REPORT TO THE DEVELOPMENT REVIEW COMMISSION FROM DEVELOPMENT REVIEW SERVICES DIVISION, PLANNING & DEVELOPMENT SERVICES DEPARTMENT, for Public Hearing and Executive Action on Wednesday, November 3, 2021 at 1:00 P.M.

CASE NO.: 20-54000071 PLAT SHEET: S-20

APPEAL: Appeal of a Streamline Approval of a variance to the minimum required lot width from 75-feet to 50-feet in order to create three (3) buildable lots on property zoned NS-1.

APPELLANT: Edwin Carlson, Jungle Terrace Civic Association President
7691 30th Avenue North

ZONING: Neighborhood Suburban Single-Family (NS-1)

Structure	Required	Requested	Variance	Magnitude
Lot Width (Lots 13-15)	75-feet	50-feet	25-feet	33%

MEMORANDUM OF LAW IN SUPPORT OF DENIAL

RALF BROOKES, ESQ. ATTORNEY FOR APPELLANT

This variance application fails to meet three essential criteria for granting a variance under the St Pete City Code sections 16.70.040.1.6.D (Variances: Standards of Review):

> ...
> (2) *The special conditions existing are not the result of the actions of the applicant;*
> *(3) Owing to the special conditions, a literal enforcement of this chapter would result in unnecessary hardship;*
> *(4) Strict application of the provisions of this chapter would provide the applicant with no means for reasonable use of the land, buildings, or other structures;*
> *(5) The variance requested is the minimum variance that will make possible the reasonable use of the land, building, or other structure;...*"

These are criteria that are commonly applied to variance applications in City Codes that have interpreted by the Courts in numerous cases over the years under numerous court decisions on the law governing variances in Florida.

1. The hardship cannot have been self-created.

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

A mere economic disadvantage due to the owner's preference as to what he would like to do with the property is not sufficient to constitute a hardship entitling the owner to a variance. Burger King v. Metropolitan Dade County, 349 So.2d 210 (3 DCA 1977); Metropolitan Dade County v. Reineng, 399 So.2d 379 (3 DCA 1981); Nance, supra; Crossroads Lounge v. City of Miami, 195 So.2d 232 (DCA 1967). Neither purchase of property with zoning restrictions on it, nor reliance that zoning will not change, will constitute a hardship. Friedland v. Hollywood, 130 So.2d 306 (DCA 1961); Elwyn v. Miami, 113 So.2d 849 (3 DCA 1959).

If a purchaser buys land with a condition creating a hardship upon it, then the hardship should be ruled self-created. Coral Gables v. Geary, 383 So.2d 1127 (3 DCA 1980). The requirement

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

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

The purchase of property with zoning restrictions on the property will normally not constitute a hardship. Friedland v. Hollywood, 130 So.2d 306 (DCA 1961); Elwyn v. Miami, 113 So.2d 849 (3 DCA 1959). Namon v. DER *558 So. 2d 504 (Fla 3rd DCA 1990)* and the cases cited therein address cases where property is purchased AFTER adoption of prohibitory regulations:

"Appellants are deemed to purchase the property with constructive knowledge of the applicable land use regulations. Appellants bought unimproved property. A subjective expectation that the land could be developed is no more than an expectancy and does not translate into a vested right to develop the subject property. *See Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1382, 1383* (Fla.), *cert. denied sub nom. Taylor v. Graham, 454 U.S. 1083, 102 S. Ct. 640, 70 L. Ed. 2d 618 (1981)*

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

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

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

2. Consistency with neighborhood and scheme of regulations.

Granting the variance must not adversely affect the zoning scheme as a whole. Granting of a variance is illegal, and beyond the authority of any local administrative body, where the proposed variance is not shown to be in harmony with, and not "in derogation of the spirit, intent, purpose, or general plan of [the zoning] regulations." Troup v. Bird, 53 So.2d 717 (Fla. 1951). "A variance should not be granted where the use to be authorized thereby will alter the essential character of the locality, or interfere with the zoning plan for the area and with rights of owners of other property." Elwyn v. City of Miami, 113 So.2d 849 (Fla. 3rd DCA 1959).

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

Some cases go so far as to say no variance can be granted if the property can still be used without the variance. This approach incorporates, to some extent, the law of taking of property without

just compensation, i.e., a variance can be granted and will not be overturned if no other reasonable use can be made of the property without a variance.

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

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

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

Additional case law supporting DENIAL of this variance application in numerous cases including:

City of Jacksonville v. Taylor, 721 So.2d 1212 (Fla. 1st DCA 1998)
Bernard v. Town Council of Palm Beach, 569 So.2d 853 (Fla. 4th DCA, 1990); Metropolitan Dade County v. Betancourt, 559 So. 2d 1237;
Town of Indiatlantic v. Nance, 485 So.2d 1318 (Fla. 5th DCA 1986) *("Nance I"),*
Town of Indiatlantic v. Nance, 400 So.2d 37 (Fla. 5th DCA 1981), approved, 419 So.2d 1041 (Fla.1982)." *("Nance II"),*
City of St. Augustine v. Graubard, *780 So.2d 272 (Fla. App. 2001)*
Maturo v. City of Coral Gables, 619 So.2d 455 (Fla. 3rd DCA 1993);
Herrara v. City of Miami, 600 So.2d 561 (Fla 3rd DCA 1992) rev. denied 613 So.2d 2 (Fla. 3rd DCA 1992).
In Re Kellogg, 197 F. 3d 1116, 1121 (11th Cir. 1999).
Blount v. City of Coral Gables, 312 So. 2d 208 (Fla. 3rd DCA 1975) ("Nor are the Blounts entitled to a variance from the above zoning ordinance...as the hardship was self-created because they knew of the zoning ordinance.") (*citing other Florida cases on this issue*);
Clarke v. Morgan, 327 So.2d 769 (Fla. 1975);
Friedland v. Hollywood, 130 So.2d 306 (DCA 1961);
Elwyn v. Miami, 113 So.2d 849 (3 DCA 1959);
Coral Gables v. Geary, 383 So.2d 1127 (3 DCA 1980).

Ralf Brookes
Ralf Brookes Attorney
P.O. Box 100238 Cape Coral Florida 33910
1217 East Cape Coral Parkway #107, Cape Coral Florida 33904
Phone/Text (239) 910-5464
Fax (866) 341-6086
RalfBrookes@gmail.com
Ralf@RalfBrookesAttorney.com

Board Certified in City, County and Local Government Law by The Florida Bar

Please visit my website at: www.RalfBrookesAttorney.com
Of Counsel to the Vose Law Firm at rbrookes@voselaw.com
Please visit the Vose Law Firm webpage at www.VoseLaw.com