

5. Petitioner's Property is located within the corporate boundaries of the City in the Mixed-Use Downtown within the Courthouse Square Overlay Zoning District.
6. The City has enacted ordinances which, collectively, are referred to as the City of Bloomington Unified Development Ordinance (the "UDO").
7. This Petition seeks judicial review of the BZA's denial of a development variance.
8. According to the UDO, the BZA must apply the following factors to grant a variance: (1) The approval will not be injurious to the public health, safety, morals, and general welfare of the community; and (2) The use and value of the area adjacent to the property included in the development standards variance will not be affected in a substantially adverse manner; and (3) The strict application of the terms of this UDO will result in practical difficulties in the use of the property; that the practical difficulties are peculiar to the property in question; that the development standards variance will relieve the practical difficulties.
Bloomington Municipal Code 20.06.080(b)(3)(E)(1); Ind. Code 36-7-4-918.5 (outlining the minimum standard that is incorporated in the Bloomington Code).
9. The UDO does not define "practical difficulties."
10. "Practical difficulties" is a specific phrase that has been defined by the Indiana Court of Appeals to be determined by the following factors: a) whether the petitioner will suffer a significant economic injury from the enforcement of the zoning ordinance; b) "whether the injury is self-created or self-imposed"; and c) "whether any feasible alternative is available, within the terms of the ordinance, which achieve the same goals of the landowner." Metro. Bd. of Zoning Appeals, Div. II v. McDonald's Corp., 481 N.E.2d 141, 146 (Ind. Ct. App. 1985).

11. In 2018, Petitioner submitted a development proposal for the Property, which was to construct a new four-story mixed-use building including 16 condominiums (the "Project").
12. The Project was approved by the City's Plan Commission unanimously.
13. A series of delays affected the commencement of the Project.
14. Due to the original approval lapsing, Petitioner had to seek reapproval of the Project in 2022.
15. Because the UDO had changed since the first approval, the Project now required two variances to deviate from new development standards: (1) to allow for a smaller percentage of total first floor facade area dedicated to large display windows and (2) to allow for a smaller percentage of total ground floor area dedicated to a nonresidential use other than a parking garage use.
16. Petitioner, through its representative, Randy Lloyd ("Lloyd"), appeared for the BZA for the first time on August 25, 2022.
17. Lloyd presented information at the first hearing, along with Ryan Strauser, as a representative for the architect.
18. City staff recommended to the BZA that both variances be denied.
19. At the August 25, 2022, meeting, BZA President Barre Klapper stated, "Legally, I think the really tough thing about variances and the way that 'practical difficulties' are defined, is really narrow. It doesn't really allow us, it doesn't allow us to think about their business model or what's being proposed. We just have to look at the piece of property."

20. Staff and counsel for the City instructed the BZA that they could not consider financial hardship or the Petitioner's desires when making their determination on the variances.
21. The BZA voted to table the decision until the following meeting.
22. At the second meeting, on September 22, 2022, with Lloyd present as Petitioner's representative, the BZA approved the first variance but tabled its decision on the second variance.
23. At the second meeting, legal counsel for the City acknowledged that the Court of Appeals had established three factors for determining practical difficulties, but did not provide the entirety of the factors to the BZA, and omitted the requirement to consider the landowner's development goals. When reciting the last factor to be considered for establishing "practical difficulties," the City's legal counsel stated: "whether there are feasible development alternatives."
24. At the third meeting, on October 20, 2022, Planning and Transportation Director, Scott Robinson, and staff, discouraged the BZA members from making what the City deemed to be policy-level decisions in weighing Petitioner's variance.
25. Lloyd and Christine Bartlett were present at the third meeting and presented information as Petitioner's representative and counsel, respectively.
26. At the third meeting, the BZA was instructed by City staff that it should not consider the landowner's goals for developing the Property and legal counsel for the City legal did not instruct the BZA that they should consider the landowner's goals for developing the Property. In fact, when reciting the last factor to be

considered for establishing “practical difficulties,” legal counsel stated: “whether there are feasible development alternatives.”

27. BZA member, Joe Throckmorton, immediately prior to abstaining from the vote, stated that he understood he was not allowed to consider the economics or the desires of the Petitioner, that the decision needed to go to another body of the City, and that the City was “handcuffing” the BZA on this decision.
28. BZA President Klapper, prior to voting against the second variance, stated she believed approval of the second variance to be outside the BZA’s purview to approve.
29. Petitioner submitted materials to the BZA, which were distributed to the BZA members in a packet.
30. City staff did not present evidence to support its findings.
31. The BZA voted to deny the Petition and adopted the City staff’s findings, which were:

GROUND FLOOR NONRESIDENTIAL USE OTHER THAN PARKING GARAGE USE VARIANCE

(1) The approval will not be injurious to the public health, safety, morals, and general welfare of the community; and
PROPOSED FINDING: The granting of the variance to allow for a smaller percentage of total ground floor area dedicated to a nonresidential use other than a parking garage use will be injurious to the public health, safety, morals, or general welfare of the community. The overlay desires robust nonresidential uses on the first floor, while providing ample percentage for garage or residential space. A reduced retail space devalues the interface between the public and private realm on one of the City’s busiest downtown commercial/retail corridors.

(2) The use and value of the area adjacent to the property included in the development standards variance will not be affected in a substantially adverse manner; and
PROPOSED FINDING: The granting of the variance to allow for a smaller percentage of total ground floor area dedicated to a nonresidential use other than

a parking garage use will not affect the use and value of the area adjacent to the property in a substantially adverse manner. The site is providing 19% of the ground floor as commercial space.

(3) The strict application of the terms of the Unified Development Ordinance will result in practical difficulties in the use of the property; that the practical difficulties are peculiar to the property in questions; that the development standards variance will relieve the practical difficulties.

PROPOSED FINDING: The denial of the variance to allow for a smaller percentage of total ground floor area dedicated to a nonresidential use other than a parking garage use will not result in practical difficulties in the use of the property. The site can be developed meeting the 50% requirement. No information has been presented or found that indicates that there are peculiar conditions of this property that create practical difficulties in its use while meeting the 50% requirement. Properties to the west, east, and south all maintain more than 50% non-residential/garage space on their ground floors. There is nothing peculiar about the site that requires reduction in ground floor nonresidential or garage space.

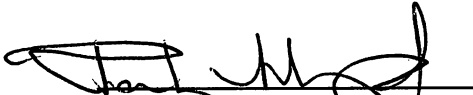
Count I - Judicial Review of Zoning Decision

32. Petitioner incorporates by reference rhetorical paragraphs 1 through 31 of its Complaint.
33. Petitioner is entitled to judicial review of the BZA's decision.
34. The BZA's decision was specifically directed at Petitioner.
35. Petitioner has exhausted all his administrative remedies by appealing to the BZA.
36. The BZA made its decision on October 20, 2022, and Petitioner filed his Complaint within thirty (30) days of the decision.
37. The BZA's decision was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.
38. The BZA's decision was short of statutory right.
39. The BZA's decision was without observance of procedure required by law.
40. The BZA's decision was unsupported by substantial evidence.
41. Petitioner is prejudiced by the BZA's decision.

WHEREFORE, Petitioner respectfully requests this Court reverse the decision of the City of Bloomington Board of Zoning Appeals and remand the matter back to the BZA to issue the variances, award Petitioner its recoverable costs and expenses incurred as a result of this lawsuit, and for all other appropriate relief.

Affirmation

I affirm under the penalties for perjury that the foregoing representations are true and correct to the best of my knowledge and belief.



By: Randy Lloyd, Member
Cutters Kirkwood 123, LLC

Respectfully submitted,

FERGUSON LAW

/s/ Christine L. Bartlett
Christine L. Bartlett, No. 29779-53
Attorney for Petitioner