



December 10, 2021

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AND REGULAR U.S. MAIL**

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**Re: Response to FLUEDRA Request for Relief
910 S.Bayshore Blvd., Safety Harbor, Florida 34695 (2021-10-VAR)**

Dear Messrs. Cremer and Steady:

This is in response to the Nov. 1, 2021 Request for Relief under the Florida Land Use and Environmental Disputes Resolution Act (“FLUEDRA”), § 70.51, *Fla. Stat.*, in relation to the referenced property (the “Property”).

Preliminary comments

FLUEDRA applies where a Property Owner “believes that . . . a development order . . . or an enforcement action . . . is unreasonable or unfairly burdens the use of the owner’s real property.” § 70.51(3), *Fla. Stat.* In their FLUEDRA request, the Property Owner alludes to an “enforcement action.” For the purposes of clarity and efficiency in the instant dispute resolution proceedings, the focus of the FLUEDRA request is a *development order* (the “Development Order”) – not an enforcement action.

More specifically, this matter results from the Property Owner’s amended application for three variances (“Variance Application”), and the related Development Order denying the Variance Application. Both the Variance Application, and the Development Order, are included in Property Owner’s FLUEDRA request as Exhibits C and B, respectively. The Variance Application and Development Order are styled “2021-10-VAR”.

Variances requested: buffers (2) and fence (1)

As indicated in the Property Owner’s FLUEDRA filing, the owner submitted a Variance Application, requesting the following three variances:

1. Wetland Buffer variance #1 (Basketball Court)
2. Wetland Buffer variance #2 (Playset)

3. Fence variance (#3)

(See Exhibit C to Owner's FLUEDRA request.)

Under § 234.02(B) of the City's Land Development Code ("LDC"), a variance request must meet eleven standards, or criteria, for approval (highlighted in the enclosures). It is the applicant's burden to present competent substantial evidence to support their Variance Application. There is no "guaranteed" right to a variance approval.

Variance not requested: wetland variance

As distinguished from the two requested wetland *buffer* variances, the Property Owner did not request a *wetland* variance. As pointed out in their FLUEDRA request, "the Property owner did not ask for" a wetland variance (p.1); a wetland variance was "not requested by the Property Owner" (p.2); and the "Property Owner did not apply for" such a variance (p.2). Further, the Property Owner confirms that "the basketball court is not in the wetland" (p.1), and it "does not encroach into the wetland" (p.2). Their FLUEDRA filing is very clear: they did not need a *wetland* variance.

The wetland variance was not included in the Development Order denying the Variance Application because it was not part of the Variance Application request. As stated in the Property Owner's request letter, the Board of Appeals "denied the Variance Application" (p.3).

The Property Owner also states in their FLUEDRA request letter that, in addition to never requesting a wetland variance, "the variance in the wetland is irrelevant and unnecessary and only created confusion" at the hearing below (p.3).

We are hoping to avoid furthering this confusion, and to this end, wish to clarify and emphasize the City's position that the instant dispute resolution procedure is appropriately focused on (1) the Variance Application; and (2) the Development Order.

Failure to exhaust administrative remedies

Section 70.51(10)(a) of FLUEDRA provides that, "before initiating a proceeding . . . the owner must exhaust all nonjudicial local government administrative appeals . . ." but can initiate a proceeding if the appeals take longer than four months.

The Property Owner has not yet exhausted, or has failed to exhaust, available nonjudicial local government remedies. The order was issued less than two months ago, and the city's LDC (§ 234-2(F)) allows for reconsideration of Board of Appeals' decisions. The Property Owner's failure to attempt reconsideration directly contradicts the statutory mandate that they "must exhaust". The Property Owner's request is not ripe, and therefore, is barred by the statute.

The Development Order

As to the Variance Application and resulting Development Order, Staff recommended denial in relation to the Board of Appeals' consideration of the Variance Application. The Board of Appeals held a "lengthy and technical" quasi-judicial hearing (see FLUEDRA request, p.3).

The Property Owner was given an opportunity to be heard, and present evidence in support of their application. Ultimately, the Board of Appeals denied the Property Owner's three variance requests. As stated above, the Property Owner never applied for a wetland variance, and it was not needed for their proposed improvements.

Under the City's LDC, "no action shall be valid unless authorized by a majority of the Board [of Appeals] members *voting on the request.*" (emphasis added). While the Board may have discussed and voted on an extraneous matter that was not part of the Property Owner's request (i.e., in this case, a wetland variance), their vote is not "valid" if it is not based *on the request.* Therefore, it was completely appropriate for the Board of Appeals to omit this from the Development Order denying the variance request.

The Property Owner does not seem to suggest that the Development Order itself was unreasonable or unfairly burdensome to the use of their Property. Instead, their request alleges the failure to include an "irrelevant, unnecessary" approval in the Development Order has somehow had an adverse impact on the use of their Property.

The Property Owner never requested a wetland variance, and did not have any reason to expect that the Board of Appeals would grant a wetland variance. The Property Owner clearly indicates that a wetland variance was not needed. The Development Order cannot be unreasonable and unfairly burdensome based on an unnecessary variance that was neither requested nor granted. The Owner has not shown, nor alleged, that the Development Order denying their requested three variances was unreasonable or unfairly burdensome to the use of their Property.

Statement of public purpose of regulations

As stated in § 234.00(A)(2), of the LDC, variances may be authorized "when special conditions exist." Their purpose is "to provide for a procedure to modify the terms of [the LDC] where literal enforcement of the requirements would result in an unnecessary hardship." No variance can be "contrary to the public interest." These regulations provide multiple standards, or criteria, to ensure that the public interest is paramount in consideration of any variance request.

The prohibition on construction within a wetland buffer, and the fence height limitation, both serve dual public purposes of (1) ensuring protection of the City's wetland ecosystems; and (2) maintaining community aesthetics.

Summary

The City's position is that the Board of Appeals properly heard and decided the Property Owner's Variance Application based on applicable LDC criteria for variance requests, and the resulting Development Order is based on ample competent substantial evidence in the record below. Additionally, the Property Owner has not exhausted available non-judicial remedies, making this matter unripe for initiation of FLUEDRA proceedings.

The Property Owner's FLUEDRA request focuses mainly on a variance that was not needed, was never requested, and was never granted. There is no indication of a failure of due process or other error at the proceedings below. Perhaps most importantly, however, is that fact that very little (if any) attempt is made in their filing to suggest that the Development Order itself is "unreasonable" or "unfairly burdens" the use of their Property.

Based on the above, it is the City's position that the Development Order is not unreasonable and does not unfairly burden the use of the Property.

We appreciate your consideration of the above, and are available to answer any questions, and address any concerns, you may have.

Very truly yours,



Jeff E. Wright

enclosures: excerpts from Safety Harbor LDC

**EXCERPTS FROM
Safety Harbor Land Development Code**

234.00 Variances and appeals.

234.02 Variances.

- (A) The Board has no authority to consider or grant the following variances:
- (1) Variances which permit the establishment of a use in a zone or district in which such use is not permitted by the regulations of the zoning district involved;
 - (2) Variances which permit the establishment of a lot or parcel which must be combined under the terms of this Code or which is part of a larger parcel which when established does not meet the area or width requirements of the applicable zoning district;
 - (3) Variances which permit an increase in density above that allowed by the applicable zoning district or Comprehensive Plan designation;
 - (4) Variances which would purport or modify any definitions set forth by the Code;
 - (5) Variance which relate in any way to a nonconforming use.
- (B) No variance shall be granted by the Board of Appeals unless a positive finding, based upon substantial competent evidence, either presented at a public hearing held by the Board or reviewed personally by the Board members, is made on each of the following standards:
- (1) The need for the proposed variance arises out of the physical surroundings, shape, topographical condition, or other physical or environmental conditions that are unique to the specific property involved.
 - (2) Strict applications of the provisions of the Code involved will deprive the applicant of reasonable use of the property meaning that the Code's intent will not be furthered and the application of the Code to the applicant is unfair.
 - (3) Granting the variance will not confer any special privilege that is not allowed for other lands, buildings, or structures in the same zoning district.
 - (4) The variance granted is the minimum necessary that will afford relief.
 - (5) The conditions or special circumstances peculiar to the property have not been self created.
 - (6) Is not based upon the presence of nonconformities or other variances granted in the district or adjoining neighborhood.
 - (7) Is not based upon conditions, including financial, personal to the applicant.
 - (8) Will not substantially diminish property value, nor alter the essential character of the neighborhood.
 - (9) Will not have a detrimental effect upon the public interest, health, safety, and welfare.
 - (10) Will not create a negative impact upon the provisions of an adequate level of service for public facilities by the community.
 - (11) Conforms to the general intent of this Code, requirements of the Comprehensive Plan and requirements of the Rules Concerning the Administration of the Countywide Future Land Use Plan pertaining to the adjustment of intensity standards.

* * * *

234.04 Authorization of variance or appeal.

- (A) No action shall be valid unless authorized by a majority of the Board members voting on the request.

53.01 Wetland and shoreline buffers.

- (A) A buffer shall be provided on all lands within 25 feet of any property designated on the Future Land Use Map as Preservation (P), or any property determined to be wetlands under the jurisdiction for the State of Florida ("jurisdictional wetlands"); and all lands within 15 feet to the top of the bank of any creeks, channels, or related waterways which contain jurisdictional wetlands.
- (B) For purposes of this section, a buffer shall mean an area reserved as open space, free of structures, impervious surface, roadways, storage and other enclosures or appurtenances.
- (C) The use of native vegetation as a buffer shall be used where such vegetation exists.

(Ord. No. 2015-02, § 2, 3-16-2015; Ord. No. 2019-05, § 2, 9-16-2019)