ITEM 13A

To: Honorable Mayor and Village Council

Date: December 30, 2013

From: Ron E. Williams, Village Manager

Re: Administrative (de minimus) Variance Ordinance for 2nd Reading

AN ORDINANCE OF THE MAYOR AND VILLAGE COUNCIL OF THE VILLAGE OF PALMETTO BAY, FLORIDA, AMENDING SECTION 30-30.3, "ADMINISTRATIVE (DE MINIMUS) VARIANCES", TO MODIFY THE ADMINISTRATIVE VARIANCE REVIEW CRITERIA AND PROCEDURES TO BE REFLECTIVE OF PREVAILING COMMUNITY DEVELOPMENT PATTERNS; PROVIDING FOR THE REPEAL OF ALL CODE PROVISIONS AND ORDINANCES INCONSISTENT WITH THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; AND PROVIDING FOR AN EFFECTIVE DATE. [Sponsored by Council Person Patrick Fiore]

UPDATE:

This item was heard and passed on first reading at the December 9, 2013, Council hearing with the following modifications:

1. Language regarding minimum request is deleted.
2. Posting of the property is incorporated in the ordinance.
3. Posting of the preliminary decision is posted on the Village's website.

Those requested changes are incorporated in the proposed ordinance for second reading and are reflected with double underlines and double strike-throughs.

BACKGROUND:

On June 3, 2013, during the "New Business" portion of the regular Village Council meeting, the Village Council directed staff to research the Village's existing variance regulations, both Public Hearing and Administrative, and return with a report and possible options as to modifying those regulations. The findings of that study were submitted at the September 9, 2013, Village Council meeting under the Village Manager's report. Subsequent to the meeting, Council Person Patrick Fiore requested that the item be brought forward as an ordinance, reflective of the findings contained therein. This report is specific to the administrative (de minimus) variance portion of that study. The full report submitted on September 9, 2013 is provided at Attachment A.

The proposed changes to the administrative variance code include: (1) providing eligibility for multifamily residential and commercial properties that are not governed by a site plan, (2) increased minimum request to 12 inches or up to 10% of the requirement not to exceed 2 feet, (3) remove from the code the "subjective" review criteria utilized by the Planning and Zoning Director when arriving at a decision, and (4) modifying the public notification provisions as it relates to the initial

application and final decision, more specifically, to require written consent from adjacent property owners at initial application and provide mailed notice of the proposed decision and notifying of the 30 day window to appeal the decision. By implementing the above changes the goals of providing: (1) greater access to the administrative procedure, (2) nominally greater dimensional flexibility, (3) an evaluation without subjective decision making, and (4) for a more transparent procedure, are met. For a fuller description of these objectives, please see Attachment A.

ANALYSIS:

The proposed ordinance was reviewed for consistency with the criteria established in Section 30-30.7(b), of the Village's Code of Ordinances. The Background Section provided above and Attachment A shall be considered supplemental information to this analysis and thusly shall be incorporated into each criterion delineated below. The following is a review of those criteria.

Criteria (1): Whether the proposal is consistent with the Comprehensive Plan, including the adopted infrastructure minimum levels of service standards and the Village's Concurrency Management Program.

Analysis: The Comprehensive Plan does not address variances. Regardless, all developments must be consistent with the provisions of the Comprehensive Plan at time of obtaining a development order (i.e. building permit, site plan resolution) on an application.

Finding: Not applicable.

Criteria (2): Whether the proposal is in conformance with all applicable requirements of Chapter 30.

Analysis: See Background Section. There does not appear to be any particular provision of Chapter 30 that conflicts with the proposed ordinance. The proposed modification offers greater flexibility to an applicant seeking relief from provisions of the Code while remaining within a "*de minimus*" request range. Further, subjective measures are removed from the Code to ensure greater consistency and predictability in review outcomes.

Findings: Consistent.

Criteria (3) Whether, and the extent to which, land use and development conditions have changed since the effective date of the existing regulations, and whether the changes support or work against the proposed change in land use policy.

Analysis: The existing provision was adopted in 2009 when the Village adopted its Land Development Code. At that time the Village adopted a request standard (5% vs.

10%) that was more restrictive than the previous standard provided by the Miami-Dade County. The provision was substantially modeled after the then existing County Code. However, the reduction in the percentage often resulted in a timely and costly procedure for requests that often equaled little more than a few inches. The proposed modification offers increased flexibility for relief while still conforming to the concept of a *de minimus* request.

Upon closer inspection of the Administrative Variance Code, it appeared that many of the review criteria were overly subjective, particularly as they pertain to an administrative ruling authority. These criteria were eliminated providing for clearer decision making parameters. This, together with a revised notification procedure, provides for greater transparency for what is an administrative decision making process.

Findings: Consistent.

Criteria (4) Whether, and the extent to which, the proposal would result in any incompatible land uses, considering the type and locations of uses involved, the impact on the adjacent or neighboring properties, consistency with existing development, as well as compatibility with existing and proposed land uses.

Analysis: Use variances are currently prohibited by Code and continue to be so with this proposed ordinance. Although the proposed administrative variance process proposes an increased range (up to 24 inches or 10 %, whichever is less), the process continues to conform with the concept of only allowing *de minimus* requests to proceed. Finally, as an additional consideration, front yard setbacks are precluded from such requests as they are most likely to present the greater visual impact to the development pattern of a community.

Finding: Consistent.

Criteria (5) Whether, and the extent to which, the proposal would result in demands on transportation systems, public facilities and service; would exceed the capacity of the facilities and services, existing or programmed, including: transportation, water and wastewater services, solid waste disposal, drainage, recreation, education, emergency services, and similar necessary facilities and services.

Analysis: The proposed amendment does not impact on the above systems as they are principally a function of use and not physical development standards of a structure.

Finding: Not applicable.

Criteria (6) Whether, and to the extent to which, the proposal would result in adverse impacts on the natural environment, including consideration of wetland protection, preservation of groundwater aquifer wildlife habitats, and vegetative communities.

Analysis: The above systems are regulated by Miami-Dade County, and as such, any development that impacts those systems must first receive approval from the DERM.

Finding: Consistent.

Criteria (7) Whether, and to the extent to which, the proposal would adversely affect the property values in the affected area, or adversely affect the general welfare.

Analysis See Criteria (3) and (4) above.

Findings: Consistent.

Criteria (8) Whether the proposal would result in an orderly and compatible land use pattern. Any positive and negative effects on land use pattern shall be identified.

Analysis See Criteria (3) and (4) above.

Findings: Consistent.

Criteria (9) Whether the proposal would be in conflict with the public interest, and whether it is in harmony with the purpose of Chapter 30.

Analysis: See Criteria (1), (2), (3) and (4) above. As reflected in the Criteria above and the study attached at Exhibit 1, there is no conflict to the public interest.

Findings: Consistent.

Criteria (10) Other matters which the local planning agency or Village Council in its legislative discretion may deem appropriate.

Analysis: As per the direction of the Village Council.

Finding: As determined by the Village Council.

FISCAL/BUDGETARY IMPACT:

There does not appear to be any fiscal or budgetary impact of this amendment.

RECOMMENDATION:
Decision for the Village Council.

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND VILLAGE COUNCIL OF THE VILLAGE OF PALMETTO BAY, FLORIDA, AMENDING SECTION 30-30.3, "ADMINISTRATIVE (DE MINIMUS) VARIANCES", TO MODIFY THE ADMINISTRATIVE VARIANCE REVIEW CRITERIA AND PROCEDURES TO BE REFLECTIVE OF PREVAILING COMMUNITY DEVELOPMENT PATTERNS; PROVIDING FOR THE REPEAL OF ALL CODE PROVISIONS AND ORDINANCES INCONSISTENT WITH THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; AND PROVIDING FOR AN EFFECTIVE DATE. [Sponsored by Council Person Patrick Fiore]

WHEREAS, on August 20, 2009, the Mayor and Village Council of the Village of Palmetto Bay created "Division 30-30, entitled Development Approval Procedures", so as to provide an orderly process upon which developments may apply for and receive development orders; and,

WHEREAS, Division 30-30, includes Section 30-30.3, Administrative (de minimus) variances, which provides for a procedure for those proposed development applications which seek administrative relief from certain provisions of the Village's Land Development Code; and,

WHEREAS, Section 30-30.3 limits the scope of such requests and employs a standard of review that may appear overly subjective, and whereby such applications must comply with all of the criteria to receive approval; and,

WHEREAS, the Mayor and Village Council desire to amend Section 30-30 to expand the permitted scope of administrative variance requests and to adjust the review criteria to minimize subjective determinations.

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

Section 1. **Recitals.** The above recitals are true and correct and incorporated herein by this reference.

Section 2. **Code Amendment.** Section 30-30.3(d) of the Code of Ordinances of the Village of Palmetto Bay, Florida, is hereby amended to read as follows:

DIVISION 30-30. DEVELOPMENT APPROVAL PROCEDURES

***

Sec. 30-30.3. Administrative development approvals.

***

(d) *Administrative (de minimus) variances.* When the literal or strict enforcement of the provisions of ~~this division~~ the Village's Land Development Code cause unusual, exceptional, unnecessary difficulties or undue hardship or injustice because of the size of the tract, parcel or lot, the topography, the condition or nature of adjoining areas, or the existence of other unusual physical conditions, the planning and zoning director may grant an administrative variance for lot coverage, setback, height, buffer, lot dimension and/or floor area ratio (FAR) requirements in accordance with the following requirements:

(1) ~~Only individual single-family or duplex sites can utilize the administrative variance procedures;~~ Any development subject to a site plan that was either adopted at, or requires public hearing, shall not be eligible for an administrative (de minimus) variance.

(2) An administrative variance granted under this section ~~shall be permitted up to minimum of twelve inches, however~~ shall not exceed ~~five~~ ten percent or two feet into any ~~one~~ setback for height, buffer, separation, and lot dimension. The front yard setback is precluded from the administrative variance process. All other requests for lot coverage, or floor area ratio shall not exceed ten percent (10%) of the permitted maximum.

(3) An administrative variance shall be submitted to the planning and zoning director, his/her designee in the form of a written application and accompanied by the filing fee.

(4) All administrative (de minimus) variance ~~The adjacent properties to the~~ applications shall ~~be provided written notice of the request and provide~~ include written consent ~~to administrative variance request as a de minimus action that would not materially affect their use and enjoyment of their~~ from the adjacent property owners. Failure to obtain the consent of all property~~ties~~ owners immediately adjacent and across from the applicant's site, shall require denial of the administrative variance and the applicant may seek a variance as provided under section 30-30.

~~(5) The application shall set forth the special conditions and circumstances that exist which are particular to the land involved and are not applicable to other surrounding lands and the basis for seeking to encroach into the setback requirements.~~

~~(6) The applicant shall clearly identify how a literal interpretation of the provisions of Chapter 30 would deprive the applicant of rights commonly enjoyed by other properties located in the Village and that the granting of the variance requested will not confer on the applicant any special privilege that is otherwise denied other properties.~~

(~~7~~5) To approve an administrative variance application, the Department Director shall find:

(A) No more than two sides of the encroaching construction shall be considered for a setback adjustment (all prior setback variances, administrative adjustments and alternative site development options shall count toward this limitation)~~; and~~. The front set back is precluded from using an administrative variance process.

(B) No prior approved setback, lot coverage or building spacing variance(s), administrative adjustment(s) or alternative site development option(s) shall be further changed by administrative adjustment~~; and~~.

~~(C) The architectural design, scale, mass, and building materials of any proposed structure or addition shall be aesthetically harmonious with that of other existing or proposed structures or buildings on the property; and~~

~~(D) The plan shall clearly illustrate water runoff solution(s) for the encroaching construction area; and~~

(~~E~~C) The property owner shall certify in writing that any and all easement areas as shown on the recorded plat remain unencumbered by the encroaching construction, unless a release of interest by the easement holder(s) is obtained and submitted prior to permit issuance~~; and~~.

(~~F~~D) The applicant provide written certification from a registered architect or engineer that the existing encroaching construction complies, or can be made to comply with all applicable construction codes, including but not limited to the Florida Building Code, the applicable fire prevention code and other zoning regulations~~; and~~.

~~(G) Any reduction in the spacing requirement between a principal building and an accessory structure on the same lot shall not result in a situation that causes maintenance difficulty or an unsightly appearance; and~~

(~~H~~E) The proposed accessory structure is a normal and customary accessory residential use~~; and~~.

(F) The impacts associated with the deviation requested are adequately mitigated through alternative measures.

(G) Protection of natural features, including trees, wetlands, archeological sites and similar circumstances.

~~(I) The property owner certifies in writing that the type and placement of any proposed outdoor lighting fixtures shall comply with the Code of Miami-Dade County and the Florida Building Code;~~

~~(J) Notwithstanding the foregoing, no proposed administrative adjustment shall be approved where the director determines that the proposed construction or addition:~~

~~(i) Will not be in harmony with the general appearance and character of the subject block face or the block face across~~

~~the street from the subject property or will result in a significant diminution of value of the adjacent property; or~~

~~(ii) Will be detrimental to the public welfare in that it will have substantial negative impact on public safety due to unsafe traffic movements, heightened pedestrian-vehicular conflicts, or heightened risk of fire; or~~

~~(iii) Creates materially greater adverse privacy impacts on adjacent residences than that permitted by the underlying district regulations.~~

(~~K~~H) Conditions and safeguards. In granting an administrative adjustment, the director may prescribe conditions and safeguards deemed necessary to protect the interests served by the underlying zoning district regulations, including, but not limited to: Landscape materials, walls, and fences as required buffering; modification of the orientation or deletion of any openings; modification of site arrangements; and modification of plans.

(8) The planning and zoning director shall give written notice of his/her preliminary determination regarding the administrative variance to the adjacent property owners and shall hear any objections regarding the preliminary determination during a subsequent 30-day period. Administrative (de minimus) variance request for non-residential uses and multifamily residential uses shall be noticed according to Section 30-30.11(o) as per mailing radius for variances. At the conclusion of the 30-day period the Village shall approve, approve with conditions, or deny the administrative variance by written order. Any written objection received from a property owner within the notice radius within the 30-day notice time period shall result in a denial of the request and the applicant may seek a variance as provided under section 30-30. Notice of intent to issue the administrative variance will be posted on the property and noticed on the Village. Posting of the property and notice on the Village web site shall be considered supplementary in nature and a complementary service to the public and shall in no way compromise the outcome of the final disposition of the preliminary decision.

Section 3. **Conflicting Provisions.** The provisions of the Code of Ordinances of the Village of Palmetto Bay, Florida and all ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

Section 4. **Severability.** The provisions of this Ordinance are declared to be severable, and if any sentence, section, clause or phrase of this Ordinance shall, for any reason, be held to be invalid or unconstitutional, such decision shall not affect the validity of

the remaining sentences, sections, clauses or phrases of the Ordinance, but they shall remain in effect it being the legislative intent that this Ordinance shall stand notwithstanding the invalidity of any part.

Section 5. **Codification.** It is the intention of the Village Council and it is hereby ordained the provisions of this Ordinance shall become and be made part of the Code of Ordinances of the Village of Palmetto Bay, Florida, that sections of this Ordinance may be renumbered or re-lettered to accomplish such intentions, and that the word "Ordinance" shall be changed to "Section" or other appropriate word.

Section 5. **Effective Date.** This ordinance shall take effect immediately upon enactment.

First reading: _____

Second reading:_____

PASSED AND ENACTED this __th day of _____, 2014.

Attest: _____

Meighan Alexander
Village Clerk

_____

Shelley Stanczyk
Mayor

APPROVED AS TO FORM AND LEGAL SUFFICIENCY FOR THE USE AND RELIANCE OF THE VILLAGE OF PALMETTO BAY, FLORIDA ONLY:

_____

John R. Herin, Jr.
Interim Village Attorney

FINAL VOTE AT ADOPTION:

Council Member Patrick Fiore _____

Council Member Joan Lindsay _____

Council Member Tim Schaffer _____

Vice-Mayor John DuBois _____

Mayor Shelley Stanczyk _____

To: Honorable Mayor & Village Council

Date: September 9, 2013

From: Ron E. Williams, Village Manager

Re: Variance Standards Memorandum

INTRODUCTION

On June 3, 2013, during the "New Business" portion of the regular Village Council meeting, the Village Council directed staff to research the Village's existing variance regulations, both Public Hearing and Administrative, and return with a report and possible options as to modifying the regulations. The Council also requested that staff complete a cost evaluation of the fees for "simple" variances. This memorandum presents the findings of that review.

The focus of the review relates to variances to zoning development review standards. The review is divided into four principal parts. Part I, "Variances Briefly", provides a brief but general discussion of what a variance is, including why such request are offered within the Code, types of variances criteria, and presents how the criteria are selected. Part II, "Public Hearing Variances", presents the range of uses afforded this option, identifies the development standards that may be varied, presents the different process methodologies that are used by other jurisdictions, and discusses options that may be available for the Village to implement. Part III, "Administrative Variances", provides a broad discussion of why this process is utilized. The section includes a discussion of the uses generally eligible to apply for an Administrative Variance and the development standards generally available for modification. Also included is a discussion of how much can the Administrative option vary on any one standard, and what relevant criteria should apply in rendering a determination. The section closes with a presentation on appropriate public notification procedures. Part IV, presents the finding of the cost analysis as applied to "simple" variances. Staff defined simple variances to mean those applications which principally apply to requests of low intensity residential uses. As such, both Public Hearing and Administrative Variances were review.

As a note to the preceding paragraph, use variances are not discussed as they are generally not permitted within our code (FT&I being the sole exception) nor are they recommended for inclusion. Use variances are often the most problematic, as they would permit a use not

ordinarily allowed within a zoning district, often putting the community at odds with the "unusual", unexpected use.

In researching alternative variance methodologies, staff selected a range of cities to see how other jurisdictions operate. All of the jurisdictions selected are in the State of Florida and include, but are not limited to variance procedures from Miami-Dade County and surrounding jurisdictions. The jurisdictions utilized for this study and their respective ordinances are provided at Exhibit A.

All of the zoning codes reviewed provide for a variance procedure. However, not all the codes provide for an administrative variance review process. Staff did not detail all the nuances from other jurisdictions, as such nuances (specific to those cities) are irrelevant to the Village's discussion in determining whether the Village should modify or alter its variance provisions.

PART I – VARIANCES BRIEFLY

Why variances? The very essence of a zoning code is to establish a set of design standards to ensure the predictable land development pattern of a community. The zoning authority of a municipality is derived from the inherent police powers of that governmental entity to protect the health, safety, welfare, and aesthetics of that community[1]. The expectation is that these design standards are reflective of the collective desire of the residents in that area. The zoning districts are crafted within a general frame work that anticipates uniformity of land size and configuration, and typical construction and site plan layout. Because not all lots or construction are uniform, most municipal zoning codes provide for variance procedures to accommodate those differences. In short, variance codes exist to address the potential scenarios in which the specific parcel and the desired design standard are out of sync with the enacted design standards. This incongruence may be caused by circumstances ranging from the constraint of an irregular lot size or configuration, to the mere desire of the requestor wanting to vary from the adopted design standard. What is universal about variances is how they apply to the affected property. Generally, decisions regarding variances are particular to the land involved, are not precedent setting, and run with the land unless conditioned otherwise. Variances provisions differ from city to city as to the scope of the development regulations that can be modified; the scope or the authority of the decision maker(s); and the criteria utilize to arrive at a decision.

The variance procedure, to hear or not to hear. Variances are typically reviewed and processed through one of two venues, a public hearing, or an administrative officer of the

[1] *Euclid v. Ambler Realty Corp.*, 272 US 365 (1926).

municipality. The first is typically referred to as a "Variance" (herein after referred to as "Public Hearing Variance") whereas the latter is referred to as an "Administrative Variance". The decision making authority of the first variety, the Public Hearing Variance, rests typically with either the elected officials of the municipality or the with a citizen board appointed by them (Planning & Zoning Board). These types of requests typically offer the broadest range of applicability with regard to the scope of the request, as the applicant may seek a partial reduction of the requirement or a complete waiver of the design standard. Administrative Variances are those that can be fully processed at the staff level, with a final decision rendered by the Planning Director. Administrative Variances typically limit the types of uses eligible for such consideration and in the types of provisions that may be modified. The review standards of Administrative Variances usually provide for clearly defined and limited parameters with limited discretion afforded to the administrative officer rendering the final decision.

The variance criteria – strict versus compatible. Decisions to deny or grant a variance are based on the particulars of the land as the Code applies to it. Variance decisions should be based on a "rational nexus" between the requested modification and the reason(s) for approval or denial. Failure to find a "rational nexus" to a variance decision gives the appearance of it being "arbitrary and capricious", subject to legal challenge, reversal and remand by an appellate court back to the deciding body for correction. Although a variance decision is not precedent setting, it should also stand to reason that similar request under similar circumstances should have similar decisions rendered. Treating similar requests similarly precludes a legal challenge based upon "disparate treatment." To provide consistency in application of the variance provision, evaluation criteria are established to guide the decision making process. The criteria reside along a spectrum (hereinafter referred to as "Standard Spectrum") of what may be classified from "Strict Hardship" to "General Compatibility". Two examples from the Village's Code are as follows:

> Strict Hardship:
> Section 30-30.7(e)(2) Existence of special conditions or circumstances. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same zoning district.
>
> General Compatibility:
> Section 30-30.7(e)(8) That the grant of the variance will be in harmony with the general intent and purpose of the Comprehensive Plan and Chapter 30, and that the variance will not be injurious to the area involved or otherwise detrimental to the public welfare[2].

[2] Even though the Village's code contains language relating to Strict Hardship and General Compatibility standards, the General Compatibility language is a subset of the Public Hearing Variance procedures, and is governed by the Strict Compatibility standard.

The two examples above contrast with each other in so far as the "Strict Hardship" standard requires a finding "that **special conditions**...exist which are"(emphasis added) specific to the receiving property that don't exist on other properties of the same zoning. Such an example would be a pie shaped lot that impairs a proposed development from complying with setbacks and still provide for a buildable lot. The "General Compatibility" criteria relies upon the "general intent and purpose" of the prevailing regulations. In other words, can the proposal be deemed compatible with the prevailing development standards. The first example is often referred to as an "Objective" criterion, whereas the second is referred to as a "Subjective" criteria. An Objective criterion is one where the rule is clearly delineated, i.e., the pie shaped lot scenario. Alternatively, the Subjective criteria provides for other considerations that may make a request reasonable in the context of the Code and surrounding development pattern. The term "Subjective" is utilized in this context as an alternative to the term Objective and is not implied to mean "arbitrary or capricious." It should be noted, however, in *Miami Dade County v. Omni Point*, 811 So.2d 767 (Fla. 3d DCA 2002), the Third District Court of Appeal, on its own initiative struck down a portion of the Miami-Dade County zoning code, and called the remainder of it in question due to a concern that the General Compatibility type language could be too ambiguous to enforce and therefore unconstitutional. The Florida Supreme Court in *Miami-Dade County v. Omni Point*, 863 So. 2d 195 (Fla. 2003), overturned the Third District, on a procedural technicality - that the Appellate Court did not have the authority to raise the issue on its own during the certiorari review of the petition. While the litigation was playing out, the entirety Miami-Dade County's zoning code was put into question --- as were many other codes with "General Compatibility" standards in them. In the *Omni Point* opinion, the Third District indicated: "[two of] Miami-Dade County['s zoning code provisions] ... [were] legally deficient because [they] lacked objective criteria for the county's zoning boards to use in their decision making process and [were] thus unconstitutional... and invalid." Due to the Supreme Court's action, the Miami-Dade County's zoning code remains in place. In light of the foregoing, however, use of strictly General Compatibility standards should be cautioned against as such a purely General Compatibility standard could be found unconstitutionally vague by the Courts in a future challenge.

Strict Hardship standards generally discourage individuals from seeking a variance, whereas General Compatibility tends to encourage them. The reason is simple, the stricter the standard, the greater likelihood the request will result in denial. The likelihood of a denial is a strong motivator to deter one from applying for a variance. It also ensures that the integrity of the Zoning Code is maintained in its narrowest application. Conversely, General Compatibility, generally leads to a greater likelihood of variance approval, thus encouraging more individuals to seek such requests. The result is a relaxation of the strictest application of the Code, and provides greater nonconformity of design within a zoning district.

Compliance with either criterion type must provide the decision maker the tools to reach such a decision. As a final note to this section, the Village's variance code is of the Strict Hardship type. A fuller description of its criteria are provided at Subsection "Variance decision – the pick and choose method."

The variance criteria – all, some, or none. Most variance provisions require all criteria be met before the request may be granted. This is the case with the Village's Code. Alternatively, there are codes that require only a majority of the delineated criteria be met. Again, as in the Objective/Subjective dichotomy, there exists the potential to relax the variance review standards by allowing the decision maker to select from a range of criteria most appropriate to the requested variance scenario. This would occur when the selective "range" option is applied to a variance code that utilizes a sort of "Chinese menu" of criteria that fall along the Objective/Subjective spectrum. It should be noted, however that this scenario may moot those criteria that would be categorized as a Strict Hardship standard (Objective criteria), resulting a code that is principally supported by General Compatibility standards (Subjective criteria).

PART II – PUBLIC HEARING VARIANCES

Variance applicability – what is eligible? Most of the jurisdictions reviewed identify which development standards are eligible for variance. Similar to the Village's scope, other cities have determined that Public Hearing Variance request items should include modification of the following development standards: setbacks, lot widths, street frontage, lot depth, lot coverage, landscape or open space requirements, height limitations, yard regulations, fence and wall regulations, signs and parking. In all of the municipal examples delineated in Exhibit A, the scale or scope of the Public Hearing Variance request is without limitation. This type of request for the relaxation of the development standards may include a minor waiver, or a complete exception to the development requirement. Given the above, staff recommends no changes to the scope of the development standards that are eligible for applying for a Public Hearing Variance.

Variance decisions – there are three paths to go by. There are, of course, more than three paths to go by in choosing how to arrive at a variance request determination. The options are as follows:

1. Do nothing leaving in place a Strict Hardship standard,
2. Change all of the provisions to a General Compatibility Standard,
3. Provide an "Alternative Path" variance protocol,
4. Require only a Majority of the Criteria be met, or

5. Implement of Hybrid of option 3 and 4.

In the interest of striking a balance, the first two options were not developed more fully as their outcomes are briefly addressed in the section of this report entitled "The variance criteria – strict versus compatible."

The Village employs a Strict Hardship methodology that also contains a few criteria that could be classified as "Generally Compatible" (see Section Variances Briefly above). Similar to the Village, most of the jurisdictions reviewed use a combination of both Strict Hardship and General Compatibility standards. Stand-out codes were Hollywood, which employed a purely General Compatibility Criteria; and Coral Gables and Fort Lauderdale which utilize a pure Strict Hardship Standard.

Two other jurisdictions, Miami-Dade County and Miami Lakes[3], offer alternative review regulations and criteria. Both jurisdictions offer alternative options for reviewing the variance, one review under a Strict Hardship standard, the second, under a General Compatibility standard. Miami-Dade County actually has three variance standards, the third was enacted in response to the Third District Court of Appeal ruling in *Omni Point,* and is a lengthy review standard containing a long list of quantifiable criteria, but not necessarily, a pure Hardship Standard. Concerns have been raised regarding the use of more than one Public Hearing Variance standard, which could lead to an arbitrary and capricious decision - in other words, using a different standard based upon the desire to obtain an outcome the decision maker wants to reach. The functional difference between the two codes is that the Miami Lakes General Applicability path requires a super majority vote for approval.

Given the above, the Village's variance code falls within the modal range of jurisdictions reviewed. This should not imply, however that a variance Code with a mix of both Strict Hardship and General Compatibility criteria may be flexibly applied. Unlike a chain which is only as strong as its weakest link, the strength of a variance Code is girded upon its strongest provision provided all criteria must be met to approve a request. If the desire of the Council is to seek some range of flexibility, then one of three approaches is suggested. The first would be to follow the approach of either Miami-Dade County or Miami Lakes and provide an alternative path for variance consideration; second, provide for variance criteria that are reflective of the full Standard Spectrum requiring a majority of those criteria be met; or third, create a hybrid of the two. Below is a presentation of the three options.

Variance decisions – the alternative path. For variances to those properties that possess a Strict Hardship due to the configuration of the land, application of a simple majority vote

[3] This report is reflective of Miami Lakes' code as published by Municode.com at the time of this writing. Miami Lakes has since amended their code to reflect a purely General Compatibility review standard.

makes sense. All of the Codes reviewed, including the Village, provide a variance code requiring a simple majority vote. Both the Miami-Dade Code and the Miami Lakes Code (and in some regard, Hollywood's), however, go further, by providing two alternative paths to the review of a variance application. The first path is consistent with the Strict Hardship standard whereas the second, provides for a General Compatibility Standard. This second path provides the opportunity to consider development alternatives to a property that may be contrary to the codified development standard, but may result in added value to the property and the community. This alternate review would provide the applicant the flexibility the development may require to be constructed, provided however, the development positively contributes to the community. Given the review standard threshold, it stands to reason most variance requests would gravitate to the General Compatibility standard [second path] as those criteria are easier to meet. By having the two standards, the result would be to render the Strict Hardship path [first path] moot. There does remain one difference between the two zoning codes: Miami-Dade County's second path requires a simple majority vote, whereas Miami Lakes requires a super majority vote.

The likely result of the Village adopting the County's two alternative approaches would be an increase in variance requests and an increase in deviation from the adopted develop standards. Miami Lakes attempts to overcome this challenge by imposing a super majority vote when the more flexible General Compatibility standard applies. Their use of the General Compatibility Standard provides for greater flexibility in the review of variance criteria and requires the governing authority to obtain a higher level of agreement as to fulfillment of those criteria. The criteria used by Miami Lakes are as follows:

a. Whether the Town has received written support of the specifically identified variance requests from adjoining property owners;
b. Whether approval of the variance would be compatible with development patterns in the Town;
c. Whether the essential character of the neighborhood would be preserved;
d. Whether the variance can be approved without causing substantial detriment to adjoining properties;
e. Whether the variance would do substantial justice to the property owner as well as to other property owners justifying a relaxation of this chapter to provide substantial relief;
f. Whether the plight of the applicant is due to unique circumstances of the property and/or applicant which would render conformity with the strict requirements of this chapter unnecessarily burdensome; and
g. Whether the special conditions and circumstances which exist are the result of actions beyond the control of the applicant.

Generally, the criteria used above are consistent with the General Compatibility standard. Criteria "a" is less a criteria and more of a notification and consent provision. Criteria "g"

falls somewhere in between the Spectrum Standard. The Miami Lakes alternative appears to provide a common sense approach in providing for a development standard that may not meet Strict Hardship, but remains compatible to the neighborhood and contributes to higher quality project for the Town. The challenge with this approach is that it appears to create an internal inconsistency within the zoning code itself. Simply put, if you don't like this process, try the other.

By having alternate code provisions which provide for a differing standards for criteria review, both Miami-Dade County and Miami Lakes left themselves open to criticism and legal challenge for having more than one standard. The concern with the creation of an alternative path is that the decision as to which process (and ultimately standard) to use in approving a variance request could be determined by a Court to be arbitrary and capricious. In other words, the very act of selecting which process to follow may be considered arbitrary and capricious as there is no rational basis in choosing between the two standards of review. A variance code, like all zoning code provisions, should not be arbitrary or capricious and should have a reasonable rational basis, resulting in consistent outcomes.

Variance decisions – the pick and choose method. The second option available is to reduce the number of criteria that must be met from the Public Hearing standards. Doing so would still require compliance with a majority of the criteria. None of the jurisdictions studied provided for this "selective" option, however this method was once practiced by Broward County when they served a much larger municipal population than they do today. Broward's code has since reverted to a hearing officer given that their municipal jurisdiction is now limited to the ports, the everglades, and a few small neighborhoods. For this method to succeed, the majority of the available criteria could not include the most stringent Strict Hardship type. Presently, the Village's Code provides for nine criteria. They are as follows:

(1) That the variance is in fact a variance allowed in this division and is within the province of Village Council.

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

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

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

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

(6) That literal interpretation of the provisions of Chapter 30 would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of Chapter 30 and would work unnecessary and undue hardship on the applicant. The

purchase of property which has an illegal nonconformity with Chapter 30 shall not be considered a hardship for the granting of a variance, nor shall conditions peculiar to the property owner be considered.

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

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

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

The majority of the criteria above fall into the Strict Hardship standard. The exceptions are criteria "1", which is merely a reiteration of the applicability provision; criteria "8" which is a General Compatibility standard; and criteria "9" which provides a tool for the Council to impose reasonable conditions on a Public Hearing Variance to mitigate any negative impact the request may have, if approved.

For this method to succeed, the Village's Public Hearing Variance review criteria would either need to be expanded or modified to include more General Compatibility options. Some examples of General Compatibility criteria from the municipalities reviewed are as follows:

1. That the requested Variance maintains the basic intent and purpose of the subject regulations, particularly as it affects the stability and appearance of the city. (Hollywood)
2. That the requested Variance is otherwise compatible with the surrounding land uses and would not be detrimental to the community. (Hollywood)
3. That the requested Variance is consistent with and in furtherance of the Goals, Objectives and Policies of the adopted Comprehensive Plan, as amended from time to time, the applicable Neighborhood Plan and all other similar plans adopted by the city. (Hollywood)
4. That the need for the requested Variance is not economically based or self-imposed. (Hollywood)
5. That the granting of the variance will not be detrimental to the public welfare or injurious to the other property in the territory in which the property is situated. (Miami-Dade County)

6. The granting of the variance will be in harmony with the general intent and purpose of these land development regulations and that such variance will not be injurious to the area involved or otherwise detrimental to the public welfare. (Miami Beach)
7. The granting of the variance will be in harmony with the general intent and purpose of this Land Development Code, and will not be injurious to the surrounding properties or detrimental to the public welfare. (Doral)

The challenge with this methodology is addressed in the Subsection "The variance criteria – all some or none.." Implementation of this option may result in a Public Hearing Variance code which is predominately within the General Compatibility Standard Spectrum. As such, the Strict Hardship standard criteria become moot.

Variance decisions – the hybrid. As mentioned in the preceding subsection above, a possible unintended outcome of the pick and choose method for selecting hardship criteria may be a Public Hearing Variance code that may principally lean toward General Compatibility. A remedy to the issue raised above may be accomplished by incorporating the concept presented in the subsection entitled "Variance decisions – the alternative path," and thus require a super majority vote when none of the selected criteria are of the Strict Hardship type. In this scenario, the Public Hearing Variance procedure operates as a hybrid to the two alternatives above: it provides for a single path, requires a super voting majority when the criteria do not include Strict Hardship standards, and is more internally consistent as the process is provided for in <u>one</u> Pubic Hearing Variance code.

PART III – ADMINISTRATIVE VARIANCES

Administrative Variances – just a little off the top please. Administrative Variances are a type of variance that provide for an administrative modification to the design standards that may be acted upon at a staff level, and without requiring a public hearing and Council approval. As presented above, not all of the jurisdictions studied provide for an Administrative Variance process. For those jurisdictions that do provide for the Administrative Variance process, the final decision rests typically with the Planning Director as guided by a specific set of standards or criteria in the Code. The sole exception is the City of Tallahassee, which utilizes a development review committee made up of department directors. The basic intent of all the various jurisdictions in utilizing the Administrative Variance process is to provide a ministerial process which accommodates minor adjustments to select code provisions, as applied to a particular type of project. Most of the codes reviewed narrowly prescribe which specific standards were eligible for minor modification. Again with the exception of Tallahassee, all the jurisdictions capped the extent of the authority of staff to modify the standards. The majority of the Administrative Variance

procedures reviewed provide for some sort of mailing notice to the surrounding neighbors. The extent of the notice and form of the notice varies from jurisdiction to jurisdiction. Moreover, each jurisdiction delineates what type of project is eligible to utilize the process and the review criteria. Again, these standards differ in each jurisdiction.

It is important to note that all jurisdictions provide some sort of variance process. The variance concept is utilized because the governing body realizes there may be a need for an exception to the general design criteria rules that have been adopted. There can be different ways of handling different types of variances, provided the Code takes into account due process considerations and attempts to treat similar types of properties similarly. The Code needs to reflect an equitable basis for developing different rules for different properties. Therefore, for example, a *de minimus* Administrative Variance may be acceptable for single-family homes, but not for commercial properties. But, all properties would have the right to seek a Public Hearing Variance.

Eligibility – for those who want to apply. The Village's Code only permits Administrative Variances be applied to single-family or duplex residential properties. More specifically, the eligible property is required to be a single-family home or a single duplex; not a collection of homes or a subdivision. The Miami-Dade County provision is greater in scope and includes townhouse developments, while Miami Lakes limits such requests to existing buildings and their associated accessory structures, regardless of the type of use. The modal response is reflected in the codes of Tallahassee, Coral Springs, Doral, Pinecrest, and Hollywood, which jurisdictions do not limit the types of developments eligible to apply for an Administrative Variance. Miami Beach and Fort Lauderdale do not provide for Administrative Variances. Cutler Bay utilizes the Miami-Dade County's Code for their Administrative Variance process.

The Village of Palmetto Bay, like the majority of the codes reviewed, does not permit an Administrative Variance to be utilized if the property received a prior variance approval, be it an Administrative or Public Hearing Variance approval. Furthermore, the Village permits no more than two Administrative Variance setbacks within any a single development.

With the exception of Tallahassee, all the codes reviewed that utilize an Administrative Variance process attempt to keep the review by staff, or the development review committee, to a minor, *de minimus* modification. Each jurisdiction defines *de minimus* differently, as we will see below, the scope of an Administrative Variance can range from a few inches to a modification of a relatively small percentage of the applicable standard.

Eligibility - Administrative Variance by another name - the Substantial Compliance Review. Although the Village code limits the use of Administrative Variances as described above, the Village Code also provides for a "Substantial Compliance" review by staff for

those developments governed by a zoning resolution with an adopted site plan. Because the Village Code requires strict adherence to the approved site plan and zoning resolution, that adopted plan becomes the site-specific zoning standard for that development. However, through the Substantial Compliance process, the development is provided the ability to flex specific design standards, allowing up to a 5% variation of the site specific zoning resolution site plan standards. Unlike with an Administrative Variance, this review precludes the reduction of minimum and maximum development standards for the site. It does, however, allow for an administrative modification of the zoning resolution's development "envelope." For those developments within the Village that are not of the single-family/duplex residential ilk, nor governed by a site plan resolution, the administrative modification option is not available. Public notice of the Substantial Compliance determination is provided to the surrounding community, with time to object to the staff determination.

Eligibility – residential or beyond? In light of the previous analysis, staff offers no recommendation as to whether the Village should continue to limit the current Administrative Variance eligibility to single-family/duplex residential properties, or whether the Council should expand the eligibility criteria to include other use districts (commercial, multifamily, mixed-use, etc). Expansion makes sense if the Council desires to provide greater flexibility in availability to an administrative adjustment process for other uses. Leaving it as is keeps the scope focused on small-scale single-family residential properties, which are often considered to be of lesser impact as compared to commercial properties. Staff does suggest, however, if the desire is to change the permitted reach of the Administrative Variance with regard to the permitted variation range (i.e. 5%, 10% etc.), the standard should also apply to the substantial compliance provision.

What to vary – a little of this or a little of that? The Village's Administrative Variance code is limited to any one lot coverage, setback, or floor to area ratio. The Village of Palmetto Bay Land Development Code does not use a floor to area ratio (FAR) as a development standard for single family or duplex residential developments. Therefore, this reference should be removed from the Code if the uses are not modified, as FAR applies to commercial uses. The Village, and all of the jurisdictions studied permit minor, or *de minimus* modification of the setback development standards. Miami-Dade County, Miami-Lakes and Hollywood permit *de minimus* modification of the lot coverage/area development standards. Hollywood also permits *de minimus* modification of the minimum lot size, lot width, and floor to area ratio for a parcel. Miami Lakes also allows a minor modification of the district height regulations. Coral Springs permits modification to setbacks and "similar dimensional" standards. Tallahassee's Administrative Variance standard is the most expansive and permits *de minimus* modification of all of its development standards, regardless of use. It is important to note that the modal development standards eligible for Administrative Variance are setbacks and lot coverage. Regardless, other development

standards that may be considered as an option available to administratively vary include the following:

Floor Area Ration
Lot coverage
Types of District
Lot Size
Lot Width
Height
Rear Setbacks
Front Setbacks
Side Setbacks
Between Building Setbacks
Accessory Structures

The list above is provided because the Council may choose to expand the scope of the Administrative Variance process, as it deems acceptable. In making any modification, however, sensitivity should be applied to the expectation of the development pattern within the community. By way of example, a rear yard setback reduction may have a limited visual impact to the development pattern of a neighborhood. However, any reduction to the front yard setback standard, or an increase to the overall height of a building, may create a more obvious impact to the development pattern of a neighborhood. This is not to suggest that the request need be excluded from consideration. Rather, the measure should be the degree of tolerance within the community to permit such requests, and whether the deviations should be permitted at all on an administrative basis. The reach of an Administrative Variance and its implications on the built-out environment are addressed below.

The Maximum Administrative Variance – how far do you want to go? One of the main elements that distinguish an Administrative Variance from a Variance for Public Hearing is how much of the development criteria may be waived. The Village permits a maximum waiver of 5% to be approved administratively. Doral also waives up to 5%. Hollywood allows up to 10%. Miami Dade County allows up to 10 % for lot coverage and 25% for setbacks, however the County does not permit any Administrative waiver to reduce a setback to less than five feet. Miami Lakes and Pinecrest allow up to a twelve inch modification of setbacks. Coral Springs permits 10% not to exceed 12 inches. Tallahassee appears not to have a minimum.

As demonstrated above, the jurisdictions reviewed used either a percentage rule (5%, 10% or 25% respectively), or a maximum request (12 inches), or a combination thereof. These approaches have strengths and weaknesses. As can be seen in Table 1 below, the percentage approach allows the size of the requested waiver to adjust in scale depending upon the size

of the applicable development standard. This approach is often utilized because different zoning districts have differing development standards; with greater or lesser development envelopes. The weakness to this approach is that it may result in requests that are so small they may hardly seem worthwhile, or in the inverse, it may result in request so large, that an administrative decision may no longer be appropriate.

Table 1. Administrative Variances as a percentage of the requirement.

	Percentage to be approved Administratively				
Setback	5%	10%	15%	20%	25%
5	3"	6"	9"	1'-0"	1'-3"
7.5	4.5"	9"	1'-1.5"	1'-6"	1'-10.5"
10	6"	1'-0"	1'-6"	2'-0"	2'-6"
15	9"	1'-6"	2'-3"	3'-0"	3'-9"
20	1'-0"	2'-0"	3'-0"	4'-0"	5'-0"
25	1'-3"	2'-6"	3'-9"	5'-0"	6'-3"
35	1'-9"	3'-6"	5'-3"	7'-0"	8'-9"
50	2'6"	5'-0"	7'-6"	10'-0"	12'-.6"
75	3'-9"	7'-6"	11'-3"	15-0"	18'-9"
100	5'-0"	10'-0"	15'-0"	20'-0"	25'-0"

The implementation of the maximum request modality, as used in Miami-Lakes, Coral Springs and Pinecrest, obviates the overly small/large waiver request dichotomy. The simplicity of this method ensures developments with smaller dimensional standards are afforded some flexibility. Its short coming results in placing a hard cap on projects with greater dimensional standards. The same is true with the cross-breed methodology used by Coral Springs, although the use a percentage rule, the total request is capped at 12 inches.

A final thought to consider before this subsection closes is to recall the previous subsection which addressed what design standards should be eligible to vary? The previous subsection provided the example of the front yard setback and maximum permitted height. As a methodology is contemplated, its impact on various types of requests should be considered. Again, is it acceptable to administratively vary a front yard setback, and if so, to what degree?

The Maximum Administrative Variance – how to strike a balance. The modalities above appear to offer an opportunity to redress the Village's Administrative Variance process in a manner that is both flexible and measured. Staff suggests that the Village continue to use the percentage rule, but provide for a minimum permitted request together with a not to exceed threshold. In this scenario, the suggestion would be to permit all eligible uses be provided a minimum request of up to 12 inches but not to exceed 24 inches. The percentage threshold can remain at 5%, or it can be changed to 10% if the desire is to

provide greater flexibility to developments with greater dimensional minimum standards. The final consideration when applying the methodology is to be sure when and where you want it to apply. Staff seeks Council direction regarding this matter.

The criteria – not just any menu. The Village employs several criteria to be evaluated against an Administrative Variance request. They are as follows:

- Applicant must identify special conditions that exist to the property,
- Applicant must identify how literal interpretation of the Zoning Code would deprive them,
- Project is harmonious with adjacent properties,
- Plan must address runoff,
- Identify all easements,
- Letter verifying construction to comply with fire and building codes,
- All primary and accessory structure can be properly maintained,
- If applicable, accessory structure is permitted,
- Lighting complies with building code,
- Project is in harmony with general appearance of the neighborhood,
- Project is not detrimental to the neighborhood, and
- Project does not create adverse impacts.

The criteria used by the Village are a mixture of Strict Hardship and General Compatibility with some standard quantifiable development provisions such as the requirement to address run-off. With the exception of Hollywood, which has only one criterion, all of the other jurisdictions reviewed use similar combinations as provided by the Village.

Variances, regardless of type, should have review criteria to guide the decision maker's eventual ruling. As it pertains to Administrative Variances, staff offers caution here. The goal should be to provide "clear and precise" standards to administrative modifications that can be applied fairly and consistently. Given the aim, how much discretion or flexibility should be provided to the administrator in making a decision? In Florida, a local legislative body cannot delegate to an administrator "arbitrary discretion" to determine the meaning of the zoning code[4]. This determination was rendered in *Henry v. Board Of County Commissioners of Putnam County*, in which the 5th District Court of Appeal found that a provision of the zoning code provided the code administrator with sufficient criteria in defining a certain specific use. However, the Court also found that the code administrator had improperly exceeded his authority by interpreting the term to include parameters not included in the

[4] *Henry v. Bd. Of County Commissioners of Putnam County*, 509 So.2d 1221, 1222 (Fla. 5th DCA 1987) ("If such standards or criteria do not exist, the zoning provision is a nullity.").

adopted definition. In essence what the court said is that all provisions of the code must be enforced equally and not at the whim and fancy of an administrative official without any ascertainable standard. Hence, the administrative officer must not be delegated the exercise of arbitrary discretionary power[5].

Criteria that provide the clearest and most precise decisions are those that utilize traditional, Strict Hardship standards, or rely upon a specific criterion such as compliance with run-off requirements. However, criteria that only permit approval under a Strict Hardship threshold would likely result in very few Administrative Variances requests being granted. If it is the desire of the Council to provide for a more flexible Administrative Variance procedure, then those standards of the strictest hardship nature would render such an attempt moot. Specific criterion(s) could be implemented, although often they are just reiterations of existing code requirements such as the water run-off example used earlier. A standard should be provided to the zoning administrator to ensure that the decision is not made on an arbitrary basis, and to ensure that the staff action is not capricious. The following are list of suggested criteria that provide for some qualitative measurement, but avoid the Strict Hardship Standard:

1. The Director finds, following review, that a specific development plan illustrating the request for such proposal is consistent with already existing development patterns within the surrounding area and with the standards listed in the Zoning and Land Development Regulations. (Hollywood).
2. Will be in harmony with the general appearance and character of the subject block face or the block face across the street from the subject property or will result in a significant diminution of value of the adjacent property. (Miami-Dade County)
3. Will not be detrimental to the public welfare in that it will have substantial negative impact on public safety due to unsafe traffic movements, heightened pedestrian- vehicular conflicts, or heightened risk of fire. (Miami-Dade County)
4. That the variance shall not be injurious to the surrounding property owners and impair desirable general development of the neighborhood or the community as proposed in the Village's comprehensive plan or otherwise be detrimental to the public welfare. (Pinecrest)
5. The deviation will not be detrimental to the public good or to the surrounding properties. (Tallahassee).
6. The deviation requested is the minimum deviation that will make possible the reasonable use of the land, building, or structure. (Tallahassee)
7. The deviation requested would provide a creative or innovative design alternative to substantive standards and criteria. (Tallahassee)

[5] *City of Miami Beach v. Seacoast Towers-Miami Beach, Inc.,* 156 So.2d 528, 531-532 (Fla. 3d DCA 1963).

8. The impacts associated with the deviation requested are adequately mitigated through alternative measures. (Tallahassee)
9. Technical impracticality - where the strict application of the requirements would be technically impractical in terms of design or construction practices or existing site conditions. The degree of existing non-conforming conditions and the extent to which the proposed modification would lessen the nonconforming condition shall be specifically considered. (Coral Springs)
10. Adjacent development conditions - where the proposed modification provides a superior alternative due to specific conditions on adjacent developments. (Coral Springs)
11. Protection of natural features, including trees, wetlands, archeological sites and similar circumstances. (Coral Springs)

Notification, tell me, tell me, tell me... Of the jurisdictions studied, only Hollywood, Miami Lakes and Miami-Dade County provide for some form of notice to the surrounding area. Pinecrest, Tallahassee and Doral do not have a notice provision for the administrative approval. Hollywood requires a notice be mailed to all property owners within 300 of feet of the receiving property. If no protest is received within 10 days of the mailing, the decision is final. Miami Lakes requires mailed notification only to the adjacent neighbors of the applicant's property; requires that the property be posted; and an advertisement placed in a newspaper of general circulation. If no appeal is received within 30 days of all the notices issuing, the administrative decision becomes final. Miami-Dade County requires written consent and notification of the adjacent property owners. Those adjacent property owners who fail to respond within 90 days will have waived any right to appeal the administrative decision. Miami-Dade County also requires an advertisement be placed in a paper of general circulation before the decision is final, however they only describe the required waiting period as "timely". The Village's Administrative Variance requirements include obtaining the written consent of the adjacent property owners. Written notice is mailed to those property owners when a preliminary decision is issued. That decision becomes final should there be no appeal within 30 days of the notice. Though not codified, the Village also posts the property subject to the Administrative Variance request during the 30 day period.

Staff believes the notification methodology currently employed under the Village code is appropriate given the existing narrow 5% variance range and eligibility limitation of residential single-family and duplex properties. It may be worthwhile to codify the property posting requirement.

This standard may also be deemed appropriate if the desire is to increase the reach of an Administrative Variance, be it through modifying the range of options or eligibility of property type. If, however, the interest is to enhance public notification and government transparency, the notification procedure could be amended to include a final notification beyond the adjacent properties at the time the preliminary decision is rendered. Hollywood

utilizes a 300 foot radius. Our current code scales the distance based on the size of the property (500', 1,500', 2,500'). Keep in mind, the concept behind an Administrative Variance is that it is a minor or *de minimus* modification. The broader the reach of the mailing notification or advertisement, the greater the cost to the applicant.

Please note that all the jurisdictions provide for an appeal of the administrative decision on the Administrative Variance, ordinarily to the Council, at a public hearing.

PART IV – COST ANALYSIS STUDY

As requested by the Mayor and Village Council, this Section provides an analysis of the Village's fees as applied to Administrative Variances and "Simple" Public Hearing Variances. Simple Public Hearing Variances is understood to mean those with regard to a request for waiver of a single zoning provision as applied to a single-family residential home. The study provides a brief discussion as to the current philosophy utilized by the Village in establishing fees. The study analyzes the actual cost to the Village for processing such requests and provides comparisons to other jurisdictions both nearby and throughout the State of Florida. The Section closes with a discussion as to the merits of adjusting the fees studied for this report.

Philosophy – you get what you pay for, or maybe more. Since its inception, the Village utilizes a fee schedule that was originally adopted by the Miami-Dade County. It was later incorporated into the Village's Code when the Village established its own zoning provisions. The fee schedule sought to establish permit fees reflective of the cost of the service being provided. The permit fees include a full range of development services offered by the Village including building permits, inspections, certificates of use, and various zoning request applications. These charges are often called user fees, i.e., they are fees for services rendered directly to a user(s) or person(s) seeking such service. The intent of the user fee is to ensure the cost of service delivery is born by the requestor and not subsidized through general tax revenues. This is done so that revenue collected from general taxes are generally applied to services enjoyed by the public at large, whereas the user fee is specific to one project or individual for their own personal benefit.

In providing a true cost recovery fee, a jurisdiction attempts to reflect the true cost associated with service. Any charge below cost recovery must then be subsidized through general tax revenue for that portion of a service not covered by the fee. Additional consideration should also be applied to what behaviors the Village is seeking to encourage or discourage. Variance requests come with risks; i.e. spending money for a service that may not provide the answer sought. As the cost of a variance rises or falls, so goes the level of risk correspondingly. These points are not offered with either a negative or positive

connotation, rather as a postulate as to what the tolerance the community has towards subsidizing a direct-to-customer service.

The challenge lies with the reasons one applies for a variance request. Some requests seek adjustment due to a hardship, which prevents development of the land to the adopted, typical, and expected standards. If the lot is pie shaped through no fault of the requestor, is it fair to require a variance fee to accommodate a typical development outcome? Conversely, some requests reflect the mere wanton desire of the requestor to exceed zoning provisions and the established standards of the community. In such cases, should the public subsidize such an application for a development that seeks to exceed typical development outcomes? Some requests seek to achieve some broader public purpose such as a Village goal of accommodating affordable housing. Although a fee schedule may be designed to accommodate a delineated Village goal which seeks to serve a broader public purpose, it cannot be structured in such a way to reflect whether the request is for hardship or just wanton desire. Such determinations are often the very subject of a variance request itself, hence why review criteria are provided to the decision making body. Thus the first two scenario's must be weighed against each other and the decision ultimately being the proverbial "what is good for one, is good for the other." This report returns later to this topic following the cost analysis review of the Village's Variance procedure.

Variance costs – Survey says! Staff completed two separate reviews regarding variance fees. The first is a step by step review of the Village's efforts in processing a variance from initial meeting to closing the file. The second was a review of variance fees of those jurisdictions used for comparison in this report and includes the South Miami's and Coral Gables fee schedule. The following is the findings of that review.

In analyzing Public Hearing Variances as applied to single-family homes the study considers the typical amount of time spent for each task. The study was so tailored because Public Hearing Variance applications for commercial properties typically require longer and more complicated reviews. The fee study did not include the cost of the mailing notification or newspaper advertisement as those are charged separately. As with the variance fee, mailers and newspaper ads are also based on cost recovery and are charged separately. The same review procedure was applied to Administrative Variances. The study design captures most of the costs associated with providing such services. Various personnel costs are averaged at the position's salary mid-point and then adjusted for benefits and those tangible items essential to perform the respective position's duties (i.e. vehicle, telephone, radio's, and computer). Not included in the cost study are paper/office materials, printing/reproduction equipment, or facility costs such as electricity, water or rent. Table 2 represents a summary of the findings from the study.

Table 2. Cost Analysis Findings.

Variance Type	Hearing	Administrative			
		Shed Fence Car Port	Setback	Rec. Use Lot Cov.	New SFR
Current fee	$1,255.00	$313.5	$598.5	$741	$963.3
Actual Cost to Village	$2,253.56	$932.87	$932.87	$932.87	$932.87
Cost/Gain	-$998.56	-$619.37	-$334.37	-$191.87	$30.43

The study reveals that Administrative Variances are generally revenue negative with losses ranging from approximately $200 to $600. Only Administrative Variances associated with new residential construction were positive, at a modest $30.43 "profit." With regard to Public Hearing Variances, as applied to single-family homes, they are subsidized by general tax revenue to the tune of approximately $1,000 per application.

Table 3 below depicts the variance fees of those jurisdictions utilized through-out the study and includes Coral Gable, South Miami, and Cutler Bay. The cells shaded green reflect fees roughly on par with that of the Village. Blue cells represent fees that are lower, whereas the red cells reflect higher fees.

Table 3. Variance Fee Comparison Table.

Variance Type	Hearing	Administrative				
		Accessory	Setback	Rec. Use	Lot Cov	New SFR
City of Ft. Lauderdale	$480.00	N/A	Note: $600 if after the fact			
City of Coral Gables	$913.50	N/A				
City of Coral Springs	$1,076.00	$164.00				
City of Doral	$850.00	$500.00				
City of Hollywood	$276.00	$276.00	Note: Plus $653 per added request			
City of Miami Beach	$1,295.00	N/A				
Palmetto Bay	**$1,255.00**	**$313.50**	**$598.50**	**$741.00**	**$741.00**	**$963.30**
Town of Cutler Bay	$1,100.00	$1,204.00				
Town of Miami Lakes	$1,400.00	$350.00				
Village of Pinecrest	$1,500.00	$800.00				
City of Tallahassee	$1,695.00	$1,695.00				
Miami-Dade County	$1,834.19	$403.64	$770.57	$954.04	$954.04	$1,240.25
City of South Miami	$3,000.00	$3,000.00				

What is important to note in attempting to understand this table is that each jurisdiction provides different methodologies to arrive at a fee. Table 3 simplifies, to the degree possible, the various jurisdictions so that they may be viewed in some comparable way. As can be seen above, the Village of Palmetto Bay falls more or less in the middle range of the various rates charged by the jurisdictions reviewed. Hence our rate appears to be neither too high nor too low. Further, when filtering the table for those jurisdictions closest to the

Village (Cutler Bay, Pinecrest, Unincorporated Miami-Dade, South Miami, and Coral Gables), we are generally within a similar fee range.

What to Charge – the price is right. As previously presented in this report, the price of the variance, whether adjusted downwards or upwards will have the likely result of either decreasing or increasing the number of variances requested each year. The reason is simply a question of risk avoidance behavior. As the price falls so does the aversion to risk; as the cost rises, the inverse occurs. With each fall in price, the subsidy grows, the number of variances requests is likely to increase, which in turn increases the total subsidy provided by revenue collected through general taxation for all variance applications received. Again, this is not to be viewed through a prism of good or bad, but rather outcomes. A lower fee, coupled with a possible relaxation of variance review criteria, will likely have a direct impact to the budget. The degree of this impact is not clear as it is difficult to anticipate just how many more applications would be received and what fee the Council desires to charge. Thus, the downward adjustment below cost recovery must be reflective of the community's values.

This dichotomy does not suggest either a positive or negative outcome. Again the issue turns to the very nature of the request. If a zoning application was sought to overcome a burden to development, then fee reduction, i.e. subsidy, may make sense. However there is an inverse to this scenario. There may be zoning applications which are requested merely because the applicant wants to exceed the zoning standard, and in turn, the predominant development pattern of the neighborhood. Such a request could presumably include a full waiver of the development provision. In this scenario, should the residents of the Village subsidize such a request? Remember, regardless of the outcome, approval or denial, the cost of the application remains relatively constant as it is reflective of the entire process.

When applied to Administrative Variance the concern is somewhat diminished. A fee reduction may result in more requests, however, the narrower range of the waiver somewhat mitigates much of the abuse that may result from the applicant's perceived reduced risk in applying.

In light of the analysis presented in this report, staff suggests user fees should be based upon actual cost recovery. As is reflected in Table 2, our current fee structure does not recoup the actual cost to the Village of providing for the variance process. Staff believes that the disparity would grow ever greater if the analysis contemplated commercial uses. Nevertheless, and consistent with Table 3, it is suggested the fee schedule remain unaltered as the Village's variance fees appear to be within the mid-range - as compared to other municipalities.

CONCLUSION

The variance tool is an important relief procedure to those properties with hardships that inhibit typical development outcomes. It should not be a procedure used simply to subvert the Zoning Code. Remember, the Zoning Code is merely a reflection of the development expectations of the community. If the Code is not reflective of those expectations, then it is the Code that must be amended, not varied. Such a condition equally applies to the variance code itself. Viewed from this prism, adjustments to the variance code may be appropriate to permit some contextual considerations of a requesting property and its surrounding development pattern. The hybrid methodology for variance review suggested in this report may achieve an equilibrium which accommodates design flexibility with standards and procedures appropriate to the nature of the request.

All of the jurisdictions studied in this report require a user fee be paid in association with a variance application. In so doing, each jurisdiction is by default seeking to recover all or some part of the cost associated with the service provided. The principal idea in doing so is to ensure the requestor of any given service is the direct beneficiary, and is not subsidized by the general tax revenue of the jurisdiction. In this view, a variance should provide for cost recovery. However, the compromise position appears to be leaving the fees as they are given the Village is a mid-range cost service provider.

In light of this report and its recommendations and suggestions, staff seeks additional direction from the Mayor and Village Council.