



# City of Sanibel

## Planning Department

### MEMORANDUM

Date: May 31, 2011

To: City Manager

From: James C. Jordan, Planning Director

RE: **VARIANCE FEES, STANDARDS AND PROCEDURES**

**POSSIBLE RELIEF FOR INNOCENT PURCHASERS OF PROPERTY THAT ARE COMPELLED TO APPLY FOR A VARIANCE IN ORDER TO ATTAIN A DEVELOPMENT PERMIT FOR "AFTER-THE-FACT", "AS-BUILT" SITE IMPROVEMENTS CONSTRUCTED BY PREVIOUS OWNERS.**

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There are occasional instances when an innocent purchaser buys property that has unpermitted site alterations or site improvements that are in violation of the Land Development Code. When the Planning Department discovers such violations, it works with the property owner to remedy the violation. An "after-the-fact" development permit can be obtained for the alteration or improvement, if, "as-built", they can comply with the standards of the Land Development Code. However, if the alteration or improvement does not comply with the standards of the Code, the property owner must modify or remove the site improvement to comply with the Code or obtain a variance(s) to the section(s) of the Code that would render the "as-built" site improvement Code compliant.

As directed by City Council, the Planning Department has identified options that would possibly extend some relief for those property owners (Innocent purchasers) that are compelled to apply for a variance in order to obtain required permits for "as-built", "after-the-fact" site improvements that were constructed by a previous owner.

The following options identified by the Planning Department addresses fees, variance standards and variance procedures.

- Option 1. No Change
- Option 2. Lower or eliminate fees
- Option 3. Revise variance standards
- Option 4. Establish a pre-application hearing with the Planning Commission for feedback on variance application

The advantages and disadvantages of these options are provided in the remainder of this report.

### **Option 1. No Change**

When a violation is discovered, it is generally the property owner who is responsible for correcting the violation(s) on his or her premises.

Violations of the standards of the Land Development Code are addressed by the City with the property owner.

Land Development Code Section 4-6 (b) states, "Any owner and any person in possession or control of the premises upon or concerning which a violation of this chapter is found shall be subject to the enforcement actions and penalties set forth in Section 1-15."

In addition, Land Development Code Section 1-17 states, "The occupant of any premises, and the owner of unoccupied premises, upon which a violation of this Code or an ordinance is apparent, the owner of any object or material placed or remaining anywhere in violation of this Code or an ordinance, and the occupant and owner of any premises served by any excavation, connection or structure illegally made or erected, shall be deemed prima facie responsible for the violation so evidenced and subject to the penalty provided therefore."

When the remedy sought by an affected property owner with a violation created by an unpermitted "as-built" site improvement requires an application for a variance, the Code does not differentiate for when the violation is the result of the actions of a previous owner and not the actions of the innocent purchaser.

The current Land Development Code is fair and equitable in treatment of variance applications. However, the Planning Department has looked for relief that could be afforded to innocent purchasers of property that are compelled to apply for a variance in order to obtain required permits for

"as-built", "after-the-fact" site improvements that were constructed without required permits by a previous owner.

The identified relief as it relates to fees, variance standards and variance procedures is presented in the remaining options.

## **Option 2. Variance Fees**

The average cost for the City to process a variance application has been established to be \$2850.00. This cost is passed along to the applicant for a variance through the variance application fee.

The variance fee for an applicant that is compelled to apply for a variance in order to obtain required permits for "as-built", "after-the-fact" site improvements that were constructed without required permits by a previous owner could be lowered or eliminated.

The cost to the City, however, to process the variance application can be expected to remain the same, but the cost to the innocent purchaser compelled to make a variance application by circumstances beyond their control can be reduced.

If a variance is not required to attain the development permit to remedy the violation, the development permit fee (Section 90-8) is doubled for the "after-the-fact" development. This fee could be lowered for the innocent purchaser, currently responsible for the actions of a previous owner.

Land Development Code Section 90-5 provides exceptions, immunities and waivers to application fees. A copy of Land Development Code, Section 90-5 is provided with this memorandum.

## **Variance Standards**

By their very nature, variances are design to provide limited exceptions to the usual requirements of established zoning codes.

The variance standards of the Land Development Code, Section 82-140, provide the basis for determining if any development can deviate from the standards of the Land Development Code. A copy of Land Development Code, Section 82-140 is provided with this memorandum.

These standards evaluate the subject property in relation to the proposed or the "after-the-fact" development and are generally neutral to the

circumstances of the property owner. However, in the application of these standards, the Planning Commission can use its discretion and make findings, such as a property owner (or a member of the property owners' family) has a medical need for a swimming pool.

In the case of the innocent purchaser that is compelled to apply for a variance due to the actions of a previous owner, the applicant should be able to demonstrate that the conditions or circumstances requiring the variance do not result from actions taken by the applicant and are not otherwise self-imposed. However, the other six standards for granting a variance must also be addressed.

If such application, compelled to be filed by an innocent purchaser, is for a variance to flood regulations, the standards of Land Development Code, Section 82-141 apply. A copy of Land Development Code, Section 82-141 is provided with this memorandum. The standards for granting a variance for the City's flood regulations (which are part of the National Flood Insurance Program) are reviewed by FEMA. The City is also required to notify FEMA whenever it grants a variance to flood regulations.

#### **Option 4. Variance Procedure**

The Planning Commission is authorized to grant variances from applicable provisions of the Land Development Code, in accordance with the standards set forth in Sections 82-140 through 82-145. Applications for variances are reviewed by the Planning Commission at a public hearing with advertised and mailed public notice.

A procedure that would afford the innocent purchaser applying for a variance access to the Planning Commission to ascertain a sense of the Commission pertaining to a variance application to be filed is problematic. This procedure would need to be structured to ensure adherence to rules for *ex-parte* communications. The Planning Commission would be disadvantaged unless "affected property owners" can comment. Furthermore, a preliminary opinion of the Planning Commission should be based on the applicant's response to the standards for attaining a variance.

A pre-application meeting with the Planning Commission by the innocent purchaser variance applicant would, by its nature, have to be inconclusive. Furthermore, a pre-application meeting that results in the filing of a variance application would likely extend both the time and costs required to process the variance application.

## **City Council's Next Steps**

City Council can decide to pursue any of the options identified or any combination of these options.

City Council can direct staff to prepare appropriate amendments to the Land Development Code in order to implement the option(s) selected by Council.

Code amendments to fees can be presented directly to City Council. Code amendments to land use regulations require a recommendation from the Planning Commission before City Council can take final action.

## **Referenced Land Development Code Sections**

### **Section 90-5. (Variances) Exemptions, immunities and waivers.**

- (a) The City is exempted from the fees set forth in this chapter.
- (b) Other governmental entities which are by law immune from payment of the fees set forth in this Land Development Code, or which exempt the City from payment of fees for the same services under their laws or ordinances, shall not be required to pay the fees set forth in this chapter.
- (c) Applications initiated by a property owner to place that owner's property into the Environmentally Sensitive Lands Conservation District shall be exempt from payment of fees set forth in this chapter.
- (d) Applications initiated by a property owner to place that owner's property upon the local Historic Register or to obtain a certificate of appropriateness for historic rehabilitation or preservation shall be exempt from payment of the fees set forth in this chapter.
- (e) Applications initiated by or on behalf of the Below Market Rate Housing Program shall be exempt from the payment of the fees set forth in this chapter.
- (f) The City Council, by resolution, may waive payment of all or part of a fee for any of following reasons:
  - (1) Demonstrated hardship of a kind and nature exceeding the general inconvenience of paying fees.

- (2) The resubmission of an application is found to be necessary, and it would be inequitable to require payment of a full application fee.
- (3) All or a substantial portion of the benefit resulting from the application will be a public benefit.

(g) Fees shall not be waived where to do so would result in a discriminatory fee structure.

### **Section 82-140. (Variances) Standards--Generally.**

The Planning Commission may grant variances upon finding all of the following:

- (1) A literal enforcement of the particular regulation would result in undue and unnecessary hardship to a property owner because the particular shape, size, location or topography of a lot or parcel, or of a structure thereon, would cause practical difficulties that would deprive the owner of reasonable use and enjoyment of such lot or parcel in the same manner as other properties similarly situated.
- (2) That the special conditions relate to unusual conditions peculiar to the specific lot or parcel or relate to special conditions of the structure involved, and are not generally applicable to other lands or structures similarly situated.
- (3) That the special conditions and circumstances do not result from actions taken by the applicant or proposed by the applicant, and are not otherwise self-imposed.
- (4) That the applicant has taken all reasonable steps to mitigate or eliminate the requested variance by the acquisition of adjacent lands or the relocation or redesign of the structure involved.
- (5) That the development or use of the subject parcel in some other manner than that proposed, in accordance with the applicable requirements, is not feasible.
- (6) That the requested variance will not be adverse to the developed neighborhood scheme and will not adversely affect the plan and scheme set forth in this land development code, and will not cause the proposed development to be inconsistent with the

Sanibel Plan nor adverse to the health, safety and general welfare of the community.

- (7) That the variance granted is the minimum necessary to mitigate the hardship demonstrated.

**Section 82-141. Same--Variances from the requirements of floodproofing and stormproofing.**

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- (b) The Planning Commission may grant variances from the requirements of Chapter 94 upon finding that:
  - (1) The variance sought is the minimum necessary to afford relief, considering the flood hazard.
  - (2) That the failure to permit the variance would result in an exceptional hardship.
  - (3) That the granting of the variance will not result in an increased flood height, additional threats to the public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing laws or ordinances.
  - (4) That the applicant has taken all reasonable steps to mitigate or eliminate the requested variance by the acquisition of adjacent lands or the relocation or redesign of the structure involved.
  - (5) That the exceptional hardship which would result if the variance were denied does not result from actions taken by or proposed by the applicant and are not otherwise self-imposed.
  - (6) That the applicant has demonstrated good and sufficient cause for the grant of the variance.
  - (7) If the parcel is within any area designated as a floodway by the Federal Insurance Administration, that no increase in flood levels during the base flood discharge would result.