

STATE OF INDIANA) IN THE MONROE CIRCUIT COURT
)SS:
COUNTY OF MONROE) CAUSE NO. 53C08-2211-MI-002400

CUTTERS KIRKWOOD 123, LLC)
)
Petitioner,)
)
v.)
)
CITY OF BLOOMINGTON)
BOARD OF ZONING APPEALS,)
)
Respondent.)

PETITIONER'S MEMORANDUM FOR JUDICIAL REVIEW OF BZA DECISION

After three meetings and being misadvised by City of Bloomington staff, the Bloomington Board of Zoning Appeals denied one of two variances requested by Cutters Kirkwood 123, LLC. The BZA's decision was based on the wrong standard and was not supported by evidence. The BZA's decision should be overturned by this Court and the Retail Variance approved.

Background

The City of Bloomington ("City") is a political subdivision of the State of Indiana. The City enacted zoning and development ordinances which, collectively, are referred to as the City of Bloomington Unified Development Ordinance (the "UDO"). The UDO was substantially amended in 2020. The Board of Zoning Appeals ("BZA") is a unit or division of the City. The BZA is a quasi-judicial body charged with hearing and deciding petitions for development standards variances from the UDO. BMC 20.06.020(d)(1)(A). A variance approved by the BZA allows a property owner to deviate from the development standards of the UDO. BMC 20.07.010.

Cutters Kirkwood 123, LLC ("Cutters") owns an undeveloped lot located at 115 E. Kirkwood Avenue, Bloomington, Indiana, in Monroe County. Cutters' Property is located within the City in the Mixed-Use Downtown with Courthouse Square Overlay Zoning District.

The Project

In 2018, Cutters submitted a development proposal for the Property, which was to construct a new four-story mixed-use building including 15 residential owner-occupied condominiums and two commercial units (the "Project"). (Exhibit 2, 9/22/2022 Transcript 25:11-12.)

The Project was approved by the City's Plan Commission unanimously. (Exhibit 1, Exhibit 1, 8/25/2022 Transcript 6:21-22.) A series of delays, including Duke Energy's year-long process of engineering, approving, and pricing the needed relocation of poles/lines in the adjacent alleys, affected the commencement of the Project. (Exhibit 1, 8/25/2022 Transcript 7:20-8:3.)

Due to the original approval lapsing, Cutters was required to seek reapproval of the Project. Because the UDO changed since the first approval, the Project now required two variances, which would not have been required under the UDO in 2018: (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. (Exhibit 4, 8/25/2022 Packet pp. 1-2.)

Cutters' basis for the second variance, to reduce the amount of commercial space on the first floor from the 50% required by the UDO, was to allow for parking on

the first floor (“Retail Variance”). Cutters’ Project included approximately 2,200 square feet of commercial retail space on the Kirkwood Avenue facade. (Exhibit 4, 8/25/2022 Packet p. 1; Exhibit 1, 8/25/2022 Transcript 3:21-23.) The retail spaces and the lobby and common stairwell for the building covered the entire length of the street facade. (Exhibit 4, 8/25/2022 Packet p. 14.) Most of the remainder of the first floor, behind the commercial space, would be used for parking. (Exhibit 4, 8/25/2022 Packet p. 14.) Each residential condominium owner would also be deeded at least one parking space in the first floor parking garage. As the condominiums would be owner-occupied, the parking was expected and necessary for the condominium units to be saleable. (Exhibit 1, 8/25/2022 Transcript 10:21-11:6; Exhibit 2, 9/22/2022 Transcript 12:24-13:2.) Condominiums are a permitted use in the Project’s zoning district and parking garages are permitted. BMC Table 03-1.

First Meeting - Both Variances Tabled

Cutters, through its representative, Randy Lloyd ("Lloyd"), appeared before the BZA for the first time on August 25, 2022. Lloyd presented information prior to the hearing, which was included in the BZA's packet, and offered testimony at the first hearing, along with Ryan Strauser, as a representative for the architect of the Project. (Exhibit 4, 8/25/2022 Packet; Exhibit 1, 8/25/2022 Transcript.)

City Planning and Transportation Department staff recommended to the BZA that both variances be denied. (Exhibit 4, 8/25/2022 Packet pp. 2-4.) During the presentation of the City’s recommendation of denial, the City staff presented no factual support for its findings. (Exhibit 1, 8/25/2022 Transcript 3:2-5:24.) City staff explained the purposes of the minimum commercial space UDO requirement: "So one of the purposes of these

standards is to encourage site design that engages directly with the public realm of the street and to promote pedestrian accessibility instead of the site uses being buffered from the pedestrian zone. A second purpose is to reflect the historic design and use patterns of the Courthouse Square character district." (Exhibit 1, 8/25/2022 Transcript 4:7-12.) City staff then stated Cutters's Project "has made efforts to support the same goals of engaging directly with the public realm and promoting pedestrian accessibility, but may not support the reflection of the historic patterns." (Exhibit 1, 8/25/2022 Transcript 4:19-22.)

BZA President, Barre Klapper, stated multiple times that the standard for granting a variance was "a very, very high threshold" and the BZA had virtually no discretion to issue a variance. (Exhibit 1, 8/25/2022 Transcript 23:2-10, 41:1-12.)

In response to President Klapper's request to define "practical difficulties," City staff provided none of the factors to be considered in determining whether "practical difficulties" exist. (Exhibit 1, 8/25/2022 Transcript 23:3-19.) President Klapper later stated her understanding that the "practical difficulties" standard did not allow her to consider the "business model or what's being proposed" and the BZA must just "look at the piece of property." (Exhibit 1, 8/25/2022 Transcript 38:21-39:1.) City staff reiterated this belief: "a lot of time it comes down, a lot of times it comes down to this is just what they want, not what the site requires." (Exhibit 1, 8/25/2022 Transcript 59:14-16.) City staff further stated: "So maybe this design, or particular use, or whatever, just isn't, sometimes things just aren't ideal for the physical space you have available." (Exhibit 1, 8/25/2022 Transcript 60:10-13.)

President Klapper expressed doubt that the Retail Variance could be granted because the desire for more parking was driven by Cutters' pro forma and indicated another type of development, that didn't require parking, could be constructed on the site. (Exhibit 1, 8/25/2022 Transcript 46:1-10.) "I mean you could have a project if you parked half as many cars but that's not viable. And that's not anything to do with, I mean it's, it's a small, it's the site, I mean it is, the site's the site." (Exhibit 1, 8/25/2022 Transcript 46:4-8.) She further explained her reasoning: "I mean the reality is this, this may not be the right site for this project as you conceptualize it right now." (Exhibit 1, 8/25/2022 Transcript 47:3-5.) She expressed she did not believe the size of the parcel could be the basis for finding a peculiarity to the property: "If it's a size issue, I mean that's just the size of the property, right." (Exhibit 1, 8/25/2022 Transcript 58:19-20.)

BZA Member Jo Throckmorton indicated his understanding that approval of the Retail Variance was challenging because it "would be counter to the UDO." (Exhibit 1, 8/25/2022 Transcript 46:13-20.) Throckmorton further stated his belief that "the site itself is in conflict with the UDO." (Exhibit 1, 8/25/2022 Transcript 54:24-55:16.) City staff reiterated this idea: "we just have to come back to like this amount of parking that they want isn't required [by the UDO]." (Exhibit 1, 8/25/2022 Transcript 59:3-4.)

The BZA voted to continue the decision until the following meeting. (Exhibit 1, 8/25/2022 Transcript 70:25-72:1.)

Second Meeting - First Variance Approved, Retail Variance Tabled Again

At the second meeting, on September 22, 2022, Lloyd again offered testimony supporting Cutters' need for the variances. The BZA approved the first variance but

tabled its decision on the Retail Variance. (Exhibit 2, 9/22/2022 Transcript 35:25-39:2, 68:6-20.)

At the second meeting, Cutters presented a detailed statement that case law created a standard of review that the BZA needed to apply to determine “practical difficulties.” (Exhibit 2, 9/22/2022 Transcript 11:18-13:16.) When asked by BZA member Throckmorton if the City was aware that precedent existed for considering economic hardship, the City’s attorney acknowledged Indiana case law established three factors for determining practical difficulties, but did not provide the entirety of the factors to the BZA. (Exhibit 2, 9/22/2022 Transcript 20:1-16.) When reciting the last factor to be considered for establishing "practical difficulties," the City’s attorney stated: "whether there are feasible development alternatives for the particular site." (Exhibit 2, 9/22/2022 Transcript 20:10.)

City staff explained the reason they believed the Retail Variance would be injurious to the public was because the City's planning documents required robust nonresidential uses in the downtown area. (Exhibit 2, 9/22/2022 Transcript 21:12-20.) City staff further stated that because the City Council had adopted community documents expressing the City's desire for robust uses downtown, a variance that went "against that desire" was "injurious" to the public. (Exhibit 2, 9/22/2022 Transcript 21:16-20.) City staff further explained parking was not required in the area where the Project was located: "So making room for it is not something that the Code, again, which is part of the adopted, you know, laws for zoning in this area, makes room for or requires." (Exhibit 2, 9/22/2022 Transcript 22:16-19.)

Lloyd testified the commercial spaces could be used for a small art gallery, boutique shop or clothing store, a carry out restaurant, or grab-and-go coffee shop. (Exhibit 2, 9/22/2022 Transcript 27:20-28:8.) The two commercial spaces could be rented separately or combined for a larger commercial rental space. (Exhibit 2, 9/22/2022 Transcript 30:15-19.) Evidence was presented by City Staff that the size of one of the two available commercial spaces was the same size as a restaurant on Kirkwood Avenue and both available commercial spaces combined was the size of an adjacent bookstore. (Exhibit 2, 9/22/2022 Transcript 29:22-24, 31:2-6.) City staff confirmed "a restaurant could fit in the size space that 50 percent would require" and staff wasn't aware of any other commercial rental tenants that would require that much (or more) space. (Exhibit 2, 9/22/2022 Transcript 49:21-25, 50:11-17.)

In arguing alternative developments existed, City Staff stated that Cutters' proposed development "isn't the only thing that can go here. . . . And in this case it, it may be difficult to develop this particular design but we haven't seen anything, or the [Planning] Department doesn't believe that we've seen anything, that indicates that it can't be developed at all without variance -- that it can't be developed without variance." (Exhibit 2, 9/22/2022 Transcript 32:5-7, 13-18; See also Exhibit 2, 9/22/2022 Transcript 53:18-19.) BZA Member Throckmorton echoed the staff's guidance that there are "other ways to develop the site" and Cutters' decision to develop the site with condominiums was a "self-imposed" hardship. (Exhibit 2, 9/22/2022 Transcript 64:13-24.)

Third Meeting - Retail Variance Denied

At the third meeting, on October 20, 2022, Lloyd and Christine Bartlett were present and offered testimony as Cutters' representative and counsel, respectively.

(Exhibit 3, 10/20/2022 Transcript 10:1-17:7.) Prior to the meeting, Cutters submitted a memorandum outlining the legal standard the BZA should consider and argument and evidence supporting each factor. (Exhibit 5, 10/20/2022 Packet pp. 27-47.)

At the third meeting, the Director of the City's Planning and Transportation Department, Scott Robinson, spoke to the BZA prior to their deliberations. Director Robinson directed the BZA that they have a "strict criteria" to follow and some of the arguments brought by Cutters were "outside those criteria" and "those policy decisions[] should be made at the Common Council or Plan Commission." (Exhibit 3, 10/20/2022 Transcript 3:2-11, 8:5-7.) "[T]hese questions being presented before you feel policy related and that's not really the role of the BZA is to effectuate policy change through your decision-making." (Exhibit 3, 10/20/2022 Transcript 8:5-7.) BZA member, Flavia Burrell, reflected the admonition later in the meeting: "Money has been, he has spent a lot of money, spent a lot of time and effort doing this, and, and now here we are trying to grant a variance that it's out of our purview almost to grant. So I don't know. I'm at a loss here." (Exhibit 3, 10/20/2022 Transcript 35:2-6.)

When BZA member Throckmorton asked whether the BZA needed to consider Cutters' development plan, he was told the BZA did not. The City attorney further explained: "You know, if a developer can set the parameters of the developer's subjectively chosen development goal in a narrow enough way, and then if the developer, in this case they're claiming the law requires the BZA to grant a variance from the developer's subjectively chosen standard if the UDO creates difficulties. You know, the BZA would effectively be cornered into granting every variance that comes before the body, and I'm not convinced, and I don't think the case law says that the third

standard, the practical difficulty standard works in that way." (Exhibit 3, 10/20/2022 Transcript 41:22-42:15.)

City staff further instructed the BZA it could not consider the landowner's goals for developing the Property. (Exhibit 3, 10/20/2022 Transcript 5:9-14.) City staff stated:

It is uncommon and odd to hear the argument being that the property isn't being able to be developed in the way that the petitioner wants and that the development goal should be considered. So think about it -- I'm going to give you a couple different examples. So think about I just own a single-family lot, I have a larger family than I did when I moved there, and I want to have a bigger house than my previous surface coverage allows. If I come to the BZA and say well my development goal is to have more living space for my family so in order to meet that development goal you need to grant this variance, that is just not how we grant variances. It has to be about characteristics of the lot; is it uncommonly small for the area, is the house size typical for that -- it's details and development characteristics of the lot that you should be considering, not the development goal of the petitioner.

...

It's, it's great, you know, for a petitioner to have a development goal. Yes, he made those goals under a different Code. Yes, that site plan expired in 2019, and that is unfortunate for him that then we updated the Code and some things changed, but his development goals aren't the, aren't, you can know them and that's fine but you don't, those aren't what are weighed in whether or not you issue a variance. That is not what the criteria says.

I mean if you just try to think about it in other examples. You know, what if he said in order for this project to meet my development goals I need to have 80 units so I'm going to need you to grant me a height variance so that it can be nine stories tall. That doesn't make any sense, that's not how we grant variances. It's not based on the goals of the person who is developing the lot. (Exhibit 3, 10/20/2022 Transcript 31:14-33:6.)

The City attorney did not correct City staff's misstatements and further instructed the BZA it should not consider the landowner's goals for developing the Property: "the third standard is not meant to be a subjective standard where a petitioner sets their own development goals subjectively and then you have to determine whether or not, based on that subjective self-set goal, whether or not there are, there are practical difficulties." (Exhibit 3, 10/20/2022 Transcript 33:19-23.)

Just prior to the motion and vote,

when reciting the last factor to be considered for establishing "practical difficulties," the City attorney stated: "whether there are feasible development alternatives." (Exhibit 3, 10/20/2022 Transcript 64:2-8.)

BZA member Throckmorton, immediately prior to abstaining from the vote, stated he understood he was not permitted to consider the economics or the desires of Cutters, the decision needed to go to another body of the City, and the City was "handcuffing" the BZA on this decision. (Exhibit 3, 10/20/2022 Transcript 62:10-63:7, 68:14-22.)

BZA President Klapper, prior to voting against the Retail Variance, stated she believed approval of the Retail Variance to be outside the BZA's purview to approve. (Exhibit 3, 10/20/2022 Transcript 64:19-21.)

City staff acknowledged the City was discussing changing the 50% first floor commercial requirement. (Exhibit 3, 10/20/2022 Transcript 66:6-13.) BZA Member, Tim Ballard, stated the 50% requirement needed to be changed due to the negative economic impact on Cutters and anyone else who develops property downtown. (Exhibit 3, 10/20/2022 Transcript 66:17-67:6.) Two other BZA members agreed the 50% requirement needed to be looked at further. (Exhibit 3, 10/20/2022 Transcript 68:14-25.)

The BZA voted to deny the Petition and issued findings:

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.

(Exhibit 3, 10/20/2022 Transcript 68:4-11, 69:4-23.)

STANDARD OF REVIEW

The exclusive means for judicial review of BZA decisions is set out in Indiana Code 36-7-4-1600 et seq. The party asserting the BZA's decision is invalid has the burden of demonstrating the same. Ind. Code 36-7-4-1614. Relief may be granted by a reviewing court when the BZA's decision is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) Without observance of procedure required by law; or
- (5) Unsupported by substantial evidence.

Ind. Code 36-7-4-1614.

A decision is arbitrary and capricious if it is patently unreasonable or made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion. A decision is unsupported by substantial evidence if there is no relevant evidence which a reasonable mind might accept as adequate to support a conclusion.

Dep't of Bus. & Neighborhood Servs. of Indianapolis v. H-Indy, LLC, 166 N.E.3d 347, 356-57 (Ind. Ct. App. 2021) (internal citations omitted).

While an agency's factual findings are entitled to deference, "the same degree of deference is not granted to an agency's legal conclusions. Law is the province of the judiciary. Indiana has long recognized that the reviewing court may set aside agency action not in accordance with law." Mammoth Solar v. Ehrlich, 196 N.E.3d 221, 234 (Ind. Ct. App. 2022). An agency's incorrect interpretation of an ordinance or a statute is entitled to no weight. Chambers v. Del.-Muncie Metro. Bd. of Zoning Appeals, 150 N.E.3d 603, 608 (Ind. Ct. App. 2020); Pierce v. State Dep't of Corr., 885 N.E.2d 77, 89 (Ind. Ct. App. 2008). If an agency misconstrues an ordinance or statute, there is no reasonable basis for the agency's ultimate action, and the reviewing court is required to reverse the agency's action as being arbitrary and capricious." Id.

If the review reveals "that the evidence upon which the BZA acted was devoid of probative value, that the quantum of legitimate evidence was so proportionately meager as to lead to a conviction that the BZA's finding does not rest on a rational basis, or that the result of the hearing must have been substantially influenced by improper considerations, the BZA's order will be set aside." Town of Munster Bd. of Zoning Appeals v. Abrinko, 905 N.E.2d 488, 491 (Ind. Ct. App. 2009).

The BZA is a quasi-judicial body charged with hearing and deciding petitions for development standards variances from the UDO. BMC 20.06.020(d)(1)(A). BZA

members are to remain impartial and are not to be influenced outside of the hearing. BMC 20.06.020(d)(5)(A). City staff from the Planning and Transportation Department are made available to the BZA to inform the BZA of all facts and information at the City's Planning and Transportation Department's disposal regarding the petition and assist the BZA by performing research and making recommendations on matters brought before them. BMC 20.06.020(e)(2).

"Although BZAs are not held to technical legal requirements, their hearings must comply with the constitutional due process standard of being fundamentally fair, impartial, orderly, and judicial. The procedures utilized by the BZA are upheld if they are determined to be fundamentally fair, orderly, judicial, and impartial." City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238, 250 (Ind. Ct. App. 2003) (internal citations omitted). "Due process contemplates notice and an opportunity to be heard. Due process also requires the opportunity to present rebuttal evidence." Id. at 251. "Due process requires that administrative bodies may not reach their decisions on the basis of preconceived bias or prejudice." Couch v. Hamilton Cty. Bd. of Zoning Appeals, 609 N.E.2d 39, 42 (Ind. Ct. App. 1993) (finding that board member's arguably biased comment which prejudiced the other board members is sufficient to raise the question of illegality to survive a motion to dismiss).

The BZA "must issue findings tailored to address the specific facts presented to the BZA. These basic findings of fact are not sufficient to support the BZA's ultimate findings if they are merely a general replication of the requirements of the ordinance at issue." Id.

ARGUMENT

The BZA failed to apply the correct standard for variance review and, instead, based their decision on the wrong standard and without support of substantial evidence. The BZA was directed by City staff and the City attorney to disregard factors clearly established by Indiana courts nearly 40 years ago. Cutters presented substantial evidence for approval of its Retail Variance request.

- A. The factors to be considered for developmental variances are established by Indiana Code 36-7-4-918.5 and the 1985 *McDonalds* Court of Appeals case.

According to the UDO and Indiana law, the factors that must be considered by the BZA for a variance are: (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); See also Ind. Code 36-7-4-918.5 (outlining the minimum standard that is incorporated in the Bloomington Code).

"Practical difficulties" is a specific phrase that, according to well-established case law, requires consideration of 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) clarified on other grounds on reh'g, 489 N.E.2d 143, trans. denied. Although portions of this test were already developed in case law, these factors were established in the 1985 McDonald's case, and this iteration of the factors has remained the test since.

Significant Economic Injury

"Indiana has long recognized economic hardship as a basis for relief from building and zoning ordinances." Beverly Shores v. Bagnall, 590 N.E.2d 1059, 1062 n.3 (Ind. 1992) citing City of East Chicago v. Sinclair Refining Co. (1952), 232 Ind. 295, 111 N.E.2d 459 and Note, Zoning Variances, 74 Harv. L. Rev. 1396, 1401 (1961).

Significant economic injury can be demonstrated in a variety of ways. Cases have found economic injury by a petitioner showing damages may occur to the property if preventative measures are not taken, that complying with the zoning code would result in additional cost and lost space, or that the redevelopment of a parcel, which had been vacant for two years, would be an "economic drain" to the petitioner through loss of rental income. Caddyshack Looper, LLC v. Long Beach Advisory Bd. Of Zoning Appeals, 22 N.E.3d 694 (Ind. Ct. App. 2014); Burton v. Bd. of Zoning Appeals of Madison Cty, 174 N.E.3d 202, 218 (Ind. Ct. App. 2021); Rising Prop. Mgmt., LLC v. Dep't of Metro. Dev. Bd. of Zoning Appeals, 961 N.E.2d 540 at *16-17 (Ind. Ct. App. 2012).

Self-Created Injury

As to whether the injury is self-created, merely purchasing a property with knowledge of the applicable zoning ordinances does not necessarily constitute a self-

created injury. See Reinking v. Metro. Bd. of Zoning Appeals, 671 N.E.2d 137, 142 (Ind. Ct. App. 1996). A self-created injury exists where the landowner took some action to make the proposed development be out of compliance with the zoning code or knowingly violated the zoning code for years before seeking a variance. See e.g. Board of Zoning Appeals of City of Hammond v. Waskelo, 240 Ind. 594, 168 N.E.2d 72 (Ind. 1960) (in which petitioners voluntarily sold a house and a portion of their lot thereby reducing the remaining lot to a smaller size than required by ordinance) and Edward Rose of Ind., LLC v. Metro Bd. of Zoning Appeals, 907 N.E.2d 598, 606 (Ind. Ct. App. 2009).

Likewise, a petitioner is not required to take affirmative action to avoid the need for a variance. See Burton, 174 N.E.3d at 219 (petitioner was not required to purchase contiguous parcels to eliminate the need for setback variances). "[W]here an unnecessary hardship is shown to exist based upon the terms of an ordinance, as they apply to the land, the ability to claim hardship is available to subsequent purchasers as well to the original owner." Reinking, 671 N.E.2d at 141. The "practical difficulties" standard is similar to the "unnecessary hardship" standard, which is applied to use variances. Edward Rose, 907 N.E.2d at 606.

Feasible Alternatives

The third prong analyzes "whether any feasible alternative is available, within the terms of the ordinance, which achieve the same goals of the landowner." Particularly with respect to this element, the required showing should not be heightened; the law requires "a showing of practical difficulties, not practical impossibilities." Burton, 174 N.E.3d at 219.

"Feasible" means something is capable of being done, but also implies what is likely to work or be useful in attaining the end desired. See Merriam-Webster Dictionary "Feasible," <https://www.merriam-webster.com/dictionary/feasible>. The word itself connotes that the alternative proposed must be likely to achieve the end desired.

This is further reiterated by the last phrase of the prong: "which achieve the same goals of the landowner." Cutters' proposed development goals must be considered. It is not sufficient to deny a variance because the site could be redeveloped entirely if that alternative development does not align with the same goals of Cutters.

B. The BZA neither understood nor followed the statutory and McDonald's factors.

Throughout the three meetings, it was clear the BZA members did not know the factors they could and could not consider and did not understand their role in considering and granting variances. The BZA members' misconceptions were reinforced by City staff and the City's attorney, who persuaded staff that Cutters' variances must be denied.

1. *The BZA members were misinformed of the factors they needed to consider.*

At the first meeting, only the BMC language was provided, "practical difficulties" was not defined, and none of the McDonald's factors were provided. (Exhibit 1, 8/25/2022 Transcript 23:11-19.) The failure to define "practical difficulties" resulted in BZA members believing they could not consider the "business model or what's being proposed," two of the established McDonald's factors, and the BZA must just "look at the piece of property." (Exhibit 1, 8/25/2022 Transcript 38:21-39:1.)

Instead of viewing the particularity of the property as a factor to weigh in favor of granting the variances, the BZA members treated these issues as factors that weighed against the variance requests. BZA members stated: "I mean the reality is this, this may not be the right site for this project as you conceptualize it right now." (Exhibit 1, 8/25/2022 Transcript 47:3-5.) And: "If it's a size issue, I mean that's just the size of the property, right." (Exhibit 1, 8/25/2022 Transcript 58:19-20.)

The BZA members also gave no deference to Cutters' goals for developing the property and believed the Retail Variance should be denied because parking was merely Cutters' desire and another type of development, that did not require parking, could be constructed on the site. (Exhibit 1, 8/25/2022 Transcript 46:1-10.)

Instead of correcting these misconceptions, City staff agreed: "a lot of time it comes down, a lot of times it comes down to this is just what they want, not what the site requires . . . So maybe this design, or particular use, or whatever, just isn't, sometimes things just aren't ideal for the physical space you have available." (Exhibit 1, 8/25/2022 Transcript 59:14-16, 60:10-13.)

BZA members likewise appeared confused as to their role in granting variances. A variance, by definition, is a divergence from the development standards authorized by the BZA. See BMC 20.07.010 ("Variance, development standards" means a specific approval to deviate from the development standards (such as height, bulk, area) that this UDO otherwise prescribes, granted pursuant to Indiana Code § 36-7-4-918.5.") However, BZA members expressed they did not believe they could grant Cutters' Retail Variance because it "would be counter to the UDO" and "the site itself is in conflict with the UDO." (Exhibit 1, 8/25/2022 Transcript 46:13-20, 54:24-55:16.) Again, City staff did

not correct this misconception, but reiterated it: "we just have to come back to like this amount of parking that they want isn't required [by the UDO]." (Exhibit 1, 8/25/2022 Transcript 59:3-4.)

In arguing alternatives existed, City staff stated Cutters' proposed development "isn't the only thing that can go here." (Exhibit 2, 9/22/2022 Transcript 32:5-7.) "And in this case it, it may be difficult to develop this particular design but we haven't seen anything, or the Department doesn't believe that we've seen anything, that indicates that it can't be developed at all without variance -- that it can't be developed without variance." (Exhibit 2, 9/22/2022 Transcript 32:13-18; See also Exhibit 2, 9/22/2022 Transcript 53:18-19.) BZA Member Throckmorton echoed the staff's guidance that there are "other ways to develop the site" and Cutters' decision to develop the site with condominiums was a "self-imposed" hardship. (Exhibit 2, 9/22/2022 Transcript 64:13-24.)

BZA members were not advised on any definition of "practical difficulties" until the second meeting and, even then, the definition was incomplete. At the second meeting, the City attorney acknowledged the Court of Appeals established three factors for determining practical difficulties, but did not provide the entirety of the factors to the BZA. (Exhibit 2, 9/22/2022 Transcript 20:1-16.) When reciting the last factor to be considered for establishing "practical difficulties," the City attorney stated: "whether there are feasible development alternatives" instead of "whether any feasible alternative is available, within the terms of the ordinance, which achieve the same goals of the landowner." McDonald's Corp., 481 N.E.2d at 146. This omission proved critical, as City

staff argued Cutters' proposed development "isn't the only thing that can go here."
(Exhibit 2, 9/22/2022 Transcript 32:5-7.)

Practical difficulties requires "a showing of practical difficulties, not practical impossibilities." Burton, 174 N.E.3d at 219. City staff encouraged precisely what Burton cautioned against and advised the BZA: "And in this case it, it may be difficult to develop this particular design but we haven't seen anything, or the [Planning] Department doesn't believe that we've seen anything, that indicates that it can't be developed at all without variance -- that it can't be developed without variance." (Exhibit 2, 9/22/2022 Transcript 32:13-18; See also Exhibit 2, 9/22/2022 Transcript 53:18-19.) Again, the damage was done, as BZA members echoed the staff's guidance that there are "other ways to develop the site" and Cutters' decision to develop the site with condominiums was a "self-imposed" hardship. (Exhibit 2, 9/22/2022 Transcript 64:13-24.)

Prior to the third meeting, Cutters provided a legal memorandum outlining the factors the BZA was required to consider—the McDonald's factors—and argument and evidence supporting each factor. (Exhibit 5, 10/20/2022 Packet pp. 27-47.) At the third meeting, Cutters' counsel reiterated the McDonald's definition of "practical difficulties" required consideration of 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. (Exhibit 3, 10/20/2022 Transcript 14:1-15:10.)

Despite the presentation of the factors, City staff continued to discourage the BZA members from considering those factors.

When BZA member Throckmorton asked whether the BZA needed to consider Cutters' development plan, he was told the BZA did not. The City's attorney further explained: "You know, if a developer can set the parameters of the developer's subjectively chosen development goal in a narrow enough way, and then if the developer, in this case they're claiming the law requires the BZA to grant a variance from the developer's subjectively chosen standard if the UDO creates difficulties. You know, the BZA would effectively be cornered into granting every variance that comes before the body, and I'm not convinced, and I don't think the case law says that the third standard, the practical difficulty standard works in that way." (Exhibit 3, 10/20/2022 Transcript 41:22-42:15.)

The BZA was instructed by City staff it should not consider the landowner's goals for developing the Property. (Exhibit 3, 10/20/2022 Transcript 5:9-14.) City staff set up several faulty examples to prove its point. What if a person had a development goal of building a bigger single-family home or what if a developer wanted to build a 9-story building? (Exhibit 3, 10/20/2022 Transcript 31:14-33:6.)

City staff's analysis was flawed. The McDonald's factors must be considered, but a petitioner is required to show each of the factors is met. City staff's straw man argument tried to show that considering the landowner's goals would lead to absurd results because if considered, every variance would have to be granted. City staff's examples looked at only one of the multiple factors in a vacuum and ignored that a variance petitioner has to show the existence of all factors. Thus, while a homeowner's

development goal may be to have a bigger house or have a 9-story building, the homeowner may not be able to show the other required factors to obtain a variance to deviate from the zoning code (i.e., whether not having a bigger house would lead to economic injury or the bigger house would not be injurious to the community or affect the area adjacent to the bigger house). Bloomington Municipal Code 20.06.080(b)(3)(E)(1); See also Ind. Code 36-7-4-918.5.

The City attorney did nothing to correct this faulty logic and instead, just prior to the motion and vote, when reciting the last factor to be considered for establishing "practical difficulties," the City attorney stated: "whether there are feasible development alternatives," again leaving off the language requiring deference to the landowner's goals. (Exhibit 3, 10/20/2022 Transcript 64:2-8.)

The net effect of City staff's and the City attorney's counsel to the BZA was the BZA members still did not understand what they were required to consider. BZA member Throckmorton, immediately prior to abstaining from the vote, stated he understood he was not allowed to consider the economics or the desires of Cutters. (Exhibit 3, 10/20/2022 Transcript 62:10-63:7, 68:14-22.)

2. The BZA members were misled to believe the Retail Variance decision was outside of their purview.

Throughout all the meetings, the BZA members expressed they felt their hands were tied. BZA President Klapper stated multiple times the standard for granting a variance was "a very, very high threshold" and the BZA had virtually no discretion to issue a variance. (Exhibit 1, 8/25/2022 Transcript 23:2-10, 41:1-12.)

Instead of counseling the BZA on the appropriate standard they should follow, City staff validated the BZA members' concerns. After two meetings discussing Cutters'

variance requests, City staff started the third meeting with an admonishment by the Director of Planning, who warned the BZA it has a "strict criteria" to follow and some of the arguments brought by Cutters were "outside those criteria" and "those policy decisions[] should be made at the Common Council or Plan Commission." (Exhibit 3, 10/20/2022 Transcript 3:2-11, 8:5-7.) The Director stated: "[T]hese questions being presented before you feel policy related and that's not really the role of the BZA is to effectuate policy change through your decision-making." (Exhibit 3, 10/20/2022 Transcript 8:5-7.)

Three of the four deciding BZA members echoed the Director's admonition later in the meeting before voting against the Retail Variance. "Money has been, he has spent a lot of money, spent a lot of time and effort doing this, and, and now here we are trying to grant a variance that it's out of our purview almost to grant. So I don't know. I'm at a loss here." (Exhibit 3, 10/20/2022 Transcript 35:2-6.) Another member stated he believed the decision needed to go to another body of the City and the City was "handcuffing" the BZA on this decision. (Exhibit 3, 10/20/2022 Transcript 62:10-63:7, 68:14-22.) Yet another BZA member stated she believed approval of the Retail Variance to be outside the BZA's purview to approve. (Exhibit 3, 10/20/2022 Transcript 64:19-21.)

- C. In applying the appropriate standard to the Project, Cutters provided evidence of each factor—its Retail Variance request should have been granted.

The City's proposed findings, which were ultimately adopted by the BZA, were not supported by substantial, or any, evidence. Without any factual evidence supporting

their finding, they are just legal conclusions, entitled to no deference. Mammoth Solar, 196 N.E.3d at 234.

The BZA's findings were "merely a general replication of the requirements of the" UDO, and thus were insufficient to support the BZA's decision. Couch, 609 N.E.2d at 42. For example, in its first proposed finding, the BZA fails to support its conclusion that the "reduced retail space devalues the interface between the public and private realm." The conclusion was not supported by any evidence and is contradicted by the fact that the Project included retail and common use space along the entire street frontage of Kirkwood Avenue.

The third proposed finding states the site can be developed meeting the 50% requirement, without any finding that the goals of the landowner can still be achieved, and finds there are no peculiar conditions of the property, while failing to consider any of the facts presented by Cutters or its architect showing multiple issues with the difficult grade and topography, the dimensions of the alleys, and the limited availability of access points. As the BZA's findings were not supported by evidence, they are entitled to no deference.

On the contrary, Cutters presented evidence on each factor supporting the approval of its Retail Variance request.

- 1. Cutters showed the approval will not be injurious to the public health, safety, morals, and general welfare of the community, and the BZA's finding otherwise was not supported by evidence.*

The Project will not be injurious to the public health, safety, morals, and general welfare of the community. In fact, Cutters presented to the BZA multiple instances in which the Project would help achieve the goals set by Bloomington's Comprehensive

Plan and former Growth Policy Plan and Downtown Vision and Infill Strategy Plan by adding an underrepresented housing form to the downtown area (owner-occupied residential condominiums) and serving the Comprehensive Plan's goals to "diversify the Downtown residential population by identifying and encouraging missing housing forms in the Downtown area (such as row houses, condominiums and live/work space)." (Exhibit 4, 8/25/2022 Packet pp. 8-9; Exhibit 5, 10/20/2022 Packet pp. 29-30 (emphasis added).)

Moreover, Cutters presented evidence there is a reasonable likelihood the amount of commercial space required without the Retail Variance would remain vacant, which would be injurious to the neighborhood. Evidence was presented that over 200,000 square feet of commercial retail and office space for rent was currently available in Bloomington and the commercial space proposed by Cutters was in higher demand and less likely to fail than businesses requiring more commercial space. Evidence was also presented that vacant commercial space, or any vacant space, negatively impacts neighboring property values, as well as the safety, crime rates, and the walkability of the area. (Exhibit 5, 10/20/2022 Packet pp. 30-31, 40, 44-45.)

On the contrary, no evidence was presented to support the BZA's ultimate finding that the Project would be injurious to the public health, safety, morals and general welfare of the community. BZA members even expressed their support for the Project. (Exhibit 2, 9/22/2022 Transcript 52:8-10 "this is a type of residential unit that we would like to see in downtown Bloomington." and Exhibit 3, 10/20/2022 Transcript 30:25 (referring to Cutters' "admirable goals for the project").)

The City's proposed finding that "a reduced retail space devalues the interface between the public and private realm on one of the City's busiest downtown commercial/retail corridors" was not explained or supported in any way. At the first meeting, City staff admitted Cutters' Project "has made efforts to support the same goals of engaging directly with the public realm and promoting pedestrian accessibility." (Exhibit 1, 8/25/2022 Transcript 4:19-22.) Of course, no pedestrian walking down Kirkwood Avenue would have any idea the Project did not meet the 50% threshold, as the entire Kirkwood Avenue facade would be retail and lobby space.

Moreover, the City was unable to point to any commercial use that would be foreclosed due to the reduced size. The City admitted a restaurant on Kirkwood was the same size as one of the two proposed commercial spaces and an adjacent bookstore was the same size as both proposed commercial spaces if combined. (Exhibit 2, 9/22/2022 Transcript 29:22-24, 31:2-6.)

2. *Cutters demonstrated 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 the BZA agreed.*

City staff's proposed finding, adopted by the BZA, agreed with Cutters that granting its Retail Variance "will not affect the use and value of the area adjacent to the property in a substantially adverse manner." (Exhibit 5, 10/20/2022 Packet pp. 32.) Evidence was presented that developing the now-vacant parking lot would likely serve to increase the value of the area adjacent to the project and vacant commercial space, which is likely to occur if the Retail Variance is denied, would have a negative impact on nearby property values. (Exhibit 3, 10/20/2022 Transcript 45:14-15, 46:2-5, 47:23-48:8.)

3. *Cutters demonstrated the strict application of the terms of this UDO will result in practical difficulties in the use of the property; the practical*

difficulties are peculiar to the property in question; the development standards variance will relieve the practical difficulties. The BZA refused to apply the proper standard for practical difficulties.

Cutters presented evidence that the strict application of the zoning ordinance would result in practical difficulties in the use of the property.

Significant Economic Injury

Cutters presented evidence that the ability to sell condominiums depends on being able to provide at least one parking space per unit. The BZA received statements from commercial realtors Brian Thompson and Kerry Feigenbaum stating not providing parking to the condominium owners would "drastically devalue the property and hinder future sales." (Exhibit 5, 10/20/2022 Packet pp. 32-33, 41-42.) Thompson, Manager/Realtor/Broker of F.C. Tucker and past President of the Indiana Realtors Association, believes, in his professional opinion, the Project is not viable without the proposed parking. (Exhibit 5, 10/20/2022 Packet pp. 41.) Evidence was further presented by Cutters that the decreased value of the condominiums (without parking included) would make the Project cease to be financially viable. (Exhibit 1, 8/25/2022 Transcript 14:25-15:2; Exhibit 5, 10/20/2022 Packet 41-42.) BZA members expressed their agreement that reducing the parking would make the Project not viable. (Exhibit 1, 8/25/2022 Transcript 46:4-8: "I mean you could have a project if you parked half as many cars but that's not viable."; Exhibit 3, 10/20/2022 Transcript 66:17-67:6.)

Cutters also presented evidence that there was a reasonable likelihood the amount of commercial space required by the UDO would remain vacant. Cutters presented data showing the amount of commercial property currently vacant in the City. (Exhibit 5, 10/20/2022 Packet 44-45.) Using the approximate rental price in the area of

\$18 per square foot, if Cutters was required to comply with the 50% commercial requirement and such space was not leased, the loss of rental income would be more than \$99,000 per year to Cutters. (Exhibit 5, 10/20/2022 Packet pp. 30-31, 33, 40, 44-45.) Cutters also presented evidence that the size of the proposed commercial spaces was the average size space for other commercial landlords in Bloomington. (Exhibit 5, 10/20/2022 Packet p. 40.)

The City presented no evidence to rebut the significant economic injury to Cutters. In fact, the City repeatedly counseled the BZA it was prohibited from considering the financial impact to Cutters. After pushback by Cutters, the City did clarify that Cutters' economic impact could be considered. However, it is clear the damage had already been done.

Self-Created Injury

Cutters presented evidence to the BZA that the injury is not self-created. When Cutters purchased the property, it was subject to a different zoning code and did not require these variances. This is not a case where Cutters knew of the need for a variance when the property was purchased.

Cutters designed a project that complied with the then-current zoning ordinance and was approved by the Plan Commission by a 9-0 vote. (Exhibit 1, 8/25/2022 Transcript 6:21-22.) Start of construction was initially delayed due to protracted negotiations with Duke Energy for the relocation of poles/lines in the adjacent alleys, an undertaking that took over a year to complete. (Exhibit 1, 8/25/2022 Transcript 27:7-13; Exhibit 3, 10/20/2022 Transcript 37:24-38:9.) Because the Duke work added approximately \$400,000 to Cutters' infrastructure budget, the Duke negotiations delayed

finalizing the overall budget, pricing and the construction loan. (Exhibit 3, 10/20/2022 Transcript 39:1-7.) The Project was then subjected to the world-wide Covid pandemic, which negatively affected financing options and all real estate construction. (Exhibit 3, 10/20/2022 Transcript 38:12-16.) During these delays, the UDO was substantially amended, and the Project, which once required no variances, now required two.

Pursuant to Reinking, when the need for a variance is based upon the terms of the ordinance, "the ability to claim hardship is available to subsequent purchasers as well to the original owner." Reinking, 671 N.E.2d at 141. Here, Cutters demonstrated the UDO's changes in 2020 caused the need for the variances. While implications were made during the BZA meetings that Cutters could have affirmatively taken actions to anticipate the UDO changes and curtail the need for variances, the law does not require a petitioner to take affirmative action to eliminate the need for a variance. See Burton, 174 N.E.3d at 219. No evidence was presented by the City showing Cutters took any action that led to the need for a variance like the petitioner in Waskelo. Waskelo, 168 N.E.2d 72 (in which petitioners voluntarily sold a house and a portion of their lot thereby reducing the remaining lot to a smaller size than required by ordinance). Here, it was the City's UDO amendment passage that led to Cutters needing two variances that were not required of Cutters when the project was approved in 2018.

Feasible Alternatives

Cutters presented evidence that there are no feasible alternatives available that will achieve the same goals of the landowner—to build residential condominiums on the site. (Exhibit 1, 8/25/2022 Transcript 6:23-25.) The question is not whether other developments could be built at this site or whether the site could be redesigned for

apartments, which might be easier to lease without parking spots. The critical inquiry is whether feasible alternatives are available to achieve Cutters' same goals—to construct an owner-occupied condominium building. There are not. Cutters' goal is a condominium project. (Exhibit 1, 8/25/2022 Transcript 6:22-7:6.) The only feasible way to develop condominiums that will sell is to provide at least one parking space per unit.

Evidence was presented there was no feasible way to include parking on any level other than the first floor due the difficult grade and topography, the dimensions of the alleys, and the limited availability of access points. (Exhibit 1, 8/25/2022 Transcript 15:16-16:6, 44:12-45:10; Exhibit 2, 9/22/2022 Transcript 23:23-25:5.) Additionally, soils and bedrock peculiar to the site, combined with the lots' tight urban size and grades, would burden the project with other significant costs even if this was a feasible option. (Exhibit 2, 9/22/2022 Transcript 16:3-6, 12-18.)

Strauser, architect for the project, explained moving the parking to the second floor would add an additional cost of \$2,000,000-\$2,500,000 to the Project, would result in a loss of five residential units, and would require the entrance to the garage be located on Kirkwood to have a long enough ramp to get to the upper level. (Exhibit 2, 9/22/2022 Transcript 24:10-21; Exhibit 5, 10/20/2022 Packet p. 47.) Losing an entire floor of residential units would take approximately \$4,500,000 in value away from the project, making it no longer financially feasible. (Exhibit 5, 10/20/2022 Packet p. 35.) If units are removed to make room for parking on upper floors, the unit price would have to increase 50% on average. (Exhibit 5, 10/20/2022 Packet p. 35.) On a per square foot basis, each unit would need to be sold at over \$600 per square foot—far above current

market pricing. Residential realtors do not believe they can be sold at this price, with or without parking. (Exhibit 5, 10/20/2022 Packet p. 35.)

Evidence was presented that parking below surface was likewise not feasible, as it would cost an additional \$2,200,000-\$2,400,000 and would require the entrance to the garage on Kirkwood Avenue to have a long enough ramp to get to a lower level. (Exhibit 2, 9/22/2022 Transcript 23:25-24:9; Exhibit 5, 10/20/2022 Packet p. 46.) In either scenario, the City has stated an entrance on Kirkwood is not desirable and would also require a significant portion of the Kirkwood facade to be used for a parking drive/ramp, having the effect of reducing the on street retail space on Kirkwood. (Exhibit 1, 8/25/2022 Transcript 15:19-16:6.)

Off-site parking also would not be feasible given security issues, distance and market demands requiring on-site parking for owner occupied condominiums at this location. Other condominiums in Bloomington provide parking on-site. (Exhibit 5, 10/20/2022 Packet pp. 42-43.)

While not required by the McDonald's factors, it is worth noting that Cutters' development goals are reasonable. The amount of retail space lost will not be apparent because the entire street frontage will still be 2,200 square feet of retail space. Cutters' Retail Variance merely amounts to exchanging 3,300 square feet of additional commercial space in exchange for essential parking spaces to support its owner-occupied condominium Project. Condominiums are a permitted use in the Project's zoning district and parking garages are permitted. BMC Table 03-1.

The BZA failed to consider whether any alternatives existed that were both feasible and achieved the same goals as the landowner. The City's attorney, in advising

them of the standard they must consider, on multiple occasions, refused to include the last phrase of the test "which achieve the same goals as the landowner." The BZA members did not consider the goals of the landowner, as required by law. Had they, they would have found no feasible alternative exists to achieve a condominium development.

CONCLUSION

For three hearings, the BZA, on advice by City staff and the City attorney, failed to follow the law in weighing the merits of Cutters' variance application request. Although the BZA is a neutral third-party, it relies on City staff to inform the BZA of all facts and information at the City's Planning and Transportation Department's disposal regarding the petition and assist the BZA by performing research. The City staff advises the BZA and makes recommendations on matters brought before the BZA. BMC 20.06.020(e)(2).

Unfortunately, the BZA was not adequately advised by City staff on the standard for its review and was advised by City staff several times it could not consider the well-established elements of the practical difficulties standard, including the economic injury to Cutters and whether alternatives existed that would achieve the same goals as the landowner. The BZA's decision, in failing to consider the established factors for practical difficulties, was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

The City's staff proposed findings, which were ultimately adopted by the BZA, were not supported by substantial, or any, evidence. On the contrary, Cutters presented evidence on each factor supporting the approval of its Retail Variance request. Had the

BZA been properly instructed, it would have found Cutters' Retail Variance should be granted.

The BZA's decision was flawed and unsupported by evidence. The BZA decision should be reversed and Cutters' Retail Variance should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was duly served upon the following individuals by the Indiana E-Filing System (IEFS) on February 22, 2023:

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/s/ Christine L. Bartlett
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