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RESOLUTION NO. 2010-86

ZONING APPLICATION VPB - 10-018

A RESOLUTION OF THE MAYOR AND VILLAGE COUNCIL OF THE VILLAGE OF PALMETTO BAY, FLORIDA, RELATING TO ZONING; DENYING THE VARIANCE REQUEST OF APPLICANTS LEOBERTO AND VIVIAN FERNANDEZ, PROPERTY LOCATED AT 16450 SW 84TH PLACE, PALMETTO BAY, FLORIDA, FOR A VARIANCE FOR A GAZEBO TO SETBACK 7.34 FEET FROM THE NORTHWEST INTERIOR PROPERTY LINE WHERE 20 FEET WAS REQUIRED ON A PARCEL ZONED E-M, AS PROVIDED FOR UNDER SECTION 30-30.6, OF THE VILLAGE CODE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, applicants, Leoberto & Vivian Fernandez pursuant to Section 30-30.6 of the Village of Palmetto Bay's Land Development Code (LDC) filed an application requesting a variance of setback requirements to allow an existing detached patio (gazebo) (11' x 16') to setback 7.34 feet from the (northwest) interior property line where 20 feet is required on a property zoned E-M, Estate Modified District; and,

WHEREAS, Planning and Zoning Department issued a recommendation of denial of the setback variance for the unpermitted gazebo; and,

WHEREAS, the Village Council of the Village of Palmetto Bay conducted a quasi-judicial hearing on the application at the Deering Estate on September 20, 2010; and,

WHEREAS, the Mayor and Village Council find, based on substantial competent evidence in the record, that the application pursuant to Section 30-30.6 of the Village's Code relating to the above requests, find that the application, is inconsistent with the Village's Comprehensive Plan and does not comply with the applicable land development regulations; and,

WHEREAS, based on the foregoing finding, the Mayor and Village Council determined to deny the application as provided in this resolution.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND VILLAGE COUNCIL OF THE VILLAGE OF PALMETTO BAY, FLORIDA, AS FOLLOWS:

Section 1. A hearing on the present application was held on September 20, 2010 in accordance with the Village's "Quasi-judicial hearing procedures" Ordinance, found at Section 2-107, of the Village's Code of Ordinances. Pursuant to the hearing, the Mayor and Village Council make the following findings of fact, and conclusions of law.

1 Section 2. Findings of fact.

2 The subject property is located at 16450 SW 84th Place, Palmetto Bay, Florida.

3
4 The applicants' property is located at 16450 SW 84 Place, Palmetto Bay, Florida. On July 14, 2010,
5 the Division of Code Compliance issued a Courtesy Warning Notice (R3807) to the applicant for
6 failure to obtain building permits for an existing detached patio (gazebo) that was under
7 construction. Thereafter, when the applicants sought an after-the-fact building permit for the
8 structure, staff determined that the structure had been constructed within the setbacks for the E-M
9 zoning district.

10
11 Planning & Zoning Department Staff determine that in order for the applicant to cure the violation
12 and come into compliance with the Building and Zoning, and Code Compliance requirements the
13 applicants were presented with the following options: (1) remove the gazebo; or (2) seek a variance
14 to allow the gazebo to stay in its current location. Please note that the applicants cannot maintain
15 this gazebo on the site without a variance. Thereafter, the Planning and Zoning Department staff
16 explained to the applicants the nature of the violation, as well as each of the option mentioned
17 above. As a result, the applicants opted to seek a variance for an interior side setback due to the
18 irregular size of the parcel.

19
20 Pursuant to Section 30-30.6, of the Code, the applicants are requesting a variance of setback
21 requirements to permit an existing gazebo (11' x 16') to setback 7.34 feet from the (northwest)
22 interior side property line where 20 feet is required. The property is a legally non-conforming parcel
23 which, in 1989, received from Miami-Dade County a non-use variance of lot frontage requirements
24 to allow the platting of the parcel with only lot frontage of 100 feet where 120 feet was required
25 under the zoning Code. In effect, the 1989 resolution reducing the frontage to the property in turn
26 allowed the property to be shorter, or a more compact parcel. The property consists of a single-
27 family home, with a pool believed to be constructed in 1996. The applicants were not the property
28 owner in 1989, or during the construction of the home site.

29
30 Due to the modification of the frontage requirement, the applicants are unable keep the gazebo,
31 without seeking a variance. The required setback would place the gazebo on top of the pool or
32 adjacent to the pool if the gazebo were to be reduced drastically in size. A minimum of 5 feet
33 distance is required from the waters edge of the pool to any structure. In addition, a 10 feet utility
34 easement runs along the (southwestern) rear property line, and such a utility easement precludes the
35 permanent construction of structures on top of the easement area, unless an express waiver is
36 obtained by the owner of the utility easement. No express waiver was obtained by the Applicants.

37
38 On September 20th, 2010, the Council held a public hearing. The Applicants (Mr. Leoberto
39 Fernandez) addressed the Council on the intent of the project and provided an explanation for
40 doing the work without a building permit. There were three neighbors that spoke against the
41 application raising noise concerns, building construction concerns (structure built without a permit),
42 argued as to size and location of the structure and damage that could result from a hurricane event.
43 Mr. Fernandez was given an opportunity by the Council to address the neighbors' concerns. The

1 Council incorporates by reference the minutes, audio tape, and transcript (if transcribed) into its
2 findings of fact.

3
4 The adopted 2009 Amended Village of Palmetto Bay Comprehensive Plan, Future Land Use Map
5 designates the site as Estate Density Residential. The residential density allowed in this category is
6 less than 2.5 dwelling units per gross acre.

7
8 **Subject Property:**

9
10 E-M; Single-Family Estate Density Residential
11 Residential District less than 2.5 D.U. per gross acre

12
13 **Surrounding Properties**

14
15 **NORTH:** E-M; Single-Family Estate Density Residential;
16 Residential District less than 2.5 D.U. per gross acre

17
18 **SOUTH:** E-M; Single-Family Estate Density Residential;
19 Residential District less than 2.5 D.U. per gross acre

20
21 **EAST:** E-M; Single-Family Estate Density Residential;
22 Residential District less than 2.5 D.U. per gross acre

23
24 **WEST:** E-M; Single-Family Estate Density Residential;
25 Residential District less than 2.5 D.U. per gross acre

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28 **Section 3. Standard of Review.**

29
30 On December 2009, the Village Council adopted Division 30-30 of the Code, relating to
31 “Development Approval Procedures.” Section 30-30.6, entitled “Variances” governs the process
32 for addressing a variance request. The Village defined a variance as “a relation of the terms of
33 Chapter 30 of the Code, due to an unnecessary and undue hardship when relation of terms is not
34 contrary to the public interest and results from conditions peculiar to the property and not the result
35 of the actions of the applicants that may result from a literal enforcement of Chapter 30 of the
36 Code.” In short, the Village has adopted a strict hardship standard for reviewing a variance request.
37 The Village Council specifically identified permitted variances at subsection (b), and prohibited
38 variances at subsection (c).

39
40 In Section 30-30.6(b) of the Code, a variance is authorized to be granted by the Village Council, after
41 quasi-judicial public hearing, only for setback lines; lot width; street frontage; lot depth; lot coverage;
42 landscape or open space requirements; height limitations; yard regulations; fence and wall
43 regulations; signs; parking; and flood regulations approved under Section 30-100.6, of the Code of
44 Ordinances, and other matters specifically permitted as variances pursuant to this Division.

1 According to Section 30-30.6(c) of the Code, the Village Council may not grant a variance to allow a
2 prohibited use, or one that is contrary to the Comprehensive Plan or Section 30-30.6 of the Code.
3 Establishment or expansion of a use otherwise prohibited shall not be allowed by variance, nor shall
4 a variance be granted because of the presence of non-conformities in the zoning district or uses in
5 an adjoining zoning district or because of prior variances granted. Similarly, a variance shall not be
6 granted which increases nor has the effect of increasing density or intensity of a use beyond that
7 permitted by the Comprehensive Plan or Chapter 30 of the Code.
8

9 Pursuant to Section 30-30.6(e) of the Code, the Village Council, may, after public hearing, adopt a
10 written resolution granting, granting with conditions or denying the variance request. The criteria
11 for reviewing the variance are as follows:
12

13 (1) That the variance is in fact a variance allowed in this Division and is within the province of
14 Village Council.
15

16 The Council found that the variance requested is not allowed and within the province of the Village
17 Council as this is not an unnecessary and undue hardship to the property owner. The request is
18 contrary to the public interest and results from conditions peculiar to the property. The request is
19 the result of the actions of the applicants. Financial considerations are not taken into consideration
20 while reviewing the request.
21

22 (2) Existence of special conditions or circumstances. That special conditions and circumstances exist
23 which are peculiar to the land, structure, or building involved and which are not applicable to other
24 lands, structures, or buildings in the same zoning district.
25

26 The Council found that in 1989, the original developer of the subdivision was granted a non-use
27 variance of lot frontage requirements to allow the subject property to have a frontage of 100 feet
28 where 120' is required. This legally non-conforming parcel is allegedly the hardship faced by the
29 applicant, due to the irregular size of the lot which was the result of a variance under the County
30 Code. Legal non-conformity may not be expanded.
31

32 (3) That the special conditions and circumstances do not result from the actions of the
33 applicant.
34

35 The Council found, due to the configuration of the lot, the distance between the interior property
36 line and patio area is 20 feet less than a regular lot. As a result, the applicants are unable to
37 accommodate the existing gazebo from either side without infringing on the setbacks or placing the
38 gazebo over the pool. In addition, a 5 feet minimum setback is required from the water's edge to the
39 gazebo.
40

41 (4) That granting of the variance requested will not confer on the applicant any special privilege
42 that is denied by Chapter 30 to other lands, buildings, or structures in the same zoning district.
43

44 The Council found, that the request was not a hardship and therefore a special privilege would not
45 be granted to the applicants.

1 (5) Financial difficulties or economic hardship shall not be a factor for determining whether a
2 variance should be granted.
3

4 The Council found that there are no financial or economic hardships related to this application.
5

6 (6) That literal interpretation of the provisions of Chapter 30 would deprive the applicant of
7 rights commonly enjoyed by other properties in the same zoning district under the terms of chapter
8 30 and would work unnecessary and undue hardship on the applicant. The purchase of property
9 which has an illegal nonconformity with Chapter 30 shall not be considered a hardship for the
10 granting of a variance, nor shall conditions peculiar to the property owner be considered.
11

12 The Council found that the physical configuration of the parcel limits the property owner's options
13 in the placement and location of the gazebo. However, there is a possible location for a smaller
14 gazebo without infringing upon setbacks. Moreover, the gazebo was built, without permits, and this
15 variance request is made after-the-fact, a self-imposed hardship, which is precluded under the Village
16 Code.
17

18 (7) That the variance granted is the minimum variance that will make possible the reasonable
19 use of the land, building, or structure.
20

21 The Council finds that requested variance will have an adverse impact to the adjacent properties in
22 the immediate area. The neighbors' view of the gazebo is blocked by a hedge that is over 6' in
23 height and a canal on the rear of the applicants' property.
24

25 (8) That the grant of the variance will be in harmony with the general intent and purpose of the
26 comprehensive plan and Chapter 30, and that the variance will not be injurious to the area involved
27 or otherwise detrimental to the public welfare.
28

29 The Council found that the variance, if approved, will not be in harmony with the general intent and
30 purpose of the Comprehensive Plan and Chapter 30 of the Code. The scale, height, and size are
31 appropriate, if not located within the setback. If not within the setback the gazebo would be
32 compatible with the character of the surrounding neighborhood.
33

34 (9) In granting any variance, Village Council may prescribe appropriate conditions to mitigate
35 the proposed variance and to ensure safeguards in conformity with the comprehensive plan and
36 Chapter 30 or any other duly enacted ordinance. Violation of conditions and safeguards, when made
37 a part of the terms under which the variance is granted, shall be deemed a violation of this chapter
38 and shall nullify the variance development approval.
39

40 The Council found that the gazebo should be moved or removed from the property.
41

42 According to Section 30-30.6(f) of the Code, once a written decision is made by the Village Council,
43 that resolution shall be recorded in the public records. The resolution granting a variance shall be
44 deemed applicable to the development for which it is granted and not to the individual applicant,
45 provided that no resolution granting a variance shall be deemed valid with respect to any use of the

1 premises other than the use specified in the application for a variance development approval (See:
2 Section 30-30.6(g) of the Code). As with all applications, if a variance is granted, the development
3 approval shall be valid for 24 months from the date of approval, or that date approved by the
4 Village Council, if a longer period is authorized during the public hearing (See: Section 30-30.2(k) of
5 the Code). In short, Section 30-30.2(k) of the Code requires that the variance be utilized,
6 constructed, if applicable, within the two year period. In this application, the gazebo already exists
7 within the setback area. Applicant is seeking an “after-the fact” variance.
8

9 Section 4. Conclusions of law.

10 1. The Application is not in compliance with the adopted 2005 Village of Palmetto Bay
11 Comprehensive Plan, and Future Land Use Map.

12
13 2. The standard of review for a variance is found at Section 30-30.6 of the Village’s
14 Land Development Code. That the Applicants’ request for a setback variance is not in compliance
15 with the applicable hardship standards.
16

17 Section 5. Order.

18
19 The Village Council denies the variance application pursuant to Section 30-30.6 of the Code to allow
20 plans entitled “Leoberto Fernandez” 16450 SW 84th Place, Palmetto Bay, FL 33157 as prepared by
21 P(3)SM, L.L.C. consisting of one sheet dated stamped received July 16, 2010, as there is no hardship.
22 The Village denies the variance application of setback requirements to permit the existing
23 unpermitted gazebo. The Council finds that the proposed variance is not keeping with the basic
24 intent and purpose of the zoning and land use regulations. There is no hardship. As such, approval
25 of this application is not in character with the surrounding uses, and is inconsistent with the Village’s
26 Comprehensive Plan.
27

28 This is a final order.
29

30 Section 6. Record.

31 The record shall consist of the notice of hearing, the application, documents submitted by the
32 applicant and the applicant’s representatives to the Village of Palmetto Bay Planning and Zoning
33 Department in connection with the applications, the Village's recommendation and attached cover
34 sheet and documents, the testimony of sworn witnesses and documents presented at the quasi-
35 judicial hearing, and the tape and minutes of the hearing. The record shall be maintained by the
36 Village Clerk.
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38 Section 7. This resolution shall take effect immediately upon approval.

39 PASSED and ADOPTED this [20] day of September, 2010.
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Attest

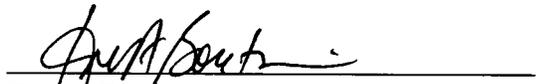


Meighan Alexander
Village Clerk



Eugene P. Flinn, Jr.
Mayor

APPROVED AS TO FORM:



Eve A. Boutsis,
Village Attorney

FINAL VOTE AT ADOPTION:

- Council Member Ed Feller YES
- Council Member Howard Tendrich YES
- Council Member Shelley Stanczyk YES
- Vice-Mayor Brian Pariser YES
- Mayor Eugene P. Flinn, Jr. YES