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Reply to: *Venice*

April 14, 2014

The Honorable John W. Holic, Mayor
and Members of the City Council
401 West Venice Avenue
Venice, Florida 34285

RE: Standard of Review for a Variance

Dear Mayor Holic and Council Members:

At a recent hearing before the Planning Commission, a question arose regarding the standard for granting a variance under the City Code. The Code Section 86-46(a)(4) reads as follows:

“Considerations in granting. The planning commission shall consider the following in making a determination on any petition:

- a. Special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other land, structures or buildings in the same zoning district;
- b. The special conditions and circumstances do not result from the actions of the applicant;
- c. Literal interpretation of the provisions of this chapter would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this chapter and would work unnecessary and undue hardship on the applicant;

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- d. The variance, if granted, is the minimum variance that will make possible the reasonable use of the land, building or structure;
- e. The grant of the variance will be in harmony with the general intent and purpose of this chapter, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and
- f. Such other conditions that are shown to exist wherein the public interests would be best served.

The issue for Council's determination is: does "consider" mean that the Planning Commission must find that each standard listed in the Code for granting a variance must be met or does "consider" mean recognition that these standards exist but the Planning Commission can choose which ones are applicable to the petition before it?

Recently, a court has agreed with an applicant and the City that "consider" allows the City to choose which standards that it will apply when granting a variance. There are other cases, however, where courts have found that if "consider" means that the City can choose the standards it will apply, that degree of discretion by the City effectively results in no standards upon which to review a petition and, therefore, the provision is legally impermissible. In my view, it would be in the best interest of the City to clarify how the Planning Commission should apply the standards for granting a variance.

There are several ways which the City could make application of the variance standards clear. One would be to state that four of the six factors must be present for the Planning Commission to grant a variance. This appears to be pretty close to the current practice of looking at the standards and determining whether most of them are present.

Another way to make it clear would be to require that all factors need to be met. The theory in support of this approach would be that a variance makes something legal that would otherwise be illegal. Therefore, granting a variance should be a difficult undertaking. A portion of one of your standards is that the literal interpretation of the Code would work a "hardship" on the applicant. Some courts have determined that a "hardship" means the deprivation of all reasonable use of the property. That's a very high standard to meet.

In recognition that a variance may be too high of a standard for certain variations of a code, some communities have created a lesser standard to vary some portions of its land development regulations that it has determined do not warrant the high standard of a variance. For example, sign location standards that preserve an existing tree, or that do not adversely impact the public or a neighbor, may be given an easier standard to meet.

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The Planning Commission has asked us to ask you to clarify this section of the Code. Before your staff and I embark upon a change to your Code, we thought it prudent to ask you for direction. To that end, I will ask the Clerk to place this on an upcoming City Council meeting.

Thank you for your review of this matter. If Jeff Shrum or I can provide greater detail or answer any questions, please let us know.

Respectfully,

A handwritten signature in black ink, appearing to read 'Dave', written over a horizontal line.

David P. Persson

DPP/dgb

cc: Barry Snyder, Chairman and
Members of the Planning Commission
Ed Lavallee, City Manager
Jeff Shrum, Community Development Director
Lori Stelzer, City Clerk