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September 4, 2020

Via E-mail
Mayor and Town Council
c/o Maggie Zeidman, President
Town Council of the Town of Palm Beach
360 South County Road
Palm Beach, Florida 33408

Re: Lack of Hardship to Support Variances in Application No. Z-20-00269 ("Present Application") for New 2 Car Garage on West Side of 143 Reef Road

Dear Mayor and Town Council Members:

Our office represents Gayle P. Petersen, as Trustee of the Gayle P. Petersen Revocable Trust, ("Petersen), the owner of 151 Reef Road located directly west of and abutting 143 Reef Road ("Property"). Ms. Petersen objects to the variances sought by John K. Criddle ("Owner")[1] to construct a new two car garage on the west side of the Property near her master bedroom and bathroom. The garage would reduce the protections of the side yard setback on the Property from 12.5 feet to 5 feet, impose the mass of a new garage close to her bedroom, subject her to additional noise, light and odors, and impinge upon her privacy, all without the requisite hardship needed for a variance. As a result, the Present Application should be denied.

I. Background

A. Original House Included a Garage Which was Converted to Living Space

The house at 143 Reef Road was built in 1951. The original plans included an enclosed one car garage. In 1972 the garage was converted into a bedroom and bathroom. The plans and approval for the conversion by the Building Department are attached as Exhibit "B." As such, at the time there was a conscious decision to trade garage space for living space on the Property, ostensibly to comply with the setbacks in the Town Code.

Nevertheless, the Owner now seeks to have his cake and eat it too by keeping the former garage living space and designing a two car garage (and rear BBQ area) which is too large for the lot. It requires two variances, including a massive 60% reduction in the west side yard set back. In doing so the Owner is forcing Ms. Petersen to bear burden of the new garage, because the Owner "**would like to have** a 2 car garage to park their cars, and store their bicycles." (emphasis added)

[1] The Present Application includes references to both John Criddle and Frances Frisbie. The owner of the Property, however, is only Mr. Criddle. *See,* Warranty Deed recorded on June 2, 2020 in the Public Records of Palm Beach County, a copy of which is attached as Exhibit "A." The ownership of the Property by just Mr. Criddle (and the lack of a homestead filing) begs the question as to his long term goals with the property. Mr. Criddle has indicated to Ms. Peterson that his plan is to upgrade and flip the house in order to make money to purchase a larger home in the future.

To the extent the Owner "would like" a two car garage it could easily be constructed without the need for any variances. By merely sliding the new garage to the east and incorporating the former garage (which is 9 feet 6 inches in width) area into the new garage design, there would be no need for a 7.5 foot reduction in the west side yard set back.[2] In the alternative, as several ARCOM members, neighbors, and Ms. Petersen have suggested, the Owner could build a smaller one car garage. The Owner has refused to consider such options, despite the fact either would comply with the Town Code, preserve the side setback, and not impose upon Ms. Petersen.

B. Prior Attempt for Variances for a Two Car Garage and Withdrawal of Application

In May of 2011, an application ("Prior Application")[3] was filed by Maura Ziska seeking a variance to construct a two car garage at the Property with a 6.25 feet wide side yard setback in lieu of the 12.5 feet required and an angle of vision variance of 112 degrees in lieu of the 100 degrees allowed under the Code.[4] The proposed two car garage was 20' 6" in width, 24' 4" in depth. The design included a new chimney and a BBQ area attached to the rear of the garage. *See,* Exhibit "D," pages A-1, A-2, A-3, SP-1.

In support of the Prior Application, Ms. Ziska argued that the hardship supporting the variances included, but was not limited to, that: i) the residence was **built without a garage**; ii) the applicant would **"like to have" a 2 car garage to park their cars, and store their bicycles**, recreational equipment and vehicles; iii) because of the configuration of the house the only place to put the garage was on the west side of the house and iv) the garage "would only **slightly encroach** into the setback" and "was minimal **for a one story structure**."[5]

Several nearby neighbors, including Jesse and Mary Azqueta, Anne and Bill Metzger, Paul and Sally Gingras, and Ms. Petersen all objected to the Prior Application and the reduction of the side yard setbacks.[6] Ms. Ziska requested a deferral of the Prior Application in an effort to come to a consensus with the neighbors.[7] She could not. As a result, the Prior Application was withdrawn by letter July 21, 2011, which withdrawal was accepted by the Town on August 10, 2011.[8]

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[2] It would also eliminate the need for any angle of vision variance.
[3] A copy of the Prior Application is attached hereto as Exhibit "C."
[4] A copy of the applicable portions of the Site Plan and Elevations for the Prior Application is attached as Exhibit "D."
[5] Ms. Ziska indicated, under oath, at the August 26, 2020 ARCOM Meeting, that the Prior Application objected to by the neighbors was for a **two story garage**. The Plans show that not to be true and the Prior Application clearly sought a taller garage which was still **"a one story structure."** More importantly, the objections filed to the Prior Application were not based upon the height of the proposed garage but upon its encroachment into the side yard setback and adverse effects on Ms. Petersen. The Zoom recording of the August ARCOM meeting for the Present Application can be found beginning at 3:45:49 which is incorporated herein by reference.
[6] A copy of the objections to the Prior Application are attached hereto as Exhibit "E." Mr. Hanlon notes in his objection for Ms. Petersen that Ms. Ziska may have a conflict since she represented Ms. Petersen in the purchase of her home.
[7] A copy of the request for the Deferral is attached as Exhibit "F."
[8] A copy of the letter by Ms. Ziska requesting the withdrawal and the confirmation of the withdrawal by Mr. Castro are attached hereto as Composite Exhibit "G."

C. Present Application Is a Revamp of the Prior Withdrawn Application

The Present Application[9] is seeking essentially the same variances as the Prior Application which was withdrawn, namely a (now larger) variance from the west side yard setback of 5 feet in lieu of the 12.5 foot minimum under the Town's Code and a variance for an angle of vision for 105 degrees in lieu of the 100 degrees maximum allowed per the Code. The proposed two car garage is 20 feet 10 inches in width, and 21 feet 2 inches in depth. The new design also includes a new chimney (with a slightly altered design from the Prior Application) and, again, includes a BBQ grill and bar area on the backside of the proposed garage. *See,* Exhibit "I," pages A-2.01, A-2.02, A-2.03, A-2.4, SP-1.01, and Sp-1.02.

As with the Prior Application, Ms. Ziska has indicated that the hardship by the Owner includes, but is not limited to, that: i) the **residence was built without a garage**; ii) the applicant **"would like to have" a 2 car garage to park their cars, and store their bicycles,** and recreational vehicles and equipment; iii) because of the configuration of the house the only place to put the garage was on the west side of the house; iv) the garage **"would *slightly* encroach into the setback;"** and v) **other properties in the area have garages and nonconforming setbacks** because they were built prior to the current zoning restrictions.[10] Again, neighbors, including Ms. Petersen, have objected to the variances requested.[11]

Regardless of the desires of the Owner, the Present Application simply does not meet the standards required for the approval of a variance under Section 134-201 of the Town Code and the case law thereon. As such, the Present Application should be denied.

II. Inability to Meet Variance Standards

A. Variances Are Direct Violations of the Code

Far too often used as an "innocent" tool to allow a specific project to slide by and be approved, a variance is nothing more than a Town sanctioned violation of the Town Code. Approving unsupported variances undermines the protections of the Code which are designed to maintain the character of the Town. As such, a variance should not be granted except in the most extreme circumstances in which the Code would not allow for virtually any use at all of the property. This is not one of those circumstances.

While homeowners often claim they have a "property right" to build on their lot, there simply is no "property right" for a variances in violation of the Town Code. Nor can a variance be based upon the "wish," "like," or "desire" of an owner to "upgrade" the home, make it more "modern" and "livable" or become their "forever home." Desires and wishes do not support a variance.

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[9] The Present Application and applicable Site Plan and Elevations are attached as Exhibits "H" and "I" respectively.
[10] While both the Prior and Present Applications include references to changes in the Town Code which require a two car garage for new construction, the lack of a two car garage on the Property is clearly a prior non-conforming permitted use and as such cannot be the basis for any claim of a "hardship."
[11] A copy of the correspondence against the variances is attached as Exhibit "J."

Neighboring property owners, however, "have a right to rely on existing zoning conditions and they have a right to a continuation of these conditions in the absence of a showing that the variance is proper." *Thompson v. Planning Com. of Jacksonville*, 464 So. 2d 1231 (Fla. 1st DCA 1985); *see also, Allapattah Cmty. Asso. v. Miami*, 379 So. 2d 387 (Fla. 3d DCA 1980). As such, often it is the "property rights" of neighbors, such as Ms. Petersen, which get trampled by the approval of an unsupported variance.

B. Owner's Claimed "Hardship" Falls Short of Variance Standards

1. Insufficient Factual Basis for "Hardship" in Light of Original Garage

In the Present Application the Owner has indicated that "**the hardship** which runs with the land **is that the residence was built without a garage** and the zoning code has changed..." *See*, Present Application, Section III and Exhibit "A," Criteria 4. (emphasis added) Such a statement is demonstrably incorrect. Therefore, it would be impossible for the Town to grant a variance based on the assertion that the "hardship" is that the residence was built without a garage when it was built with a garage, which was later intentionally converted into living space. As a result, the Owner has failed to meet the requirements of item III of the Application and Criteria 4 in Exhibit "A" of the Application. For this reason alone the Application must be denied.

In addition, the desire of the Owner to keep the old garage living space while adding a new two car garage that requires a 60% side yard variance cannot create a "hardship" either, especially in light of alternate designs available without a variance. Moving the proposed garage to the east and incorporating the old garage would not require a variance.[12] Likewise, a one car garage could easily meet the Town Code setbacks. The failure to build within the confines of the Town Code when it is clearly possible further dictates the denial of the Present Application.[13]

2. Insufficient Unnecessary and Undue "Hardship"

Section 134-201 of the Town Code is clear that only variances that "will result in **unnecessary and undue hardship**" can be granted (emphasis added). The Court's are also clear that an applicant for a variance must demonstrate a "unique hardship" to qualify for a variance. *Bernard v. Town of Palm Beach*, 569 So. 2d 853 (Fla. 4th DCA 1990) (citing, *Nance v. Town of Indialantic,* 419 So. 2d 1041 (Fla. 1982)). By definition, a **"hardship" may not be found unless no reasonable use can be made of the property without 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."** *Bernard* at 854 (citing, *Town of Indialantic v. Nance,* 485 So. 2d 1318, 1320 (Fla. 5th DCA); *see also Thompson v. Planning Comm'n,* 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985)(emphasis added).

In the case of *Bernard v. Town of Palm Beach*, 569 So. 2d 853 (Fla. 4th DCA 1990) the

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[12] The ability to use an alternate design with no variance(s) negates the Owner meeting the standards of Section 134-201(a)(5) of the Town Code that the variance sought is the minimum variance that will make possible the reasonable use of the land, building or structure, since the "minimum variance" would be no variance.

[13] *See, Indialantic v. Nance*, 400 So. 2d 37, 40-41 (Fla. 5th DCA 1981)(existence of a viable alternate plan demonstrated a lack of hardship); *Auerbach v. City of Miami*, 929 So. 2d 693, 694 (Fla. 3d DCA 2006).

desire to construct a 35 to 40 foot master bedroom, bath and den above an existing southern portion of the house resulting in a rear setback of 5 feet instead of 15 feet was not a "hardship."[14] The house could continue to be used for its purpose, albeit with a smaller bedroom and bathroom.

So too here, the claim that the Owner "would like to have" a two car garage to store its cars, equipment and bicycles does not constitute a showing that no reasonable use can be made of the Property without it. To the contrary the house can continue to be used as it has been for over 38 years since the prior garage was converted to a bedroom in 1972. Or, if the Owners "would like to have" a two car garage, it can incorporate the former garage in its design and stay within the parameters of the Code. Therefore, the Applicant cannot meet the requisite unnecessary and undue hardship needed for a variance, leaving the Present Application to be denied.

3. Any "Hardship" Would be Self-Imposed

Even if the lack of a legally recognized hardship could be overlooked (which it cannot) any "hardship" alleged by the Owner would clearly be self-imposed. The courts have consistently found 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 or buyers**.[15] *See, Maturo v. Coral Gables*, 619 So. 2d 455 (Fla. 3d DCA 1993); *City of Coral Gables v. Geary*, 383 So. 2d 1127 (Fla. 3d DCA 1980).

As a result, situations in which purchasers **are fully aware of the shape and size of a lot, but still design a building which is too large for the lot, constitutes a self-created hardship**. *Thompson v. Planning Com. of Jacksonville*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985); *see also, Namon v. State Dept. of Environ. Reg.*, 559 So. 2d 504 (Fla. 3d DCA 1990). In the present case, the Owner was (or should have been) fully aware of the Property's size, location and set backs, yet designed a two car garage which was too large and encroached on the required side yard setbacks next to Ms. Petersen. Such a choice represents a self-centered, self-created "hardship" which cannot support the variances sought. As such, the Present Application must be denied.

4. Property Restrictions Are Not Unique

In addition to the above, there can be no "hardship" in the present case in light of the fact that several of the nearby homes admittedly share the same difficulties as the Property. Under Section 134-201(a)(1) of the Code an applicant must demonstrate that "special conditions and circumstances exist which are peculiar to the land, structure or building involved **which are not applicable to other land lands, structure or buildings in the same zoning**." (emphasis added)

As a result, "a prerequisite to the granting of a hardship zoning variance is the presence of

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[14] *See also, Herrera v. Miami,* 600 So. 2d 561, 562 (Fla. 3d DCA 1992) (reversing approval of a variance where there is no finding that "it is virtually impossible to use the land as it is presently zoned."); *Auerbach v. City of Miami,* 929 So. 2d 693, 694 (Fla. 3d DCA 2006) ("Florida courts have held that a legal hardship will be found to exist only in those cases where the property is **virtually unusable**...,")(citing to *Mauro v. City of Coral Gables,* 619 So. 2d 455,456 (Fla. 3d DCA 1993)).

[15] Here, there is no peculiarity at all as to the size or shape of the Property.

an exceptional and unique hardship to the individual landowner; **unique to that parcel and not shared by other property owners in the area**." *Indialantic v. Nance*, 400 So. 2d 37, 40 (Fla. 5th DCA 1981)(emphasis added). Therefore, as is the case here, where an applicant's lot has a similar size, shape and topography and is subject to the same zoning requirements, including the height, set-back, and landscaping, restrictions, the restrictions are common difficulties and cannot establish the unique hardship required to support the proposed variances.[16]

In the Present Application Ms. Ziska admits that the present house is "nonconforming to today's code" and further admits that "many properties and residences in the area have garages and non-conforming setbacks as the residences were built before the current zoning restrictions were in place."[17] Moreover, the lots in the area are the same general shape and size. As such, the limitations on the Property are shared by other lands, structures and buildings in the same zoning district and cannot be the basis for a hardship. The Present Application therefore must be denied.

III. Conclusion

The circumstances in the Present Application simply do not factually or legally support the requisite "hardship" for a variance under the Town Code or the case law. The argument that the original house did not have a garage when it did cannot be used as the basis for a hardship. The home can reasonably continue to be used as it has been since 1972 without a two car garage. In the alternative, the plans can be modified to construct a two car garage without a variance.

The Owner's situation is not unique. Many other homes in the area have the same shape, size and issues. Therefore, any "hardship" is clearly self-imposed by the Owner by designing too large of a garage on too small of a lot, despite knowing the shape and size limitation of the Property. Under the circumstances, Ms. Petersen should be allowed to rely upon the protections in the Town Code and not be forced bear the burden of the Owner's desire for a two car garage which requires a 60% side yard set back reduction next to her master bedroom and bathroom.

The Application should be denied.

Very truly yours,

John R. Eubanks, Jr.

cc: Wayne Bergman, Director Planning, Zoning & Building
Paul Castro, Zoning Manager
John C. Randolph, Esq.
Kelly Churney, Administrative Specialist
Town Clerk, Town of Palm Beach

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[16] Likewise, a variance application **cannot rely upon previously approved variances in the jurisdiction**. *See*, *City of Jacksonville v. Taylor,* 721 So. 2d 1212 (Fla 1st DCA 1998); *see also, Herrera v. City of Miami*, 600 So. 2d 561, 563 (Fla 3d DCA 1992)("on review of an administrative grant of a zoning variance, **the standard is not whether variances have been granted to similarly-situated applicants in the community**…") (emphasis added)

[17] Again, the mere fact that the Property may be non-conforming and grandfathered is not the basis for a variance.