



OFFICE OF THE VILLAGE MANAGER

NO. 023-2015

LETTER TO COUNCIL

TO: Mayor Martin Packer and Members of the Village Council

FROM: Jorge M. Gonzalez, Village Manager

A handwritten signature in blue ink, appearing to be "Jorge M. Gonzalez".

DATE: February 6, 2015

SUBJECT: Explanation of the Difference between Variances and Text Amendments

The purpose of this Letter to Council (LTC) is to transmit the attached memorandum which is an explanation of the difference between Variances and Text Amendments provided by Weiss Serota Helfman Cole Bierman & Popok, P.L..

Should you have any questions or require additional information, please feel free to call the Richard Weiss or me directly.

Attachment

Memo

To: Jorge Gonzalez, Village Manager

Through: Richard Jay Weiss, Village Attorney

From: Susan Trevarthen and Kathryn Mehaffey

Date: January 29, 2015

Re: Explanation of the Difference Between Variances and Text Amendments

We've received several questions regarding the difference between a variance and a code change – specifically related to the consideration of proposed changes at Bal Harbour Shops (referred to as the “Shops”). The Village’s Zoning Code (Chapter 21 of the Village Code of Ordinances, referred to as the “Code”) contains regulatory requirements that address exactly where and how a property can be developed. The proposed changes at the Shops do not fully meet all of the requirements of the Village’s Code. Two different approaches to getting the project approved have been suggested by the applicant, should the Council want to approve the project:

- I. Village Council Approval of Variances to the Code; or
- II. Village Council Adoption of Text Amendments to the Code.

The two approaches have different procedures and criteria for review and approval. Given the importance of the proposed project to the Village, we felt it was important to answer the questions.

In brief, a variance is a site specific, one-time Village Council approval allowing a development (and only that development in that situation) to do something in a manner different than what the Village Code provides. A text amendment is a permanent revision of the Village Code which is, once adopted, applicable to everyone and every property.

Each of these options, what they mean, and how they are implemented, are discussed below.

I. Variance

A variance is a Village approval process by which an applicant can request a deviation from the requirements of the Code for a proposed development. Examples of Code requirements that an applicant might request variances for include things like parking requirements, building setbacks

and floor area ratios (often referred to as "FAR"). Approval of a variance changes none of the actual language of the Code, but it gives permission to the applicant to legally develop a property with the approved deviations - or variances - from the Code requirements. Approving a variance is specific only to that request - it permits no one else to utilize the varied standards. All other development, including other projects by the applicant who obtained the variance, is still subject to the original Code requirement.

VARIANCE EXAMPLE

Code requirement: the Code requires specific parking stall and aisle dimensions at specific angles of parking, including 60 degree and 90 degree angled parking. [Section 21-385(o)] The letters shown on the Off-Street Parking Chart diagram correspond to the standards in the Table of Dimensions that follows it.

OFF-STREET PARKING CHART

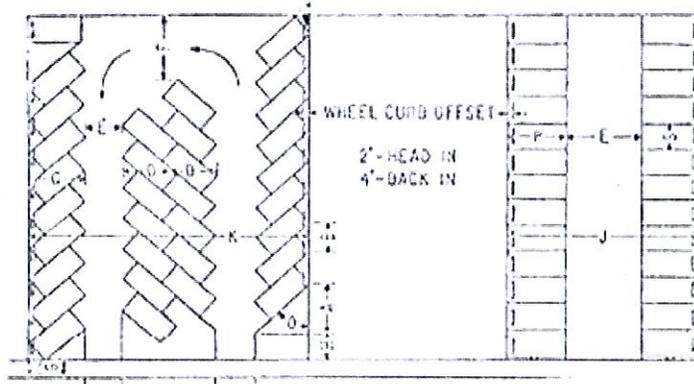


TABLE OF DIMENSIONS (IN FEET)

	O	S	P	A	B	C	D	E	F	G	H	J	K
60°	9.0	19.0	12.1	10.4	21.0	18.8	17.0	15.0	2.6	12.0	59.0	113.6	
	9.5	19.0	12.3	11.0	21.3	18.9	15.5	15.0	2.8	11.5	58.1	111.4	
	10.0	19.0	12.4	11.5	21.5	19.0	14.0	15.0	2.9	11.0	57.0	109.0	
90°	9.0	19.0	0.0	9.0	19.0	19.0	25.0	20.0	0.0	0.0	63.0	126.0	
	9.5	19.0	0.0	9.5	19.0	19.0	24.0	20.0	0.0	0.0	62.0	124.0	
	10.0	19.0	0.0	10.0	19.0	19.0	23.0	20.0	0.0	0.0	61.0	122.0	

Proposed variance request - to permit angled parking at 75 degrees, with related new standards for parking stall and aisle dimensions.

75°	9.0	*****
	9.5	*****
	10.0	*****

** - specific standards would be provided by the applicant, and reviewed, considered and approved by the Council as part of the variance.

If approved, the variance does not change the Code, but the applicant could utilize the 75 degree parking and related parking stall and aisle dimensions in their development. The Table of Dimensions in the Code will continue to look exactly the same as before the variance. Other property owners would be required to meet the original requirements, with only the 60 and 90 degree parking standards. No one, including the applicant in a different development, has future use of the 75 degree parking standards.

Variance Procedure

The process for review and consideration of a variance request is a “quasi-judicial” public hearing process. This is a process where the decision-making body – the Village Council – sits as a neutral third party – like a judge – evaluating the application of the general Village policies (the Code) to a specific property. They hear evidence from the applicant and any interested members of the public affected by the proposed development, weigh the evidence against the Code criteria, and decide on each variance request. People who wish to speak are sworn in and their testimony given under oath.

To obtain a variance, an applicant must submit an application which will include information about how they intend to develop the property, the site plan, and an identification of how their proposed development doesn’t meet the Code.

Once an application is received, the Village staff will evaluate the request, develop a staff report, set a date for a public hearing, and provide notice of the public hearing in the newspaper and to property owners within a 300 foot radius of the subject property. The Village Council will then meet and hold a public hearing at which anyone can be sworn in and speak. The hearing will be conducted as a “quasi-judicial” public hearing. Detailed hearing procedures are set out in Article VI of Chapter 2 of the Village Code of Ordinances. A quasi-judicial hearing requires:

- Notice
- Hearing before a neutral decision maker
- Presentation of evidence
- Sworn testimony
- Questioning of witnesses

Once the Council has heard from the public, the Council will weigh all the testimony and evidence received at the public hearing, in addition to the materials submitted by the applicant, staff or anyone else prior to the hearing. The Council must evaluate whether all of the variance criteria have been met for the specific request.

Variance Criteria

For a property located in the Bal Harbour Business Zoning District, the following criteria for approval of a variance are set out in Section 21-53(a) of the Code:

(a) *Business District.* The Village Council, following a public hearing, may grant a nonuse variance upon a showing by the applicant that the variance maintains the basic intent and purpose of the zoning and other land use regulations as set forth in this section. In considering an application for variance, the Village Council shall affirmatively determine whether the application meets all the following criteria:

- (1) The granting of the variance must be compatible with the surrounding land uses and not be detrimental to the community as a whole.
- (2) The granting of the variance must do substantial justice to the applicant as well as other Property Owners in the district.
- (3) The variance can be granted in such fashion that the spirit of this chapter will be observed and public safety and welfare secured, without tending to create fire or other equally or more dangerous hazard or provoke excessive overcrowding or concentration of people or population.
- (4) Compliance with the strict letter of the regulations will result in a practical difficulty so as to prevent the Owner from using the Property for a permitted purpose or render compliance unreasonably burdensome.

To approve a variance request, the Village Council must determine that they received “competent substantial evidence” showing that all of the four criteria were met. “Competent substantial evidence” is evidence that a reasonable mind would accept as adequate to support a conclusion. Evidence can be submitted by anyone, but must be “fact based.” Subjective preferences (“I don’t like it” or “I love it”) are not fact based, and do not constitute Substantial Competent Evidence. Note that these criteria do **not** require the applicant to prove the existence of a hardship, which is a criteria for variances in many codes; they only require demonstration of a “practical difficulty.”

Variance Decision

Once the Village Council approves an individual variance, the applicant can develop the property under the “varied” code standard rather than the actual Code standard.¹ The varied Code standard will *only* apply to the specifically approved situation, not to any other situations or properties.

¹ If a protest is filed against a variance pursuant to Section 21-55 of the Code, then a four-fifths vote of the Village Council is required:

... In case, however, of a protest against such application by the Owners of record of 20 percent or more, either of any area of Lots included in such proposed change, or those immediately adjacent in the rear thereof extending 375 feet therefrom, or those directly opposite thereto extending 375 feet from the street frontage of such opposite Lot, such amendment shall not become effective except by the favorable vote of four-fifths of all members of the Village Council.

To our knowledge, this 1980 Code provision has never been invoked. If a protest were to be filed, we would need to interpret how to apply its provisions to the facts of the particular application under protest.

If the applicant or a party affected by and does not like the Council’s decision on the variance, they may appeal to the Circuit Court by filing a “Writ of Certiorari”. Certiorari is a narrow, limited Circuit Court review in which the Court evaluates:

- Whether procedural due process was accorded;
- Whether the essential requirements of the law were observed; and
- Whether the decision is supported by competent substantive evidence.

See, e.g., Metropolitan Dade County v. Betancourt, 559 So. 2d 1237, 1239 (Fla. 3d DCA 1990) (“The proper standard of review in a zoning variance case is whether the lower tribunal had before it competent substantial evidence to support its finding” citing *Town of Indialantic v. Nance*, 400 So. 2d 37 (Fla. 5th DCA 1981)).

II. Text Amendment

The second approach to resolving the gap between the proposed project and the current Code – text amendments to the Code – would actually, and permanently, change the Village Code. This is done by following a process to legally *amend* or *change* the actual *text* of the Code – hence “text amendment.”

TEXT AMENDMENT EXAMPLE

Code requirement – the Code requires specific parking stall and aisle dimensions at specific angles of parking, including *60 degree* and *90 degree* angled parking.

Proposed text amendment – to revise (*amend*) the Code to provide specific and *permanent* language permitting angled parking at *75 degrees*, with related parking stall and aisle dimensions.

OFF-STREET PARKING CHART

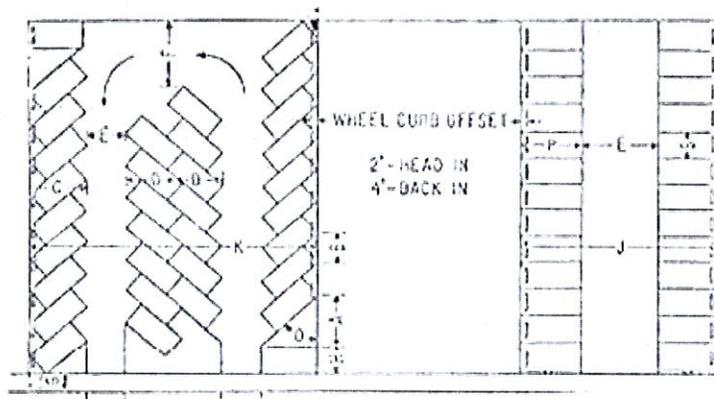


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	10.0	19.0	12.4	11.5	21.5	19.0	14.0	15.0	2.9	11.0	57.0	109.0
75°	<u>9.0</u>	**	**	**	**	**	**	**	**	**	**	**
	<u>9.5</u>	**	**	**	**	**	**	**	**	**	**	**
	<u>10.0</u>	**	**	**	**	**	**	**	**	**	**	**
90°	9.0	19.0	0.0	9.0	19.0	19.0	25.0	20.0	0.0	0.0	63.0	126.0
	9.5	19.0	0.0	9.5	19.0	19.0	24.0	20.0	0.0	0.0	62.0	124.0
	10.0	19.0	0.0	10.0	19.0	19.0	23.0	20.0	0.0	0.0	61.0	122.0

* underlined text indicates additions to the Code.

** specific standards would be provided by the applicant, and reviewed, considered and approved by the Council as part of the text amendment change.

If approved by the Village Council, the text amendment would change the Code – permanently – as demonstrated above. Other property owners, and additional development by the applicant, could utilize the new standards in all future developments.

Text Amendment Procedure

Review and consideration of a request for a text amendment is a “legislative” process. The Village Council sits as the general policy maker. They will evaluate the impacts of changing the overarching and applicable Code – as it will uniformly apply to everyone affected by that provision of the Code, not just to a specific property or person.

Often, Code or text amendments are initiated by a local government staff or governing body. However, an individual applicant may also request that the Council consider amending the Code. An applicant must submit an application which will include the specific language they want changed, added to, or deleted from the text of the Code. Their application will include an explanation and justification for the proposed amendment.

Once an application is received, the Village staff will evaluate the request, develop a staff report, and set a date for a first reading by the Village Council, following its review recommendation and public hearing while sitting as the designated Local Planning Agency. The Village Council would, at its next meeting, conduct a second reading and public hearing. Because the proposed change will apply to everyone the Code applies to, there is not an individual subject property and no individual notices are mailed. Notice of the public hearing is published in the paper. At the public hearing, anyone can speak on the proposed change. Speakers are not sworn, and their testimony is not given under oath.

Once the Council has heard from the public, the Council will consider the comments received from the public, in addition to the materials submitted by the applicant, staff or anyone else prior to the hearing and decide whether to approve or deny the amendment. The formal requirements for a “legislative” hearing are:

- Notice
- Public hearing
- Presentation of evidence

Text Amendment Criteria

The Village Code of Ordinances does not set out criteria for the amendment of the Code. However, the Village Council must have a “reasonable basis” to support any action they take. Generally, the Village Council will evaluate whether the proposal serves the public health, safety, and welfare of the Village and its residents. In addition, when specifically amending the Zoning Code, the Council will evaluate whether the text amendment is consistent with the applicable provisions of the Village’s adopted Comprehensive Plan.

Text Amendment Decision

If the Village Council approves a text amendment, the Village Code is permanently changed. The applicant can develop the property under the new Code requirement rather than the old Code requirement. The new Code requirement will apply to all future situations or properties, not just for the applicant, but for other property owners as well. Once approved, the new standards will be allowed as of right, without special approval by the Village Council.

If the applicant or a party affected by the Village’s decision does not like the Council’s decision to amend the text of the Code, they may appeal to the Circuit Court. The review by Circuit Court is *very* limited and is judged by a “Fairly Debatable” standard. *See Kuvin v. City of Coral Gables*, 62 So. 3d 625, 632 (Fla. 3d DCA 2010). In the appeal of a legislative decision such as a text amendment, the Court evaluates:

- Whether there was a reasonable basis to support the Village’s action

The fairly debatable standard gives great *deference* to the decision of the local government. In fact, the Court may not second guess the wisdom of the local government’s action, but must affirm their decision if there is any reasonable basis for the decision and there are no constitutional violations.