permanent mooring), Staff feels that a positive finding can be made for criteria (f), (g), and (h); conversely—for reasons described further below—Staff feels that a positive finding *cannot* be made for criteria (a), (b), and (c). Consequently, Staff recommends denial of the requested variance to Section 58-555(a)(5). In the event that the Board rejects Staff's recommendation and grants the requested variance to Section 58-555(a)(5), no further action by the Board is required.

However, if the Board concurs with Staff's recommendation and denies the requested variance to Section 58-555(a)(5), the Owners have indicated to Staff that they intend to comply with Section 58-555(a)(5) by eliminating the original roofed structure's (the "Original Structure") use as a boat slip, either through blocking it off, decking it in, or otherwise. Significantly, in this instance, a variance to Section 58-543(m) (roofed structures over the water except covered boat slips prohibited) for the Original Structure is necessary because the Original Structure no longer qualifies as a boat slip and, therefore, no longer qualifies for the roofing exemption under 58-543(m). In this scenario, Staff feels that a positive finding can be made to each of criteria (a), (b), (c), (f), (g), and (h). Consequently, if necessary, Staff recommends approval of the requested variance to Section 58-543(m), so long as the Owner complies with Section 58-544 (Dock Repair and Reconstruction) in the event of the Original Structure's repair, replacement, or reconfiguration.

Each Staff recommendation for each variance request is stated succinctly in the Staff Report.

Analysis

This analysis focuses on the three criteria where Staff does not feel the Board can make a positive finding of fact: (a), (b), and (c) for the requested variance to Section 58-555(a)(5). Because Staff's reasoning for (c) is self-explanatory, this analysis focuses on (a) and (b).

It is important to note that criteria (a) and (b) are closely related. *See, e.g.*, Maturo v. City of Coral Gables, 619 So. 2d 455, 466 (Fla. 3d DCA 1993) (explaining that a *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" (emphasis added) (quoting City of Coral Gables v. Geary, 383 So. 2d. 1127, 1128 (Fla. 3d DCA 1990))); Green v. City of Miami, 107 So. 2d 390, 393 (Fla. 3d DCA 1958) ("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*." (emphasis added)); City of Fort Lauderdale Bd. of Adjustment v. Kremer, 139 So. 2d

448, 450 (Fla. 2d DCA 1962) ("Unnecessary *hardship* as used in a zoning ordinance and relating to variances usually means that the difficulties or hardships relied on must be unique to the parcel involved in the application of the variance. They must be *peculiar to the particular property* . . . ." (emphasis added)). Therefore, analyzing (a) and (b) together is appropriate.

It is also imperative to emphasize how high a bar Owners face in establishing an "unnecessary hardship." As the Fourth DCA explained in Bernard v. Town Council of Palm Beach: "[I]t has been held that a 'hardship' may not be found unless no reasonable use can be made of the property with the variance; or, stated otherwise, '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, 854-55 (Fla. 4th DCA 1990) (quoting Town of Indialantic v. Nance, 485 So. 2d 1318, 1320 (Fla. 5th DCA), *rev. denied*, 494 So. 2d 1152 (Fla. 1986)).

First, Owners assert that their (admittedly long) 200 feet of riparian frontage constitutes a "special condition" warranting a third boat slip. In other words, Owners argue that more space justifies more slips. But this logic is antithetical. As explained in the Florida caselaw cited above, a "special condition" justifying a variance must be tied to some *hardship* depriving the owner of reasonable use of his/her land. For example, a setback variance might be appropriate for a riparian owner whose riparian frontage is short. Similarly, a length variance might be appropriate for a riparian owner whose riparian frontage indents or curves inward. These hypothetical variances could be necessary for a riparian owner to enjoy his/her riparian right to wharf out like other riparian owners in the City. But that is not the case here. Staff is unaware of any other residential single-family riparian owners in the City who enjoy three slips. Indeed, Staff strongly doubts that Owners will be able to produce evidence of any such similarly situated riparian owners, and certainly not in any substantial quantity.

Consequently, denying Owners' variance request for a third slip will *not* "deprive or make it practically difficult for [Owners] to enjoy the same proportion of development potential commonly enjoyed by other properties in the same [residential] zoning district." Owners do not need a third slip to retain their riparian right to wharf out like other homes in the City. Certainly, Owners do not need a third slip to use the Property for the purpose for which it is zoned (residential). Stated succinctly: Owners do not need a third slip to reasonably enjoy the Property.

It is not surprising then, that the crux of Owners' argument is the historic designation that the Original Structure received from the City Historic Preservation Board on November 5, 2021. In the Variance Request, Owners argue that "the [Original Structure] represents an important piece of history, which is not able to be preserved under the [Code], unless the [Owners] eliminate one of the two functional boat slips that exist at the property."[i] This is a crucial point: Staff is not asking Owners to remove the Original Structure; Staff is asking Owners to remove or modify any one of the three slips on the Property to abate the violation of Section 58-555(a)(5). If the Owners want to preserve the Original Structure, they are welcome to do so if they address the tie poles to the south or the boat lift to the north.

Even assuming for the sake of argument that Staff is asking Owners to remove the Original Structure, the historic designation of same does not establish an "unnecessary hardship." Although there does not appear to be any Florida caselaw directly addressing this question, persuasive

caselaw from other states suggests that a historic designation does not, in and of itself, satisfy the hardship criterion. *See, e.g.*, Smith v. Bristol Zoning Bd. of Appeals, No. CV 89-0437569S, 1991 Conn. Super. LEXIS 1731, at *8-9 ("An owner's desire to preserve the historical significance of a structure is not in itself sufficient to support a variance on the round of unnecessary hardship." (citing Downtown Neighborhood Ass'n v. City of Albuquerque, 783 P. 2d 962, 967 (N.M. App. 1989))); Downtown Neighborhood Ass'n, 783 P. 2d at 967 ("It seems clear that the designation of a house as historically significant, does not in and of itself answer the ultimate question of unnecessary hardship." (citing Sorg v. North Hero Zoning Bd. of Adjustment, 378 A.2d 1978 (Vt. 1977))).

The nexus between the Original Structure and unnecessary hardship is especially weak here given how and when the historic designation occurred. To Staff's knowledge, there was no petition from the public or proposal from the City. Rather, the Owners petitioned the City Historic Preservation Board *after* being notified by (County) Staff of the violation of Section 58-555(a)(5)—in an apparent attempt to preemptively buttress this Variance Request. Indeed, in the Owner's Historic Designation Application (which has been entered into the record), under Narrative Description #3, the Owners explain in **bold** font: "Unfortunately the [Original Structure] is facing an imminent threat as [Staff] is seeking to remove the famous covered roof and have cut in half the south portion of the decked area . . . ." Also attached to the Historic Designation Application (as well as the Variance Request) is a Staff proposal (dated July 16, 2021) to resolve the violation of Section 58-555(a)(5).[ii]

It follows that, in many respects, the historic designation of the Original Structure can be viewed as a self-imposed hardship. Not only are self-imposed hardships expressly barred by criterion (b), they are frowned upon under Florida law. *See, e.g.*, Schmidt v. City of Treasure Island, No. 15-000040AP-88A, 2015 Fla. Cir. LEXIS 8603 *9 ("A self-imposed hardship or self-acquired hardship . . . is not the kind of hardship for which a variance should be granted." (quoting Elwyn v. City of Miami, 113 So. 2d 849, 852 (Fla. 3d DCA 1959))); Green, 107 So. 2d at 393 ("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."); Bernard, 569 So. 2d at 854-55 (self-created hardship cannot be the basis for a zoning variance (citing Thompson v. Planning Comm'n of Jacksonville, 464 So. 2d 1231 (Fla. 1st DCA 1985))).

Conclusion

In sum, the Owners cannot produce the evidence required for the Board to make a positive finding of fact as to (a) (special conditions) and (b) (unnecessary hardship) for the requested variance to Section 58-555(a)(5) (structure may not accommodate over two vessels for permanent mooring). Regarding criterion (c) (minimum code deviation necessary), as established above, the Owners do not need a third slip to make reasonable use of the Property. Consequently, just as for (a) and (b), a positive finding as to (c) appears unattainable. However, as discussed above, assuming that Owners agree to modify the Original Structure to prevent its use as a slip, Staff does feel that all applicable criteria can be established for the (conditionally) requested variance to Section 58-543(m) (roofed structures over the water except covered boat slips prohibited) to keep the roof over the Original Structure.

[i] From Staff's vantage point, the Owners cannot plausibly argue that the Original Structure cannot function as a slip. First, Owners appear to concede that the Original Structure may function as a slip by seeking a *variance* to keep the Original Structure it its current condition. Had Owners believed that the Original Structure cannot function as a slip, they should have foregone this Variance Request and permitted the County Code Enforcement Special Magistrate to determine whether a violation of Section 58-555(a)(5) exists—a path that Staff proposed. Second, an e-mail dated April 18, 2018 from Jason Rogers of Priority Marine Construction, LLC — the contractor that constructed the boat lift to the north —and (prior) County Marine Inspector Pete Holland confirms that the prior owners of the Property intended to "put a smaller boat through the front of [the Original Structure]" (this e-mail has been entered into the record). Mr. Rogers is correct: a vessel (perhaps two) can pull (or reverse) directly into the Original Structure and moor securely therein.

[ii] It should be noted that this Staff proposal focuses on modifying the Original Structure because the Owners expressed an unwillingness to modify either the boat lift to the north or the tie poles to the south to prevent use as a slip.