IN THE 17th JUDICIAL CIRCUIT COURT
IN AND FOR BROWARD COUNTY, FLORIDA

RICHARD CRUSCO,
CHARLES DOHERTY, and
FRANK J KOLB JR.
Petitioners.

Filed pursuant to Fla.R.App.P.9.100(f)(2)

v.

Case No: _____

TOWN OF HILLSBORO BEACH,
In re Variances to Zoning Height Limit,
Filed by Property Owner,
Hillsboro Mile Property Owner, LLC
and authorized agent, Eric Fordin (Applicant)
Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI – SITE PLAN

Petitioners (collectively "Petitioners") file this Petition for Writ of Certiorari pursuant to Florida Rules of Appellate Procedure 9.100(b), (c) and 9.190(b)(3) to quash a quasi-judicial decision granting approval of a SITE PLAN on February 1, 2021 for a 10-story building that exceeds the zoning height limit ~ based on a previously challenged[1] height variance to construct a 10-story building (130'+) feet in height within a zoning district that prohibits buildings taller than 3-stories (35' feet) by the Town of Hillsboro Beach, in Broward County, Florida approved at a hearing held on January 11, 2022.

[1] Companion Case # 062022CA001479AXXXCE [CACE-22-001479]

The Variance should not have been granted under the applicable standards and Florida case and Petitioners have filed a Petition for Writ of Certiorari in Companion Case # 062022CA001479AXXXCE [CACE-22-001479]. While this companion case was, and is still, pending, the Town a few days later also approved a Site Plan for the RM-16 zoned property at a City Council quasi-judicial hearing held on February 1, 2021. Petitioners, the Expert Planner Daryl Max Forgey AICP, Petitioners Attorney all appeared to object to the Site Plan because the project's 10-story (130+ ft) eastern building on Parcel B located on the ocean side of A1A exceeds the 3 story, 35 foot height limit of the Town's zoning code RM-16

ARTICLE VI. - RM-16 MULTIPLE FAMILY DWELLING RESIDENTIAL DISTRICT REGULATIONS (WITH 3-STORY MAXIMUM LIMIT)

Section 12-142(A):

> "For property on the east side of SR A 1 A, **no building or structure shall be erected or altered to a height exceeding 35 feet and shall not exceed 3 stories** above the dune elevation. …"

The arguments why the variance should not have been granted are set forth in the Petition for Writ of Certiorari in Companion Case # 062022CA001479AXXXCE [CACE-22-001479].

JURISDICTION

This Court has been given jurisdiction to issue writs of certiorari by Article V, Section 5(b) of the Florida Constitution and Florida Rules of Appellate Procedure 9.030(c)(3).

STANDARD OF REVIEW

"In first tier certiorari proceedings, the circuit court must determine:

'(1) whether procedural due process is accorded,

(2) whether the essential requirements of the law have been observed, and

(3) whether the administrative findings and judgment are supported by competent substantial evidence."

Broward County v. G.B.V. International, Ltd., 787 So.2d 838 at 843 (Fla.2001) quoting Deerfield Beach v. Valliant, 419 So. 2d 624 at 626 (Fla. 1982) (emphasis added).

BACKGROUND

Petitioners are adversely affected citizens and residents of the Town of Hillsboro Beach, Florida.

The Town is a Florida municipal corporation located in Broward County, Florida.

Venue is proper in Broward County, Florida because the

challenged development order was approved by the Town located in Broward County and affects real property located in Broward County.

The site plan is based upon an two illegal height variances for (the "**Project**") on to increase the height to 130' from the maximum 35' allowed in the zoning district and another to add even higher appurtenances beyond the 130' as described in the notice:

> QUASI-JUDICIAL PUBLIC HEARING - Requests a Variance Pursuant to Section 12-283 of the Town's Code to Exceed the Height Limitations in Section 12- 142 of the Code.
> **Variance Request for Height up to 130 feet and 10 stories.**
> QUASI-JUDICIAL PUBLIC HEARING - Requests a Variance Pursuant to Section 12-283 of the Town's Code to Exceed the Height Limitations in Section 12- 142 of the Code.
> **Variance Request for Use of Roof Beyond the Maximum Height of 130 feet.**

As explained in the Town's Staff Report:

> "The subject property is located at 1174 -1185 Hillsboro Mile and contains two vacant parcels. The current owners purchased the property in December 2020 and are in the process of developing the property.… The revised site plan and variance request submitted on December 17, 2021, proposes at total of 130 units, which is 9 additional units from the previous request. Twenty-eight residential units are proposed for Parcel A (west of Hillsboro Mile) within a 3-story structure including

underground parking with a maximum height of 35 feet. There are up to 102 multi-family condominium-style units proposed for Parcel B on the east side of Hillsboro Mile. These units would be constructed within a 10-story, 130-foot tower with two underground stories for garage and storage and a rooftop level with private amenities… The maximum height within the RM-16 zoning district is 35 feet and 3 stories and the request would be 95 feet higher the maximum height in the zoning district and just over 3x the maximum number of stories allowed within the Town's Land Development Code (LDC). As proposed, the proposed 130-foot, 10-story building within Parcel B of the development does not comply with the height requirements set forth within the RM-16 district as provided below:

> Sec. 12-142. - Height regulations.
>
> (A) For property on the east side of SR A1A, no building or structure shall be erected or altered to a height exceeding 35 feet and shall not exceed 3 stories above the dune elevation. For property on the west side of SR A1A, no building or structure shall be erected or altered to a height exceeding 35 feet and shall not exceed 3 stories above the roadway crown elevation of SR A1A adjacent to the property."

In addition, a second variance would need to be approved to allow for decorative structures and mechanical equipment to be an additional 15 feet above the proposed 130-foot building height to a maximum of 145 feet if this variance for height is considered and approved."

Staff Report, p. 1-2.

THE PARTIES

The Project's main address is 1174-1175 Hillsboro Mile, Hillsboro Beach, Florida (collectively the "**Property**").

Respondent Town of Hillsboro Beach is a Florida municipality and the local government that approved the subject application. Respondent Property Owner, Hillsboro Mile Property Owner, LLC and authorized agent, Eric Fordin is the Applicant in the proceedings below.

Petitioners Richard Crusco objected to the variance and to the site plan (Variance Transcript p. 80-83) and owns and resides on real property at 1194 Hillsboro Mile Condo # 22, Hillsboro Beach FL 33062.

Petitioner Charles Doherty, objected (Mr. Charlie Variance Transcript p 80) and owns and resides on real property at 1194 Hillsboro Mile Condo #27, Hillsboro Beach FL 33062.

Both Richard Crusco and Charlie Doherty are owners and residents of real property known as Hillsboro Beach and Yacht Villas located to parcels to the north and less than 500 feet from the Project.

Both Richard Crusco and Charlie Doherty filed a written request

for adversely affected party status to allow objections presented by his attorney Ralf Brookes (Variance Transcript pp. 54-63) and expert planning opinion testimony in opposition to the variance by Expert Planner Daryl Max Forgey, AICP. (Variance Transcript pp. 63-66).

Petitioner Frank J. Kolb Jr. objected (Variance Transcript p. 70) owns and resides on real property adjacent to the subject variance at 1173 Hillsboro Mile, Hillsboro Beach FL 33062 which appears in the rendering of the project presented at the site plan hearing next to the proposed 10 story building:

The applicant's property and the petitioners' real property are all located in the very same RM-16 zoning district. The applicant and the petitioners' real properties are only 1 parcel removed from each

other.

As a direct and proximate result of the development order approval for Project's higher height that greatly exceeds the allowable maximum building height in RM-16 zoning district, Petitioners will be adversely affected because the scale, mass and height of the proposed 130 +' building that will far exceed the 35' MAXIMUM building height that is allowed under the same zoning district RM-16 that petitioners properties are located and built to comply with the zoning code.

Petitioners purchased their property in reliance on the maximum height limits established by the RM-16 zoning district in the zoning Code. The test for standing in quasi-judicial matters is found in Renard v. Dade County, 261 So. 2d 832 (Fla. 1972), and proximity to a particular use of land has been found to satisfy this test exceeding the general interest in community good shared in common with all citizens; however, when determining standing, the courts *"should not only consider the proximity of* the *property, but the type and scale of the challenged project in relation to Petitioner's property*." Rinker Materials Corp. v. Metropolitan Dade County 528 So.2d 904, 906-907 (Fla. 3rd DCA., 1987). See also, City of St. Petersburg, Bd. of

Adjustment v. Marelli 728 So.2d 1197, 1198 (Fla 2nd DCA, 1999).

As nearby and proximate property owners, Petitioners have standing under Renard v. Dade County, 261 So.2d 832 (Fla. 1972). Petitioners has standing to seek judicial review of the rezoning. Common law standing to bring this action is set forth under Renard v. Dade County, 261 So.2d 832 (Fla. 1972); Upper Keys Citizens Coalition v. Wedel, 341 So.2d 1062 (3rd DCA 1987); Save Brickell Ave., Inc. v City of Miami, 393 So.2d 1197 (3rd DCA 1981).

ESSENTIAL REQUIREMENTS OF LAW

The site plan is based on an illegal variance that was sought for the construction of a ten (10) story building, where only three (3) stories are permitted by the zoning code and overall zoning scheme of the Town and would far exceed the height of Petitioner's buildings.

[Excerpt from Applicant' Site Plan Renderings].

Height is limited to 3-stories n RM-16 (Article VI City Zoning Code)

ARTICLE VI. - RM-16 MULTIPLE FAMILY DWELLING RESIDENTIAL DISTRICT REGULATIONS (WITH 3-STORY MAXIMUM LIMIT)

Section 12-142(A) of Article VI of the Code states under RM-16:

> "For property on the east side of SR A 1 A, **no building or structure shall be erected or altered to a height exceeding 35 feet and shall not exceed 3 stories** above the dune elevation. …"

In order for the Applicant to erect its intended ten (10) story building, the Applicant sought a variance from the provisions of Section 12-142(A) far exceeding the 3-story limitation imposed by the Zoning. A simple but careful review of the variance application and request clearly demonstrates that the Applicant failed to show the existence of legal or factual basis, or any hardship which would warrant the granting of a variance to this development proposal.

The Applicant knew, or should have known, prior to closing on the subject parcel, of the height restriction imposed by the Town's Code[2]. The Applicant chose to ignore the provision of the Code in preparing its development plans which were contrary to the Code. The Applicant cannot claim hardship or unique and impractical circumstances after it purchased property with full knowledge of the Code limitations pertaining to the parcel.

The Parcel is not a triangle shaped lot that has setbacks that make development virtually impossible or impractical to build upon;

[2] As Mayor Tarrant, who met with the applicant developer's lobbyists ex parte, publicly acknowledged in an open letter published on the web and advocating for approval of the variance prior to the quasi-judicial hearing, the Applicant knew of the limitation before it purchased the property.

rather, the development of this Parcel is entirely possible under current zoning regulations on the very same footprint at 35’ without the necessity of a variance, to go from 3 stories to 10 stories. It is the sky, and not the land, in which the applicant seeks to reach higher heights than allowed by the RM-16 zoning.

In attempting to demonstrate "unusual and practical difficulties or particular hardship" imposed by the subject height restriction, the Applicant recites previously existing restrictions known and associated with the Parcel in the form of the 1992 Conservation Area. This also could not have come as a surprise to the Applicant at the time of purchase as the Conservation Easement to Broward County was recorded in the Official land records of the County. The Applicant voluntarily chose to close on the Parcel with full knowledge of both the height restriction and the 1992 Conservation Easement.

The Applicant could have elected not to proceed with the purchase of the Parcel, knowing that the Code allowed only a three-story building on what Applicant refers to as the "East Parcel"; but the Applicant proceeded anyway, at their own risk. The fact that there are matters of record that limit the height and the developable portion of the Parcel do not impose a hardship that precludes the

Applicant's use of the parcel for multi-family dwelling units. The Parcel can be developed in accordance with existing zoning regulations and restrictions without a variance. See Appraisal.

Does the lot possess physical characteristics which renders the lot undevelopable, which would be a factor in finding an exceptional or unique hardship or impractical difficulty under the Code? Quite simply, the answer is "no." This buildable footprint is not impacted by the setbacks or the conservation easement. The proposed development soars ten stories over the sands of Hillsboro Beach from one singular footprint and this same footprint can be used to build a three story 35’ tall building. The buildable footprint clearly demonstrates that there is a useable, developable land within the parcel and that there exists a buildable footprint from which a three (3) story Code-compliant residential building can be erected. Applicant's own plans unequivocally demonstrate and evidence that the physical characteristics of the land do NOT render it undevelopable in accordance with the Town's building and zoning regulations. Clearly, the Applicant can develop the subject parcel in accordance with the Code within the same footprint, but at three (3) stories in compliance with the RM-16 zoning.

The Applicant can still build a compliant three (3) story building on the East side of A1A similar to the three story building that is contained in the site plan for the western side of A1A (project Parcel A):

The Conservation Area even if unique to the subject property, is and was a known matter and does not impact the ability of the Applicant to develop the remainder of the East and West Parcel in accordance with the requirements of the Code. The Applicant knew of the Conservation Area and that, notwithstanding the easement on the beach sand dunes, the Parcel was entirely buildable in compliance with the Code and the height regulations and the overall zoning scheme of the Town's zoning code. which not even in the next higher zoning category only allows a seven (7) story building. The Applicant argues that the variance sought is "in harmony with

the general purposes and intent" of Chapter 12 of the Code (i.e., the zoning code).

The existence of the Conservation Area does not warrant a height variance of the magnitude sought by the Applicant (over 300% higher than the maximum allowed height) because you can see over the dunes from the first (or second) habitable floor just as Petitioners can see the beach from their second story balcony:

The overall zoning scheme of the Town's zoning code in the next higher zoning category RM-30 only allows a maximum building height of seven (7) stores. Article VII, RM-30 (with seven-story limit); Section 12-162, establishes a maximum building height of 75 feet, or seven stories, even in this higher zoning district RM-30.

The instant parcel is RM-16, yet the applicant seeks to leap past RM-30 height without obtaining a rezoning to a district that would allow 10 stories rather than the limit of 3 stories in RM-16. This variance is contrary to the overall scheme established in the City's zoning code for orderly growth because it jumps zoning from RM-16 to well past RM-30 which is limited to seven (7) stories to go far further up to ten (10) stories. This flies in the face of the zoning scheme and is not in harmony with the general purposes and intent of the Zoning Code as can be seen when compared to Petitioners Zoning Code Compliance height next door:

As noted in Transcript p. 56-57 this variance is too great to withstand scrutiny under the zoning scheme of the Town:

"Article IV, Section 12-142, if you look at the article header it says, RM-16 with three-story maximum limit. So not only is your height one of the constraints for that zoning category, it's actually put right into the header of the zoning category. So RM-16 has a three-story limit. There is another higher zoning category, Article VII, RM-30 (with seven-story limit). And under that Section 12-162, you're allowed 75 feet, or seven stories, in the RM-30. … It is an improper use of a variance to skip the rezoning process. To go from RM-16, past RM-30, and add even three more additional stories on. It's an improper use of the variance law. Even in your code, and under case law, to more than triple the allowable height that's in a zoning category… if you want to do something different here and become a high-rise community, then you need to change your zoning code. Because right now you're limited in RM-16 to three stories, and RM-30 to seven stories."

Tr 56-57.

As noted in the Transcript objections this does not meet the code requirements for a variance and is in derogation of the overall zoning scheme of the Town:

"Code compliance with the 35 feet was known when they

purchased the property, or joined in the LLC to purchase the property. It will not impose unusual or impractical difficulties or particular hardships that are not already present on my client's property, and other properties in RM-16, and even in RM-30 where they're limited to seven feet. Why should they be allowed to go even past RM-30 by an additional three stories? The variance is not in harmony with the general purpose and intent of the zoning scheme." Tr. 57.

The Applicant next argues that the granting of a variance will not serve as a convenience. However, the Applicant's development scheme that far exceeds the height that is allowed in the zoning category by more than 300% and is a "bridge too far" to cross using a variance. If the Applicant were to comply with the RM-16 zoning contained in the Code, it can only build a three story building. In so doing, the Applicant could not secure the same profits as a ten story building. See Appraisal. That would limit the Applicant's potential financial benefits from this development, but that is not the kind of inconvenience or hardship or impractical difficulty in development that is recognized in Florida variance law.

Florida case law clearly holds that that a mere "*economic disadvantage*" or the owner's mere preference as to what the owner 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 (Fla. 3r^d^ DCA 1977); Metropolitan Dade County v. Reineng, 399 So.2d 379 (Fla. 3r^d^ DCA 1981); Crossroads Lounge v. City of Miami, 195 So.2d 232 (Fla. 3r^d^ DCA 1967).* As noted in Petitioners' objections below (Transcript p. 58 "ATTOREY BROOKES: -- Related Group is a Company that makes a lot of money. There's no need for them to make $105 million versus $38 million. I think there was an appraisal, and hopefully it's part of the record from before. I know I turned in part of it today. That said that the Town Manager requested to see what the appraised values were. So that's relevant to the variance, because a variance is allowed when there's no reasonable economic use of the property left." There are many constraints on development and an applicant is not always entitled to, or able to fit, the maximum number of dwelling units on a particular parcel that depends on variables and constraints such as how large (square feet) the units are, how much parking is required, what are the setbacks, etc.… An

applicant is not entitled to a variance simply because it cannot achieve the maximum density when the property can still be used for the purpose it is zoned and when there is still a valuable and economic use that can be made of the property without the variance.

As the Applicant has made abundantly clear, it can construct a Code compliant three-story building on the exact same footprint albeit it will make less money. Being required to comply with the height provisions and restrictions of the Code is and forgoing millions of additional dollars in profit may be an inconvenience for the Applicant, but that is the limit imposed by the zoning code on this buildable, developable parcel that can be developed for multifamily dwelling units at less than 10 stories.

The Applicant fails to show that there is a demonstrable or unusual hardship in this case. The Applicant can build a condominium project without a variance. The Applicant can do so under the same restrictions that apply to neighboring and adjacent parcels. Each and every parcel in the zoning district, including Petitioners, are subject to the same limitations and restrictions as Applicant's Parcel. It is a limitation and restriction common to this Parcel and its neighbors. It is neither unique nor unusual and is

factored into the fair market value of the property that a buyer is willing to pay and acknowledged at closing through due diligence examination of the zoning on a property.

Lastly, the Applicant attempts to address the provisions of Code Section 12-283(C)(3) that the granting of the variance "it will not impair an adequate supply of light, air and sunshine to adjacent property or unreasonably increase the congesting in streets or highways or increase the danger of fire or endanger the public safety or unreasonably diminish or impair established property values within the surrounding area, or in any other respect impair the public health, safety, comfort, morals or welfare of the inhabitants of the Town of Hillsboro Beach." A three story building code compliant building would result in far less impacts and would result in far less shadow on the beach and the protected conservation area of the Local Area of Particular Concern that would be shaded by the beach parallel 10 story building.

Florida law is abundantly clear concerning the granting of variances. A careful examination of Florida Law regarding the legal standards and principles clearly demonstrates that the Applicant is not entitled to the variance sought. Florida law in abundantly clear

that the hardship needed for a variance cannot have been self-created and the burden of proof is on a party seeking a variance.

There is a long line of Florida court opinions concerning the variance criteria and standards, which have been strictly construed by the courts of Florida because a variance is in derogation of Code requirements. *See, Josephson v. Autrey, 96 So.2d 784 (Fla. 1957).* These criteria has been interpreted to mean three things:

1. 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.

2. The purchase of property with zoning restrictions on it or reliance by a purchaser that zoning will not change, will not constitute a hardship.

3. If a purchaser buys land with a condition creating a hardship upon it, the owner is only entitled to such variance as his predecessor in title was entitled.

The requirement that the need for a variance cannot be self-created is required by most municipal and county codes and Florida case law. *See, 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. 4th DCA 1995); Town of Ponce Inlet v Rancourt, 627 So.2d 586, 588 (Fla. 5th DCA 1993). Case law, not only the land development regulations, control the degree of showing needed to support the approval of a variance to depart from the express requirements of local regulations. The days of the "weeping variance" (i.e., “feeling sorry” for an applicant) as basis for a variance is contrary to what is required under case law to show entitlement to a variance from local Code provisions under Florida case law. *Town of Indialantic v. Nance, 400 So.2d 37 (Fla. 5th DCA 1981), affd. 419 So.2d 1041; appealed again at 485 So.2d 1318 (Fla. 5th DCA 1986), rev. den. 494 So.2d 1152. See also, 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; 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).*

In *Blount v. City of Coral Gables, 312 So.2d 208, 209 (Fla. 3rd DCA 1975),* the Third District Court of Appeal held that the applicants

in the case, the applicants, were not "entitled to a variance from the above zoning ordinance...as the hardship was self-created because they knew of the restricted zoning_ordinance." *See also, Clarke v. Morgan, 327 So.2d 769 (Fla. 1975); Friedland v. Hollywood, 130 So.2d 306 (Fla. 4th DCA 1961); Elwyn v. Miami, 113 So.2d 849 (Fla. 3rd DCA 1959); Coral Gables v. Geary, 383 So.2d 1127 (Fla. 3rd DCA 1980).*

The purchase of property with zoning restrictions on the property does not constitute a hardship. *Friedland v. Hollywood, 130 So.2d 306 (Fla. 4th DCA 1961); Elwyn v. Miami, 113 So.2d 849 (Fla. 3rd DCA 1959).*

The case *Namon v. DER, 558 So. 2d 504 (Fla. 3rd DCA 1990),* and the long line of cases cited therein, address this situation, where property is purchased with prohibitory regulations in place at the time of purchase, just as in the instant case. The court in *Namon v. DER, 558 So. 2d 504 (Fla 3rd DCA 1990)* recognized such pre-existing notice as applied to takings analysis in Florida cases, finding that "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." *Id. at 505.* The *Namon* court, explained that "A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights.... The property continues to exist in the state in which appellants have contracted to acquire it."

In *Elwyn v. City of Miami, 113 So.2d 849, 852 (Fla. 3d DCA 1959), cert. denied, 116 So. 2d 849 (Fla. 1959),* the Third District Court of Appeal held that "One who purchases property while it is in a certain known zoning classification, ordinarily will not be heard to claim as a hardship a factor or factors which existed at the time he acquired the property."

The Applicants economic desire to develop the Parcel to 10 stories does not legally justify the granting of the desired variance. Florida case law is clear. As the Court in *Thompson v. Planning Commission, 464 So.2d 1231 (Fla. l' DCA 1985)* held, "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." 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 (Fla. 3d DCA 1979).*

It is the land, and not the nature of the project, which must be unique and create a hardship. In *Town of Indialantic v. Nance*[3], the applicant sought a height variance to build a six (6) story building where the applicable code only permitted a three (3) story building. Sound familiar? The Fifth District Court of Appeal held "that Nance does not suffer the unique and unnecessary hardship required for the issuance of a variance." *Id. at 41.* Importantly, and identically to the Applicant's Request in this case, the Court found that "Nance possessed a viable dual three (3) story plan that, with the exception of the parking deficiency, met all Indiatlantic zoning requirements, including the height restriction....The viability of this dual three-story plan itself demonstrates a lack of hardship." *Id. at 41. (Emphasis added).*

In this case, the Applicant's ten story plan can be a three story

[3] *Town of Indialantic v. Nance, 400 So.2d 37 (Fla. 5th DCA 1981), aff'd. 419 So.2d 1041; appealed again at 485 So.2d 1318 (Fla. 5th DCA 1986), rev. den. 494 So.2d 1152.*

building on the same footprint, albeit it will yield less units and therefore less revenue. However, in this case, just as in the *Indiatlantic* case, there is no legal hardship or unique and impractical difficulty. And mere economic disadvantage is not sufficient to support a request for a variance from what are otherwise Code requirements on height applicable to all other property owners in the RM-16 zoning district, would would even exceed the RM-30 zoning district.

The Fourth District Court of Appeal, which includes Broward County, in *Bernard v. Town Council of Palm Beach, 569 So.2d 853 (Fla 4th DCA 1990)* held that an applicant who seeks a variance must demonstrate a 'unique hardship' in order to qualify for a variance. 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." *Id. at 854-55. (Emphasis added) (additional citations omitted).* In the matter before the Board, the Applicant has not and cannot reasonably demonstrate that it is virtually impossible to use the land for the purpose for which it is zoned. Unquestionably and undeniably,

the Parcel can be used for the purpose for multifamily buildings and dwelling units for which it was zoned RM-16.

The Florida courts have also addressed the criteria that the variance “must not adversely affect the zoning scheme as a whole.” As the Florida Supreme Court found, the granting of a variance is 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. 3r^{d} DCA 1959).* In this case, a ten (10) story building would not only be violative of the zoning plan in place for this particular area, RM-16 limited to three (3) stories, but would even skip over higher zoning districts like RM-30 that limits maximum building heights to seven (7) stories, in effect leaping over multiple zoning categories to achieve the desired ten (10) stories through use of this illegal variance rather than pursue a rezoning.

The alleged "benefits" that the Applicant's project will bring to the Town. "Sweeteners" offered up by the Applicant, such as the granting of a beach access easement or participating in the cost of burying utility lines, and other extrinsic matters, such as additional tax revenues which may supplement items such as the cost of beach renourishment, have no place in the consideration of a variance. A “sweetheart” variance is not condoned in Florida case law. Chisholm v. Miami Beach 837 So. 2nd 842 (Fla. 3rd DCA 2002)(“SCHWARTZ, Chief Judge (specially concurring). On July 1, 2002, a panel of this court unanimously and without opinion denied a petition for writ of certiorari seeking second-tier review of a decision of the Appellate Division of the Eleventh Judicial Circuit. City of Miami Beach v. Chisholm Properties South Beach, Inc., 830 So.2d 842 (Fla. 3d DCA 2002). In that case, Chisholm Properties South Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. 689 (Fla. 11th Cir. Ct. August 9, 2001), *the circuit court, in a comprehensive and insightful opinion by Judge Altonaga, rejected an attempt by a hotel owner and the City of Miami Beach to grant totally unjustified and illegal height variances through the device of a sweetheart "settlement"* …I of course totally agree with this opinion and thus with the panel's

determination to deny review. See Broward County v. G.B.V. Int'l, Ltd., 787 So.2d 838 (Fla.2001); Haines City Community Dev. v. Heggs, 658 So.2d 523 (Fla.1995)."

While there may always be a desire to "reach for the brass ring", grant an Applicant a variance, the decision cannot and must not be based on the convenience or profitability to the Applicant or the tax revenue generated as a windfall to the Town. This would be contrary to the zoning scheme of the area. Under the existing Code, the Applicant has failed to meet the burden of demonstrating any unique hardship which would preclude the development of the Parcel under the zoning Code, as it exists today. The property can be developed in accordance with the existing zoning regulations without the granting of a variance.

If the Town wishes to permit such high-rise development, the answer is to amend the Zoning Code to increase the height limit so that an entire district can take advantage of the provisions thereof, and not to engage in spot zoning by the granting of variance to individual property to exceed zoning height by more than 300%.

This is not the typical triangular pie-shaped parcel that needs a set back variance just to build, there is a buildable footprint upon

which to build three (3) stories rather than 10 stories. The alleged hardship was clearly known and has existed for years. The Applicant knew of the restrictions on height. This is not enough, and legally insufficient, to justify the granting of a variance to depart from the RM-16 zoning to more than triple the allowable height.

In *Alvey v City of North Miami Beach*, 206 So. 3d 67 (Fla. 3rd DCA 2016), the City's failure to apply its land development code is a departure from the essential requirements of law; the circuit court's failure to apply the correct law resulted in a miscarriage of justice. The *Alvey* opinion provides an explanation of why this is so, and an also apt conclusion:

> "Those who own property and live in a residential area have a legitimate and protectable interest in the preservation of the character of their neighborhood, which may not be infringed by an unreasonable or arbitrary act of their government. Zoning ordinances are enacted to protect citizens from losing their economic investment or the comfort and enjoyment of their homes by the encroachment of commercial development by an unreasonable or arbitrary act of their government. Thus, the burden is upon the landowner who is seeking a rezoning, special exception, conditional use permit, **variance**, site plan approval, etc. to demonstrate that his petition or application complies with the reasonable procedural requirements of the applicable ordinance and that the use sought is consistent with the applicable zoning …. Because rezoning actions have an impact on a limited

number of persons or property owners, and the decision is contingent on facts arrived at from distinct alternatives by applying, rather than setting policy, the nature of the proceeding is quasi-judicial subject to strict scrutiny on certiorari review. We conclude that the circuit court appellate panel departed from the essential requirements of law by failing to apply the correct law—the City's Code, in its first tier certiorari review of the City's rezoning decision. The City's … decision departed from the essential requirements of law because, like the City, the circuit court failed entirely to consider, much less apply, the essential provision of the City's zoning code. We, therefore, grant the petition and quash the circuit court's decision affirming City Resolution R 2012–9."

Alvey, 206 So. 3d 67 at 73-74 (Fla. 3rd DCA 2016).

As Expert Planner Daryl Max Forgey testified (Transcript pp. 64-66)

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MR. FORGEY:· "I have earned the Master of Public Affairs Degree in urban and regional planning from the O'Neill School of Public and Environmental Affairs at Indiana University Bloomington.· I have been a member in good standing of the American institute of certified planners since 1993.· This will be my 29th year with that distinction.· And I will provide a copy of my resume after I'm done with this presentation.

This is a quasi judicial hearing, strict scrutiny applies.· The staff report is very factual, and I'd like to summarize a few things that it says.

First, the Applicant seeks a variance, not a

rezoning, and I think that's an important distinction. The second is that the subject property is zoned RM1[6]. And you've heard both from Counselors Kleiman and Brookes as to the meaning of that RM-16, and it's allowable height and density.

The previous request was denied for 170 feet, and 15 stories. And that Section 12-142 of your code sets a maximum height in this zoning category of 35 feet. I have no conflict with Mr. Hickey's facts, but

I disagree with his analysis. And specifically as it relates to hardship.

Again, you've heard from two very capable attorneys as to why this isn't a hardship, but I'm going to give you a land use planner's reason for why it isn't a hardship. For one thing, the property was purchased on December 2020. That means that the Applicant knew what the land use distinction was. He was not gulled into -- he knew what it was.

And the definition in your code is that, "unusual and practical difficulties or particular hardship," are one of the criteria. There is nothing unusual or practical about this difficulty. What he bought is what he has. And it's not your obligation to make it more valuable for his own benefit.

The Applicant's attorney referred to the difficulties of building on this parcel. Every parcel has difficulties. Most parcels have some advantages, too. And this is a good parcel of land. The conservation easement does not constitute a hardship. And, as we have just learned, it's been in place since approximately 1992. It's been there longer than I have been in AICP[4]. That's 30 years.

[4] American Institute of Certified Planners (AICP) designation.

24· It is not the least variance that the
25· Applicant could seek.· It is far from the least

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1· variance.· Counselor Kleiman said that none of that
2· matters.· And he was referring to the stunning quality
3· of what the Applicant proposed to put on the site. I
4· agree.· This is not a judgment of the quality of their
5· work, but it's not the least variance.
6· And we've also heard from both of our
7· attorneys regarding the big looming shadows that a 10-
8· story project would impose.· I agree with that.· There
9· is a good use that the Applicant has on this parcel.
10· MR. SERDA:· Five minutes.
11· MR. FORGEY:· The property is quite
12· developable.· We are asking today that you sustain
13· your code, that you keep faith with the neighbors.
14· It's viable, it meets all requirements of your code as
15· it exists, and this isn't a hardship.
16· Mayor, that concludes my comments, and I ask
17· that you deny.

REQUEST FOR RELIEF

Petitioners respectfully request an order from this court reversing and quashing the decision below for failure to afford procedural due process and failure to comply with essential requirements of law.

Respectfully submitted,
/s/ Ralf Brookes
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email on this date, March 1, 2022 to the following:

Hillsboro Beach Town Attorney DJ Doody
via email: Ddoody@cityatty.com

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition for Writ of Certiorari complies with the word count and font requirements of Florida Rule of Appellate Procedure 9.1000(1).

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