

Memo

To: Mayor and Town Council
From: John C. Randolph
Date: March 28, 2023
Subject: 125 Worth Avenue

I have reviewed the various arguments submitted in regard to the dispute as to whether 125 Worth Avenue is a three story or four story building. Although there are legitimate arguments on both sides of the issue, I find in favor of Wayne Bergman's well-reasoned explanation as set forth in his memos of March 6, 2023, and March 16, 2023, copies attached. Also see Fire Marshall Martin DeLoach's memo of March 17, attached. As a matter of fact, the structure which exists on the roof of 125 Worth Avenue is a fourth story by definition and by appearance. I have attached a photograph of this fourth story structure for your reference.

The other assertion raised in opposition to this application is that the application does not meet the criteria necessary to be granted a variance, especially as to the request to expand the fourth floor. As I have indicated in the past, I cannot advise you as to how to vote in regard to matters such as these. I can only advise you as to the law. In that regard I, once again, provide you with a copy of the case Bernard vs. Town Council of the Town of Palm Beach which explains the law as it relates to variances.

I am happy to answer any questions you may have in reference to this matter.



John C. Randolph

cc: Kirk Blouin
Wayne Bergman

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TOWN OF PALM BEACH

Information for Town Council Meeting on: March 15, 2023

To: Mayor and Town Council

Via: Kirk Blouin, Town Manager

From: Wayne Bergman, Director of Planning, Zoning & Building

Re: 125 Worth Avenue

Date: March 6, 2023

STAFF RECOMMENDATION

Staff would like to put into context our interpretations and decisions made regarding the proposed project at 125 Worth Avenue over the last several years. This is a complex project that has been in the development queue for at least four years with three different applications. This memo will not include specific opposition and concerns expressed by the neighboring property owners and residents. This memo will also not provide a full history on this project, but will focus on the recent land use applications.

2019 PROJECT SUMMARY

The applicant (Rob Frisbie) met with former PZB Director Josh Martin regarding 125 Worth Avenue. Mr. Frisbie's plan was to add to the existing fourth-floor of the building and to create four fourth-floor condominiums. The condominiums would be located within the existing building footprint and each condominium would have a balcony that would extend near the edge of the existing building roofline, basically expanding the existing fourth-floor footprint on all four sides. On the ground level, a one-story building would be added in the location of the existing east surface parking lot. At first, a restaurant was proposed in this new addition, then later was removed due to concerns from the neighboring condo owners. The very visible first three floors would have cosmetic alterations made to the façade of the building. Final versions of this project proposed the ground-level east building addition to be in the northwest section of the existing parking lot and to be used to house mechanical equipment. All surface parking would be removed as part of the 2019 proposal.

2019 APPLICATION

After several meetings with the applicant, architect Rafael Portuondo, attorney Jamie Crowley, Director Josh Martin, and PZB staff, the first application was made. It was a Comprehensive Plan Amendment, a zoning text amendment, and changes to the Worth Avenue Design Guidelines. Director Martin tentatively agreed to prepare some of the zoning text amendments for

the applicant. The Comp Plan amendments were to change the Future Land Use Element to allow, in some cases, a fourth-floor (although a small fourth-floor exists today). This would have resulted in changes to both the zoning code relative to the C-WA district and to the Worth Avenue Design Guidelines. This initial project was to demolish the existing 3,000 sf fourth floor, then add a new larger fourth-floor, which would be just over 12,000 sf. This is why the applicant needed the Comp Plan amendment, as the grandfathered nonconforming fourth-floor would be completely removed (abandoned), then rebuilt larger.

2019 REVISIONS TO THE APPLICATION

The applicant decided to withdraw the original application, and in turn to simply request a site plan, special exceptions and variances. The applicant said this decision was made after receiving feedback from one or more Town Council member(s). The feedback was basically described to staff as that the Town Council may not support a Comprehensive Plan amendment, but that requesting multiple variances was the better way to proceed. At this point Zoning Manager Paul Castro was asked by Director Martin to help delineate the various zoning matters and possible variances needed to approve the project. The applicant described the project as an expansion of the nonconforming fourth-floor, along with a shared parking concept to eliminate the surface parking, and other variances for the ground level building additions and façade changes, building height, lot coverage, site plan review and special exceptions. Mr. Castro indicated that requesting an expansion of the grandfathered, nonconforming fourth-floor was already established by past precedent, as a few other tall, nonconforming buildings in the past have requested and received variances to expand by adding additions, awnings, pergolas, etc. to the nonconforming floor. I remember Mr. Castro pointing out the window of the Director's office at the nonconforming six-story building behind Bricktops, which he said required variances to expand the nonconforming penthouse. Mr. Castro said that this precedent was vetted through Town Attorney Skip Randolph in the past, and therefore could be used again. He also indicated several other midrise buildings, primarily condo buildings, have requested and received the same zoning relief. Staff requested that the applicant provide plans that showed the fourth-floor to remain (if the fourth-floor was demolished it would be a violation of the Comprehensive Plan). Although submitted as a combo project (both Arcom and Town Council approvals needed), staff asked that the project be re-noticed to neighbors and that the matter come to the Town Council first to deal with the variances, special exceptions and site plan review, as there is no need for Arcom to spend possibly several months on this project if the zoning variances are not granted by the Town Council.

Ultimately the applications were withdrawn by the applicant.

2023 PROJECT SUMMARY

ARCOM - The applicant, 125 Worth Partners LLC, has filed an application requesting Architectural Commission review and approval for the substantial demolition, renovation and expansion of the existing four-story nonconforming commercial building with underground parking, including multi-story additions and façade alterations in accordance with the Worth Avenue Design Guidelines, involving multiple variances including from the parking requirements, setback, lot coverage, height and open space regulations and other nonconforming aspects of the existing building.

TOWN COUNCIL - The applicant, 125 Worth Partners LLC, has filed an application requesting Town Council review and approval for a Special Exception with Site Plan Review for the substantial demolition exceeding 50% exterior building elevations for the renovation and expansion of the existing four story nonconforming commercial building (with underground parking) including multi-story additions and façade alterations proposing in accordance with the Worth Avenue Design Guidelines and a Special Exception to permit retail and office uses greater than 4,000 SF gross leasable area in the C-WA district. Additionally, the applicant is seeking review and approval for Variances (1) to reduce the required parking; (2) to modify and expand nonconforming four-story building; (3) to exceed the maximum overall building height in order to construct a new rooftop and rooftop projections; (4) to exceed the maximum allowable lot coverage for the fourth level; (5) to reduce the required front yard setback, (6) to eliminate the requirement for an on-site loading space, (7) to retain and increase the existing nonconforming lot coverage for the first, second and third levels; (8) to retain the existing nonconforming building length; (9) to retain the existing nonconforming landscape open space; and (10) to further increase the existing nonconforming floor area due in association with the voluntary demolition of portions of the nonconforming building exceeding 50% of exterior wall square footage, in conjunction with the renovation of an existing four-story office and retail building.

STAFF'S VIEW OF THE PROJECT

The current PZB staff acknowledges that 125 Worth Avenue is a four-story building. While this fact may be debated and contradicted by past records, real estate advertisements and other documents, PZB staff has, on at least two different occasions, visited the building as a field visit and walked up to the fourth-floor penthouse. It is easily accessible from any floor. The fourth-floor is just over 3,000 sf in size, has a concrete roof, which is about 13 feet high, is air conditioned, and has large glass windows on two sides. The fourth-floor footprint further expands over the third floor with a covered arcade on three sides. The interior enclosed space currently houses mechanical equipment, but this space could be converted to office or condominium use by relocating the mechanical equipment and renovating the interior space to the desired configuration. Two separate PZB Directors have established their interpretation of this fourth-floor designation.

Variances are needed to expand the nonconforming fourth-floor, as this precedence is already established in the Town, vetted by the Town Attorney and has been used by applicants in the past. Further, the former Zoning Manager reviewed the 1972 plans from the original building construction and maintains that the building was designed and constructed as a four-story building with underground parking. Staff acknowledges that two-story buildings, and sometimes three-story buildings, are allowed by the Comprehensive Plan in the commercial land use areas, but staff further acknowledges that there many buildings in Town that exceed the Comprehensive Plan height limitations, several of them along Worth Avenue. These buildings were constructed prior to the adoption of the current Comprehensive Plan. These nonconforming, but grandfathered, buildings can be enlarged / expanded with zoning variances, as has been done in the past, but cannot be expanded beyond the footprint of the building.

Wayne Bergman

From: Wayne Bergman
Sent: Thursday, March 16, 2023 1:23 PM
To: JULIE ARASKOG; Kirk Blouin; Julie Araskog; Skip Randolph; James Murphy; Jennifer Hofmeister-Drew; Legal; Town Attorney; Bradley Falco
Subject: RE: Meeting to discuss four stories

Julie - I sent what we could find from the old permits.

However, I cannot explain why the 50-year-old permit application, old permits, county tax assessor description, or realtor marketing documents collectively describe this building as a three-story building with mechanical penthouse. I authored a memo a few years back on this matter, and authored an updated memo on March 6, 2023, and then co-authored the March 13, 2023 staff memo that explained that the building is four floors. I believe that 125 Worth Avenue is a four-story building.

The reasons for this determination:

1. First, my review of the original building permit plans, dated 1972 by architect Robert Michael Kolany, show the individual levels (floors, stories) of the building. The plans include notes that show the penthouse floor elevation, penthouse story, penthouse elevations, penthouse floor height, penthouse roof height, and penthouse core plan (elevators, stairs, storage). These plans show a four-story building with an additional two stories of underground parking.
2. Second, my three trips to view the spaces over the past several years. The space is accessed by two sets of stairs (scissor stairs). The enclosed space of this floor is around 3,000 sq ft. It is air conditioned, has around 14' tall ceilings, floor to ceiling windows on two sides. Plus, this space is surrounded by an arcade about 8' in width (adding another 3,700 sq ft of building coverage). This space is a level / floor / story of this building. This is not an "accessible roof deck", "observation deck", or "similar area".
3. Finally, the Town Zoning Code definition of story - "... that portion of a building ... included between the surface of any floor and ... the space between such floor and the ceiling next above it". This accurately describes the mechanical penthouse.

This determination does not mean that I, or staff, fully support the application and proposed project. In fact, we are concerned with additions totaling 16,000 sq ft while removing 23 parking spaces. I pointed out to you that the demolition will remove all exterior walls (windows, storefronts, and walls), leaving for a period only the structural slabs and supporting concrete columns. Richard Sammons verified that point during his architectural presentation. We are concerned with the fourth floor someday becoming a restaurant or bar, if the proper safeguards are not attached to any approval. I am concerned with the precedent that will be set for the fourth-floor expansion.

Thank you.

Wayne Bergman, MCP, LEED® AP
Director
Town of Palm Beach
Planning, Zoning, Building
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Palm Beach, FL 33480
Office: 561-227-6426
www.townofpalmbeach.com

McDonald, Jamie D.

From: Martin Deloach <MDeLoach@TownofPalmBeach.com>
Sent: Friday, March 17, 2023 9:29 AM
To: Wayne Bergman; Craig Johns
Subject: RE: 125 Worth Ave

I have walked the space several times over that last couple years for different reasons. The 4th floor has two exits with stairs that may not meet today's separation requirements but could with a life safety 101 analysis as has been done with several of our older structures with what are called scissor stairs. The NFPA has a very simplistic definition of an occupiable story "3.3.260.1 Occupiable Story .A story occupied by people on a regular basis" The area on the 4th floor is clearly used on a regular basis, there are storage rooms, there are mechanical units that would require maintenance on a regular basis and there appears to be a small office area for the maintenance staff.

The floor has large windows that look out onto Worth Avenue to the south and the Atlantic ocean to the east. This space would be considered the highest occupiable floor by the fire code.

Marty DeLoach Fire Marshal

Town of Palm Beach
Fire Rescue Department
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From: Wayne Bergman <wbergman@TownOfPalmBeach.com>
Sent: Friday, March 17, 2023 7:20 AM
To: Craig Johns <CJohns@townofpalmbeach.com>; Martin Deloach <MDeLoach@TownofPalmBeach.com>
Subject: 125 Worth Ave

Craig & Marty -how many STORIES is this existing building? You can visit it and use the stairs to get to all levels.

Wayne Bergman, MCP, LEED® AP Director

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569 So.2d 853

District Court of Appeal of Florida,
Fourth District.

Mei-Ling BERNARD, Petitioner,

v.

The TOWN COUNCIL OF the TOWN
OF PALM BEACH, and Joseph Davidson
and Polly Davidson, Respondents.

No. 90-1460.

|

Nov. 7, 1990.

Synopsis

Property owner applied for zoning variance to construct a bedroom and bath and extend her house. Council voted to grant the variance based on hardship caused by “unusual configuration” of the land. The Circuit Court for Palm Beach County, Edward Rogers, [Edward Fine](#) and Jack Cook, JJ., denied abutting property owner's petition for certiorari, after applying fairly debatable test. Abutting property owner sought to quash circuit court's decision. The District Court of Appeal held that the circuit court's failure to find whether competent substantial evidence was presented to show that no reasonable use could be made of the property absent the variance required that the circuit court's order be quashed.

Quashed and remanded.

[Letts, J.](#), dissented with opinion.

Attorneys and Law Firms

***853** Dennis J. Powers of Commander, Scott, Henderson & Powers, Palm Beach, for petitioner.

[John C. Randolph](#) of Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, for respondent-The Town Council of the Town of Palm Beach.

[Robb R. Maass](#) of Alley, Maass, Rogers & Lindsay, P.A., Palm Beach, for respondents-Davidson.

Opinion

PER CURIAM.

Mei-Ling Bernard, a property owner in Palm Beach, Florida seeks to quash the circuit court's decision, sitting in its appellate capacity, which upheld the respondent Palm Beach Town Council's approval of an application for a zoning variance filed by respondent Polly Davidson, the next door neighbor of petitioner.

Davidson's application for variance sought:

***854** (a) To construct bedroom and bath above existing south portion of house, the rear setback line being 5' from East property line instead of 15' setback as now required by zoning ordinance in RA district.

(b) To extend split level house southward by constructing bedroom and bath over existing lower floor of house as per sketch attached hereto. Same constitutes a third floor addition [Code Section 5.21 contains a restriction against a third story on a residential structure.]

At the hearing on Davidson's application, her attorney stated that she had received approval of the construction project in 1957; that subsequently her husband died so she did not proceed with the project; that she had recently remarried, however; and that she now desired to proceed with the project because:

[I]t is a hardship now for them to live in that house without an addition of a master bedroom and den which they need desperately.... The hardship runs with the land. And that is because this is a peculiar size lot. It's odd shaped. The building itself which is the house was formerly an employees wing of a larger old house in Palm Beach.... But the hardship is that we cannot add any additional construction other than this location because of the peculiar nature of the lot, size of the lot.

An architect for Davidson explained that “the land is so peculiar, you can see the wedge shape view of the lake that goes around the cul-de-sac to provide her vista of the lake and it's so narrow down there nothing could really be built. And if it could it wouldn't be attached to the main residence.” The

architect stated that as it stands, the house has three bedrooms, two of which are very small.

Bernard's attorney stated that the Davidson house was already only about five feet from Bernard's property line rather than the required fifteen feet, and that the proposed additional construction would destroy Bernard's view of Lake Worth and would obstruct fresh air and light to Bernard's swimming pool and garden. Bernard's attorney also argued that in order to be granted the variance Davidson was required to show that absent the variance she would experience unnecessary and undue hardship; and that not being permitted to have a thirty-five to forty foot master bedroom simply was not a "hardship."

In response to a councilman's query, the Town Attorney opined that in determining hardship the council could consider the irregularity of the lot and the property lines. Accordingly, the council ultimately voted to grant the variance based on a hardship caused by the "unusual configuration" of the land.

In denying certiorari, the circuit court said: "We find no reason to set aside the council's assessment of 'hardship'. We find hardship is in the eye of the beholder."

The circuit court further relied on *Bell v. City of Sarasota*, 371 So.2d 525, 527 (Fla. 2d DCA 1979), for the proposition that where there are conflicts in the evidence to support the decision of a zoning board, a reviewing court should uphold the judgment of the board if it is a "fairly debatable" decision. *Bell* was not a "variance" case, however, nor has this court spoken to the specific issue raised here.

When a party seeks review here of a circuit court's disposition of administrative action, our review is limited to determining whether the circuit court afforded procedural due process and applied correct law. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla.1982). Bernard does not contend that the circuit court failed to afford her procedural due process. She does contend, however, that the circuit court failed to apply the correct test. We agree.

In its order the circuit court applied the "fairly debatable" test, which is used to review legislative-type zoning enactments. The proper standard of review in a zoning variance case is whether the agency or lower tribunal was presented with

competent substantial evidence to support its findings. *Nance v. Town of Indialantic*, 419 So.2d 1041 (Fla.1982).

An applicant who seeks a variance must demonstrate a "unique hardship" in *855 order to qualify for a variance. *Id.* Also, it has been held that 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." *Town of Indialantic v. Nance*, 485 So.2d 1318, 1320 (Fla. 5th DCA), *rev. denied*, 494 So.2d 1152 (Fla.1986). See also *Thompson v. Planning Comm'n*, 464 So.2d 1231 (Fla. 1st DCA 1985) (hardship necessary to obtain zoning variance may not be found unless there is showing that under present zoning no reasonable use can be made of property, and self-created hardship cannot constitute basis for zoning variance).

Rather than determining whether competent substantial evidence was presented to show that no reasonable use could be made of the property absent the variance, the circuit court here found that "hardship is in the eye of the beholder." Accordingly, we grant the petition, quash the circuit court's order and remand with direction to apply the test recited and adopted herein.

GLICKSTEIN and STONE, JJ., concur.

LETTS, J., dissents with opinion.

LETTS, Judge, dissenting.

In *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla.1982), our supreme court, upholding an earlier decision of this court, made it quite clear that, in circumstances such as are before us now, review at the district court level is limited. Notwithstanding, the majority has exceeded those limits and has substituted its judgment for that of three trial judges who have already reviewed this case in an appellate capacity. In my opinion, the majority is engaging in a hair-trigger grant of one of the great writs, supposedly only obtainable under rare and extraordinary circumstances.

All Citations

569 So.2d 853, 15 Fla. L. Weekly D2719