

ORDINANCE NO. 11-13

AN ORDINANCE OF THE TOWN OF INDIALANTIC, BREVARD COUNTY, FLORIDA RELATING TO ZONING; MAKING FINDINGS; AMENDING SECTION 17-4, CODE OF ORDINANCES BY ADDING DEFINITIONS; AMENDING SECTION 17-141, CODE OF ORDINANCES BY CLARIFYING AND REVISING THE STANDARDS FOR ISSUANCE OF A VARIANCE; PROVIDING FOR SEVERABILITY/ INTERPRETATION; PROVIDING FOR REPEAL OF ORDINANCES AND RESOLUTIONS INCONSISTENT HEREWITH; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the standards for the granting of a zoning variance set forth in Chapter 17 are in need of simplification and standardization consistent with Florida case law relating to the grant of zoning variances;

WHEREAS, the unnecessary hardship standard is used by most Florida local government jurisdictions, and few jurisdictions in Florida use the practical difficulty standard;

WHEREAS, the practical difficulty standard is used in other states, including among other states Maryland, New York, and Ohio. See, e.g., *Loyola Federal Savings & Loan Ass'n. v. Buschman*, 176 A.2d 355 (Md. 1961); *Tozzo v. Board of Appeals on Zoning*, 578 N.Y.S.2d 666 (App. Div. 1992); *Peterson v. Washington Court Athletic Club*, 502 N.E.2d 252 (Ohio App. 1986);

WHEREAS, the practical difficulty standard seems to be the most appropriate standard to utilize however based on three reasons;

WHEREAS, the Town has for fifty years utilized two standards in granting zoning variances, including the “practical difficulty” or “unusual difficulty” standard and the “unnecessary hardship” standard;

WHEREAS, the undue and unnecessary hardship standard is a very rigid standard, which is so strict almost no variance could ever be granted;

WHEREAS, an unnecessary hardship may not be found unless no reasonable use can be made of the property. See, e.g., *Thompson v. Planning Commission of City of Jacksonville*, 464 So.2d 1231 (Fla. 1st DCA 1985); see also *Maturo v. City of Coral Gables*, 619 So.2d 455, 456 (Fla. 3d DCA 1993); *Herrera v. City of Miami*, 600 So.2d 561 (Fla. 3d DCA), rev. denied, 613 So.2d 2 (Fla. 1992); *Bernard v. Town Council of Town of Palm Beach*, 569 So.2d 853 (Fla. 4th DCA 1990);

WHEREAS, one commentator writes that,

Courts have distinguished between “use variances” [which aren’t permitted in Indialantic and most other Brevard municipalities], which allow a departure from the restrictions on uses ordinarily allowed within a zone, and “area variances,” which allow deviation from the general rules on building and lot size, and frontage and setback distances, etc. Since use variances are assumed to have a greater impact on the community, the “unnecessary hardship” standard was

developed and applied to them, but a lesser standard requiring only showing of a “practical difficulty” is applied to area variances.

Reynolds, Osborne M., Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One But Himself to Blame?, 20 Urb.Lawyer 1, 6-7 (1988) [hereinafter: Self-Induced Hardship in Zoning Variances].

WHEREAS, one court has explained that because a use variance has a greater impact on the character of the zoned district than an area variance, the stricter standard of an unnecessary hardship is applied to use variances. The practical difficulty standard is applied to area variances. See Village of Bronxville v. Francis, 135 N.E.2d 724, aff’g, 150 N.Y.S.2d 906 (N.Y. 1956);

WHEREAS, the Zoning and Planning Board, sitting as the Local Planning Agency, finds this Ordinance to be consistent with the Town’s Comprehensive Plan;

WHEREAS, the Town Council adopts the findings of the Local Planning Agency as to consistency with the Town Comprehensive Plan; and

WHEREAS, the Town Council finds that this Ordinance will promote the public health, safety, welfare, economic order, and public interest and convenience, of the Town.

NOW, THEREFORE, BE IT ENACTED by the Town Council of the Town of Indialantic, Brevard County, Florida:

SECTION 1. That Section 17-1 of the Code of Ordinances of Indialantic, Florida, is hereby amended to read as follows:

Sec. 17 1. Short title.

This chapter shall be known as the “Indialantic Zoning Code Ordinance” and may be so cited.

SECTION 2. That Section 17-4 of the Code of Ordinances of Indialantic, Florida, is hereby amended to read as follows:

Sec. 17 4. Definitions.

As used in this chapter, the following words and phrases shall have the meanings indicated:

\* \* \*

(50.2) Pervious. Being of a substance that can be penetrated or permeated such as a soil that allows passage to lower levels.

(50.3) Practical difficulty. In the case of a variance, a practical difficulty is a standard which is similar to but less rigorous than the unnecessary hardship standard. It is a non-self created characteristic of the property. The standard asks whether a literal enforcement of a zoning regulation will create a practical difficulty in the use of the parcel of land for the purpose or in the manner for which it is zoned. Some of the factors that may be considered in determining

whether a practical difficulty exists include: (i) how substantial the variance is in relation to the requirement sought to be varied; (ii) whether a substantial change will be produced in the character of the neighborhood; (iii) whether the difficulty can be obviated by some method feasible for the applicant to pursue other than by a variance; and (iv) whether, in view of the manner in which the difficulty arose, the interest of justice will be served by allowing the variance. Finding that factors (i) (that the variance requested is not substantial); (ii) (that a substantial change in the character of the neighborhood will not occur if the variance is granted); (iii) (that the difficulty occurring can only be obviated by grant of the variance); and (iv) (that the interest of justice will be served by granting of the variance), are all factors in support of the variance.

(51) Principal building. A building in which is conducted the principal use of the lot on which it is situated. In a residential district any dwelling shall be deemed the principal building on the lot on which the same is situated. An attached carport, shed, garage or any other structure with one or more walls or a part of one wall being a part of the principal building and structurally dependent, totally or in part, on the principal building, shall be deemed part of the principal building, but a detached and structurally independent carport, garage, or other structure shall be deemed an accessory building.

\* \* \*

(69) Tourist court. Same as “motel.”

(69.1) Unnecessary hardship. In the case of a variance, an unnecessary hardship is a standard which is similar to but much more rigorous than the practical difficulty standard. The unnecessary hardship standard is a very restrictive standard. It is a non-self created characteristic of the property in question which renders it virtually impossible to use the land for the purpose or in the manner for which it is zoned. The standard asks whether a literal enforcement of a zoning regulation will create an unnecessary hardship which makes it virtually impossible to use the land for the purpose for which it is zoned.

(70) Use. The purpose of which land or a building is arranged, designed or intended, or for which either land or building is or may be occupied or maintained.

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(71.1) Vacation Rental. An attached or detached residential structure or dwelling unit that is rented, leased or assigned for tenancies of less than ninety (90) days or three (3) calendar months, whichever time period is less, and for a monetary consideration, or which is advertised or held out to the public as a place periodically rented for a monetary consideration for periods of less than 90 days or three (3) calendar months, whichever time period is less. For the purposes of this chapter, a vacation rental is a commercial use. For the purposes of this definition, subleases for less than 90 days are to be considered as separate rental periods. This definition does not include month-to-month hold-over leases from a previous lease longer than 90 days. Vacation rental use does not include hotels and motels, which are specifically addressed in specific zoning districts. A vacation rental unit may also be a bed and breakfast facility. A vacation rental unit may be located in an apartment or condominium building or a single-family residential dwelling unit, but only as a specifically permitted use as is noted in a particular zoning district.

(71.2) Variance. A variance is a modification of, or deviation from, the regulations of chapter 17 of the town code of ordinances, the Indialantic zoning code, which is authorized and approved by the board of adjustment after the board finds that the literal application of the provisions of the zoning code would cause an unnecessary hardship or a practical difficulty in the use or development of a specific parcel of land or building.

(72) Yard. An open space (except as permitted herein) other than a court, on a lot, unoccupied and unobstructed from the ground upward, except as otherwise provided in this Chapter. See also definitions of Front yard; Rear yard; Side yard, corner, and Side yard, interior.

SECTION 3. That Section 17-141 of the Code of Ordinance of Indialantic, Florida, is hereby amended to read as follows:

Sec. 17 141. Authority.

(a) The board of adjustment may grant variances in specific cases to as follows:

(1) To vary or alter adopt the strict application of any of the requirements of this chapter in the case of exceptionally irregular, narrow, or shallow lots or unusual topographical conditions, whereby such application of a particular requirement would result in a practical difficulty unusual difficulties or an unnecessary hardship not caused by the applicant himself that would deprive the owner of the reasonable use of the land or building involved.

(2) To vary the strict application of the provisions of this chapter relating to the use, construction, or alteration of buildings or structures, or the use of land, which imposes unusual and practical difficulties or unnecessary hardships, and such variations of the strict application of the provision of this chapter:

(b) To obtain a variance the applicant must demonstrate to the board of adjustment that:

(1) A practical difficulty or an unnecessary hardship is caused by the literal application and enforcement of the zoning code provision from which a variance is sought;

(2) (a) Will The granting of the variance will not authorize a use prohibited, or result in a use variance, in the district in which the property is located;

(3) (b) Will not The preponderance of evidence presented at the variance hearing does not demonstrate that the granting of the variance will seriously impair the use of adjacent property, or significantly reduce the value of adjacent property, regardless of the zoning district in which the adjacent property is located in the same district;

(4) (c) Is The need for the variance is made necessary by the unique character of the property; and

(5) The need for the variance is not caused in any way by the owner or occupant of the property upon which the variance is sought; .

(6) That the request for a variance is not solely based on an economic disadvantage to the owner or occupant of the property upon which the variance is sought, because an economic disadvantage to an applicant does not constitute a hardship or practical difficulty sufficient to warrant the granting of a variance; and

(7) That the request for a variance is not solely based on a need or desire of the owner or occupant of the property upon which the variance is sought to be obtained to gain an economic benefit, because an economic advantage to an applicant does not constitute a hardship or practical difficulty sufficient to warrant the granting of a variance.

(3) In determining whether to grant a variance the board of adjustment may consider the goals, objectives and policies of the comprehensive plan.

(4)(3) In granting a variance, the board of adjustment may prescribe any conditions that it deems necessary or desirable in the furtherance of the purpose of this chapter.

### SECTION 3. Severability/Interpretation Clause.

(a) In the event that any term, provision, clause, sentence or section of this Ordinance shall be held by a court of competent jurisdiction to be partially or wholly unenforceable or invalid for any reason whatsoever, any such invalidity, illegality, or unenforceability shall not affect any of the other or remaining terms, provisions, clauses, sentences, or sections of this Ordinance, and this Ordinance shall be read and/or applied as if the invalid, illegal, or unenforceable term, provision, clause, sentence, or section did not exist.

(b) In interpreting the provisions of this Ordinance, the following rules and symbols shall apply:

(1) Words underlined are additions to existing text.

(2) Words stricken through are deletions from existing text.

(3) Asterisks (\* \* \*) indicates a deletion from the Ordinance of text existing in the Code of Ordinances. It is intended that the text in the Code of Ordinance denoted by the asterisks and not set forth in this Ordinance shall remain unchanged from the language existing prior to adoption of this Ordinance.

(c) Any legislative intent included in this Ordinance shall not be codified.

SECTION 4. Ordinances and Resolutions in Conflict. All ordinances or resolutions or parts thereof that may be determined to be in conflict herewith, except portions of the Comprehensive Plan, are hereby repealed.

SECTION 5. Effective Date. This Ordinance shall become effective upon adoption.

PASSED by the Town Council of the Town of Indialantic Florida, on first reading on the \_\_\_\_ day of \_\_\_\_\_, 2011, and ADOPTED by the Town Council of the Town of Indialantic, Florida, on final reading on the \_\_\_\_ day of \_\_\_\_\_, 2011.

TOWN OF INDIALANTIC, FLORIDA

By: \_\_\_\_\_

David Berkman, Mayor

ATTEST: \_\_\_\_\_ (TOWN SEAL)

Laura Eaton, Town Clerk