Filed: 3/24/2023 5:46 PM
Monroe Circuit Court 8
Monroe County, Indiana

STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT
	) SS:	
COUNTY OF MONROE	)	CAUSE NO. 53C06-2211-MI-002400

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

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF BOARD OF ZONING APPEALS' DECISION AND RESPONSE TO PETITIONER'S MEMORANDUM

The Bloomington Board of Zoning Appeals ("BZA") applied the proper standard in evaluating Petitioner's variance application and did not commit clear error in finding that Petitioner's restrictive design, which flouted the overlay requirements of Bloomington's Zoning Code, failed to warrant a variance.

Bloomington's City Council has enacted a zoning ordinance governing land use and development within our community. Ind. Code § 36-7-4-201, *et seq*.; Bloomington Mun. Code § 20.01, *et seq*. Any developers building in Bloomington must comply with the zoning directives enacted by our local elected representatives. However, in rare circumstances, a developer dealing with a parcel that presents a unique peculiarity may ask a group of five unelected, volunteer civilians on the Board of Zoning Appeals for permission to disregard a portion of the zoning ordinance. Ind. Code § 36-7-4-918.1, *et seq*. When rare circumstances warrant such action, the BZA may allow a

developer to disregard otherwise-applicable zoning laws. This exception is called a variance.

In the present case, Cutters Kirkwood 123, LLC ("Petitioner") sought a variance from a regulation that requires fifty percent of first floor space located in Bloomington's core downtown[1] to be dedicated to non-residential and non-parking garage uses. Informally, this rule is often described as requiring downtown development to dedicate fifty percent of first floor space to "commercial" or "retail" uses.

After extensive deliberation, Bloomington's BZA denied Petitioner's request to disregard the fifty percent first-floor commercial requirement and issued findings in support of its decision. The Petitioner now appeals the BZA's decision upholding the zoning ordinance and denying the variance request. For the reasons set forth herein, this Court should not substitute its judgment for the BZA's and should uphold the BZA's decision to deny Petitioner's variance.

Legal Background

Bloomington's Zoning Ordinance

Like its sister cities and counties throughout the state, Bloomington's City Council has codified a zoning ordinance[2], which can be found in Title 20 of Bloomington's municipal code. Bloomington Mun. Code § 20.01.010, et. seq. The City Council's zoning ordinance establishes various zoning districts, for example

[1] Bloomington's zoning code titles this core downtown overlay zoning district the "Courthouse Square Downtown Character Overlay" district.

[2] Bloomington's zoning code is also often called the "Unified Development Ordinance" or "UDO."

Residential Large Lot (R1), Residential Small Lot (R3), Employment (EM), Mixed-Use Downtown (MD), and more. Bloomington Mun. Code § 20.02.010, Ind. Code § 36-7-4-601. In addition to zoning districts, the City Council also codified several "overlay districts," such as the "Courthouse Square Downtown Character Overlay" district (CS) and the "University Village Downtown Character Overlay" district (UV). Bloomington Mun. Code § 20.02.010. Rathkopf's *The Law of Zoning and Planning* summarizes overlay districts as follows:

> To provide for greater flexibility and discretion in the control of land use and development in certain areas of the community, modern zoning ordinances often provide for numerous special zoning or overlay districts. These special zoning or overlay districts will either impose independent or supplemental restrictions or controls on land use and development within the area designated.

Bronin, S., et al., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 10:3 (*Special zoning, overlay, and planned development districts*) (4th ed.).

The property at issue in this case is zoned Mixed-Use Downtown in the Courthouse Square Downtown Character Overlay district (MD-CS). When they codified special protections for properties zoned Mixed-Use Downtown Courthouse Square overlay district, Bloomington's councilmembers explained their goals in codifying the overlay:

> Purpose. The Mixed-Use Downtown Courthouse Square (MD-CS) character area is intended to maintain the historic character of downtown by providing a diverse mix of traditional commercial retail uses at the street level to capitalize on, maintain and enhance the pedestrian activity, and to visually define the sidewalk edges with interesting buildings that respect the established context of traditional commercial storefront buildings.

Bloomington Mun. Code § 20.02.020(g)(4)(A). Bloomington's elected representatives are clearly concerned with maintaining the traditional commercial character of our City's downtown spaces.

In furtherance of this goal, the City Council codified the following zoning requirement on the ground floor of downtown structures:

> A minimum of 50 percent of the total ground floor area of a building located along each street frontage identified by a black line in Figure 47 shall be occupied by nonresidential primary uses . . . [e]nclosed parking garages shall not be counted toward the required nonresidential use.

Bloomington Mun. Code § 20.03.010(e)(1). The Council codified the following map, labelled "Figure 47," identifying those downtown blocks where fifty percent of ground floor space cannot be residential or an enclosed parking garage:

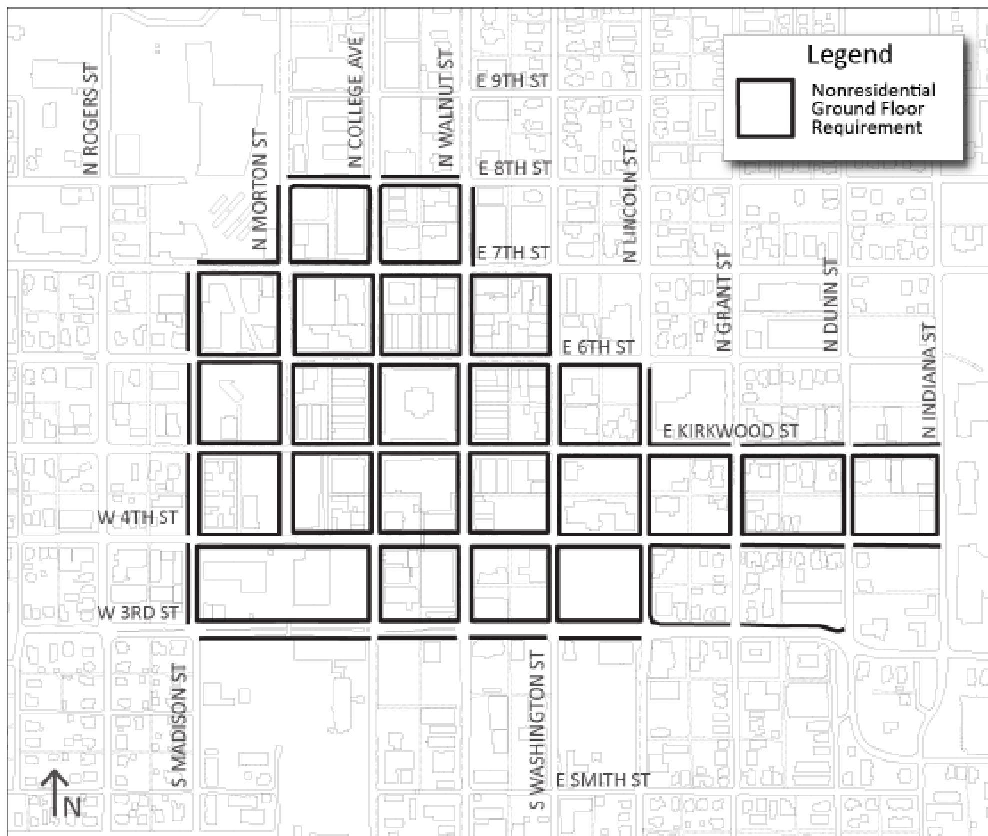

Figure 47: Downtown Nonresidential Ground Floor Requirement

Id. Again, the consequence of prohibiting more than fifty percent of ground floor space from being occupied as residential space or as an enclosed parking garage is that the space is instead dedicated for commercial purposes.

Boards of Zoning Appeals

Boards of zoning appeals are "usually composed of persons without legal training" and are charged with conducting informal administrative proceedings on certain zoning requests. *City of New Haven v. Chem. Waste Mgmt. of Indiana, L.L.C.*, 701 N.E.2d 912, 921 (Ind. Ct. App. 1998). As such, "courts are reluctant to impose strict technical requirements upon their procedure." *Id*. More specifically, BZAs are empowered to grant variances from zoning regulations enacted by local elected officials, and thus allow developers to avoid zoning ordinances. Ind. Code §§ 36-7-4-918.1 to -922. To that end, in a decision upholding the Floyd County BZA's actions, the Court of Appeals described a variance as "dispensation granted to permit a property owner to use his property in a manner forbidden by the zoning code." *Stiller Properties, LLC v. Floyd County Board of Zoning Appeals*, 144 N.E.3d 727, 728 (Ind. Ct. App. 2020).

There are several types of exceptions petitioners may seek from a BZA, including use variances, special exceptions, and development standards variances. Ind. Code §§ 36-7-4-918.1 to -918.8. In the present case, the Petitioner is seeking a development standards variance. State law sets the baseline standards a BZA must use when deciding on a request for a development standards variance:

> A board of zoning appeals shall approve or deny variances from the development standards (such as height, bulk, or area) of the zoning ordinance. The board may impose reasonable conditions as a part of the board's approval. A variance may be approved under this section only upon a determination in writing that:
>
> (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;
>
> (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and
>
> (3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the "practical difficulties" standard prescribed by this subdivision.

Ind. Code § 36-7-4-918.5.

As permitted by Indiana Code § 36-7-4-918.5(a)(3), Bloomington's City Council modified the third "practical difficulties" criterion with additional, more stringent language, so that the third criterion reads:

> (c) 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.*

(emphasis added) Bloomington Mun. Code § 20.06.080(b)(3)(E)(i)(1). Because of this local modification, the BZA must determine that a petitioner meets each of the following three criteria in order to approve a development standards variance:

> (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;
>
> (2) the use and value of the area adjacent to the property included in the 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.

Several cases have added additional clarity to these requirements, and in particular the third, practical difficulties criterion. In a very recent pronouncement on the third, practical difficulties standard, the Court of Appeals provided the following guidance:

> When determining whether compliance with a zoning ordinance will result in practical difficulties, a reviewing court may consider: "(1) whether 'significant economic injury' will result if the ordinance is enforced; (2) whether the injury is self-created; and (3) whether there are feasible alternatives." *Caddyshack Looper, LLC v. Long Beach Advisory Bd. of Zoning Appeals*, 22 N.E.3d 694, 704 (Ind. Ct. App. 2014). These factors are not exhaustive or exclusive. *Id.*

Burton v. Bd. of Zoning Appeals of Madison Cnty., 174 N.E.3d 202, 218 (Ind. Ct. App. 2021), *trans. denied*. BZAs and reviewing courts may consider these three additional factors when determining whether "the strict application of the terms of this UDO will result in practical difficulties in the use of the property." Ind. Code § 36-7-4-918.5, Bloomington Mun. Code § 20.06.080(b)(3)(E)(i)(1).

Because petitioners seeking variances or special exceptions are attempting to avoid the law, petitioners bear the burden of proving that they meet the necessary criteria. "[T]he burden of demonstrating satisfaction of the relevant statutory criteria rests with the applicant for a special exception." *Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County North Board of Zoning Appeals*, 677 N.E.2d 544, 548 (Ind. Ct. App. 1997), *reh'g denied, trans. denied*. Therefore, in order to receive a

development standards variance, petitioners must present evidence that convinces the BZA that they have met their burden of proof on all three above-recited criteria.

There are important distinctions in the evidentiary requirements imposed on BZAs when they *grant* a variance as opposed to when they *deny* a variance. The Court of Appeals has held that "[t]o reverse the grant of a variance on the basis of insufficient evidence, an appellant must show that the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding and decision of the board does not rest upon a rational basis." *Stiller*, at 729. See also *Burcham v. Metro. Bd. of Zoning App. Div. 1 of Marion Cty.*, 883 N.E.2d 204, 213 (Ind. Ct. App. 2008) and *Snyder v. Kosciusko Cty. Bd. of Zoning App.*, 774 N.E.2d 550, 552 (Ind. Ct. App. 2002). Clearly it is difficult to overturn a BZA decision granting a variance.

However, this minimal standard does not apply because Bloomington's BZA *denied* the variance petition, rather than granting it. Our supreme court has clarified the applicable evidentiary standard when a development variance is denied:

> In order to set aside the determination of a board which has denied a zoning variance, the reviewing court must find that each of the statutory prerequisites for variance has been established as a matter of law. *Metropolitan Board of Zoning Appeals v. Standard Life Insurance Co.* (1969), 145 Ind.App. 363, 251 N.E.2d 60, *trans. denied* (1970). "In other words, the evidence *supporting* each prerequisite must be such that no reasonable man could fail to accept that prerequisite as proved." *Id.* at 61.

Town of Beverly Shores v. Bagnall, 590 N.E.2d 1059, 1061 (Ind. 1992) (emphasis in original). The Supreme Court went on to say, "[t]o reverse the board's finding, the trial court had to find that no reasonable person could agree with the board's

conclusion." *Id.* at 1063. Then, upholding the BZA's decision to deny the development standards variance, the Supreme Court determined that "[t]his tall hurdle was not cleared." *Id.* So unless the record reveals that no reasonable person could have agreed with the Board's conclusions in its findings, then the BZA's decision must be upheld.

There are additional evidentiary issues unique to BZA proceedings. State code directs staff to "appear before the board at the hearing and present evidence in support of or in opposition to the granting of a variance" and to "file with the board a written statement setting forth any facts or opinions relating to the matter." Ind. Code § 36-7-4-920. Courts direct BZAs to treat the staff report as evidence: "[t]he Board is entitled to consider the staff report as evidence." *Allen v. Bd. of Zoning Appeals for City of Noblesville*, 594 N.E.2d 480, 484 (Ind. Ct. App. 1992). In the instant case, staff submitted a report to the BZA as evidence, which has been entered into the record before this Court. Petitioner's Ex. 5.

Furthermore, BZAs are permitted to deny petitions when petitioners fail to carry their burden, without the need for the presentation of any contrary evidence. In upholding the Hamilton County BZA's denial of an exception in *Crooked Creek Conservation & Gun Club, Inc. v. Hamilton Cnty. N. Bd. of Zoning Appeals*, 677 N.E.2d 544 (Ind. Ct. App. 1997), the Court of Appeals clarified that BZAs may determine that a petitioner didn't carry its burden, even without affirmative evidence:

> Since remonstrators need not affirmatively disprove an applicant's case, a board of zoning appeals may deny an application for a special exception on the grounds that an applicant has failed to carry its burden of proving compliance with the relevant statutory criteria regardless of

> whether remonstrators present evidence to negate the existence of the enumerated factors.

Id. at 548. The Court of Appeals has held that BZAs need not rely on any evidence when it denies a zoning petition on multiple occasions. In *Ripley Cnty. Bd. of Zoning Appeals v. Rumpke of Indiana, Inc.*, 663 N.E.2d 198 (Ind. Ct. App. 1996), the Court of Appeals upheld the Ripley County BZA's denial of a special exception and noted

> the difficulty a board of zoning appeals faces when attempting to support its determination that particular criteria have not been met. As in the instant case, an applicant generally has a burden when seeking a special exception to prove the existence of certain factors or criteria. If a board of zoning appeals determines the criteria have not been satisfied, it has the discretion to deny the exception. To require that the board then explain why the criteria have not been met in effect either places a burden on those who are opposed to the special exception to come forward with evidence in opposition, or requires the board to set forth requirements for meeting each of the criteria. Neither option is appropriate, as each removes the burden from the applicant to put forth affirmative evidence on each criteria.

Id. at 207.

In summary, when a petitioner seeks an exception so that it may avoid having to follow zoning laws, (1) the petitioner bears the burden of proof on each criteria, and (2) the petitioner must meet each and every criteria. Then, on appeal to a trial court, a petitioner who was unable to convince a BZA to give it permission to ignore a zoning ordinance must show that no reasonable person could have agreed with the BZA's negative findings on each and every criteria.

Factual Background

Petitioner Cutters Kirkwood 123, LLC, is seeking to build residential condominiums on East Kirkwood Avenue, just a few feet from the courthouse square

in Bloomington and within Bloomington's Mixed-Use Downtown, Courthouse Square Overlay district. Petitioner's Ex. 5. As part of its vision for the project, the Petitioner requested a "variance from downtown character overlay standards to allow for a smaller percentage of total ground floor area dedicated to a non-residential use other than a parking garage use."[3] Petitioner's Ex. 5. More specifically, the Petitioner opted to put forward a building "containing a ground floor parking garage." *Id*. There is no structure at the site, as "[t]he site currently contains a surface parking lot." *Id*.

As directed by Indiana Code Section 36-7-4-920, staff prepared a report for the BZA and presented evidence in opposition to the variance at the BZA meetings where the petition was heard. Petitioner's Ex. 1, 2, 3, and 5. While the City Council has directed that downtown developments reserve fifty percent of first floor space for non-residential and non-parking garage uses, the Petitioner proposed dedicating a mere "19 percent of the ground floor" to non-residential and non-parking garage uses. Petitioner's Ex. 5.

While most BZA petitions are handled on a single night, in this case, the Petitioner was permitted to present its case on three occasions: August 25, 2022; September 22, 2022; and October 20, 2022. Petitioner's Ex. 1, 2, and 3. At the end of the hearing on October 20, 2022, Bloomington's BZA denied the Petitioner's request

[3] The Petitioner also sought a second variance to allow the project to proceed with a smaller percentage of first floor façade area being dedicated to large display windows than the zoning code permits. Petitioner's Exhibit 5. That variance was granted and therefore is not at issue in the present litigation.

to avoid the City's zoning laws and issued the following findings on criteria one and three[4]:

> *(1) The approval will not be injurious to the public health, safety, morals, and general welfare of the community*
>
> **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.
>
> *(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.*
>
> **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.

Petitioner's Exhibit 5; Petitioner's Exhibit 3, 10/22/2022 Transcript 68-9. In lieu of modifying its existing proposal to comply with the legal requirements governing proposed developments in downtown Bloomington (or even taking steps to modify

[4] Because the parties agree that the second criteria is not at issue, Respondent does not address it in this filing.

their proposal to come closer to the 50% ground floor commercial requirement than the 19% proposed), Petitioner opted to initiate the present litigation before this Court.

Standard of Review

BZA decisions are given substantial deference and can only be reversed when the Petitioner can show clear error of law. *Burton*, 174 N.E.3d at 209-10. When reviewing a BZA decision, a trial court "may not substitute [its] judgment for that of the zoning board, and [it] may neither reweigh evidence nor reassess witness credibility." *Stiller*, at 729. A trial court may not conduct a trial de novo, and may not substitute its decision for that of the BZA absent a finding of illegality. *Edward Rose of Indiana, LLC v. Metro. Bd. of Zoning Appeals, Div. II, Indianapolis-Marion Cnty.*, 907 N.E.2d 598, 601 (Ind. Ct. App. 2009). "There is a presumption that determinations of a zoning board, as an administrative agency with expertise in the area of zoning problems, are correct and should not be overturned unless they are arbitrary, capricious, or patently unreasonable." *Boffo v. Boone Cnty. Bd. of Zoning Appeals*, 421 N.E.2d 1119, 1125 (Ind. Ct. App. 1981). "Thus, a reviewing court does not conduct a trial de novo and may not substitute its decision for that of the Board." *Id*. The determinations of the BZA, as the presumed expert in the area of zoning problems, are afforded substantial deference and may only be overturned if clear error is demonstrated.

Argument

The BZA's Finding on the First Criterion—Injury to the Public—is not Clear Error

In order to obtain a development standards variance from the requirement that 50% of ground floor space on East Kirkwood Avenue (in the heart of Bloomington's downtown) be dedicated to commercial uses, the petitioner is charged with demonstrating that "the approval will not be injurious to the public health, safety, morals, and general welfare of the community." Bloomington Mun. Code § 20.06.080(b)(3)(E)(i)(1). Following the hearing on the instant petition, the Board of Zoning Appeals determined that petitioner had not met its burden with regard to this second criterion and found:

> 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.

Petitioner's Ex. 5.

Though *Ripley* and *Crooked Creek* make it clear that the BZA was not required to support its determination that the Petitioner did not carry its burden to obtain a variance, the BZA's decision was nonetheless based on substantial evidence. The record demonstrates that a failure to preserve the historical character of downtown would be injurious to the public, as reducing the square footage of retail space devalues the interaction between the public and the private on East Kirkwood

Avenue across the street from the Buskirk-Chumley Theater, in arguably Bloomington's busiest and most famous commercial and retail corridor.

One of the Board's findings in determining that allowing a variance from the requirement that fifty percent of the ground floor space be dedicated to commercial purposes is that "the overlay desires robust nonresidential uses on the first floor." This finding indicates that the history of Bloomington's downtown places an emphasis on commercial uses, rather than on the proliferation of residential uses along East Kirkwood Avenue.

In support of this finding, the staff report submitted as evidence to the BZA states "that not meeting the ground floor regulation is found to be injurious to the community because it goes against what the community desires along the main corridor." Petitioner's Ex. 5. The staff report goes on to point out that one of the purposes behind the 50% requirement is "to encourage site design that engages directly with the public realm of the street and to promote pedestrian accessibility, instead of the first floor site uses being buffered from the pedestrian zone." *Id*. The evidence in the staff report supports the BZA's finding that the overlay desires robust nonresidential uses on the first floor.

Testimony also supports this finding. At the BZA's August 25 meeting, Development Services Manager Jackie Scanlan testified that "this isn't like the outskirts of downtown, this is the heart of downtown, it's not even one block off of the Square. I think the expectation of being able to fill commercial space here, if

anywhere, this is where we think that it could work." Petitioner's Ex. 1, 22:15-19. At the second hearing on September 22, Scanlan further testified:

> The overlay in which this building is located desires robust non-residential uses on the first floor, that's why it requires 50 percent. That's why we don't have that everywhere, we do have that here. It's desired here in our community documents adopted by Council, and we do find that not meeting that regulation, especially at this location, is injurious because it goes against that desire. You know, this isn't a side street that happens to be in the overlay, it's on Kirkwood.

Petitioner's Ex. 2, 21:12-21. In pointing out that the variance would be injurious to the public by damaging the overlay and the historic nature of Bloomington's downtown, Scanlan continued, "We do not have a lot of vacant commercial on our main pedestrian corridor in downtown, which is Kirkwood." Petitioner's Ex. 2, 21-22:24-25, 1. This oral testimony supports the BZA's finding that "The overlay desires robust nonresidential uses on the first floor, while providing ample percentage for garage or residential space." Petitioner's Ex. 5.

There is also ample evidence in the record to support the BZA's further finding on the first criterion 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." *Id*. Kirkwood is an immensely important commercial and retail corridor in our community, and when commercial space along the corridor is limited in size, the types and number of commercial enterprises that might locate along Kirkwood become similarly limited, as this finding suggests.

In support of this finding, the BZA received evidence in the staff report: "as the UDO has updated, the community has become less car-centric so this regulation and

the fact that the MD-CS zoning district does not require any parking are intentional components of the UDO." Petitioner's Ex. 5. Here, staff is highlighting the importance of Kirkwood as a *pedestrian* rather than *vehicular* corridor. In such corridors, it's reasonable to emphasize the importance of ground floor commercial or retail space, as the finding indicates.

Furthermore, oral testimony also supports this finding. At the September 22 BZA meeting on the variance request, Scanlan testified:

> [W]e are slightly less car-centric. In this particular overlay parking is not required. This particular development would like parking here but it isn't something that the Code is mandating at, in this area. 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.

Petitioner's Ex. 2, 22:12-19. Again, staff is pointing out that in a pedestrian-focused space, like East Kirkwood Avenue between the courthouse square and the Sample Gates, commercial and retail space is even more valuable.

At the September meeting, Scanlan further testified that "allowing limited small commercial spaces on the front reduces what those spaces can do to bring people to those areas, right. So the 50 percent could house more things than a smaller commercial space could, and that was considered when those percentages were created." Petitioner's Ex. 2, 22:3-9. Here, Scanlan's testimony directly supports the notion that allowing reduced retail space would devalue the interface between the public and private realm on our main street—Kirkwood. Reducing the amount of ground floor space from fifty percent to a mere 19% limits the types and number of commercial use that might otherwise locate on Kirkwood.

Even though the BZA's first finding supporting the denial of Petitioner's variance request need not be supported by substantial evidence, in this case there is ample evidence in the record to demonstrate that granting the variance would be injurious to the public health, safety, morals, or general welfare of the community.

The BZA's Finding on the Third Criterion—Practical Difficulties—is not Clear Error

In order to obtain a development standards variance from the requirement that 50% of ground floor space on East Kirkwood Avenue be dedicated to commercial uses, the petitioner must also demonstrate that "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 Mun. Code § 20.06.080(b)(3)(E)(i)(1). Following the hearing on the instant petition, the Board of Zoning Appeals determined that petitioner had not met its burden on this third, practical difficulties criterion and found:

> 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.

Petitioner's Ex. 5. As with the first finding regarding injury to the public, the Board's finding on the third criterion is also supported by evidence in the record—even though it need not be.

In testimony at the August 25 BZA meeting, Scanlan pointed out that unlike many petitions for variances, "There isn't a peculiarity here, there's nothing here at this time." Petitioner's Ex. 1, 24:8-9. Because the Petitioner is proposing to develop what is now a surface parking lot, there are innumerable development alternatives to the developer's selected design, many of which would be capable of meeting the requirement to reserve fifty percent of ground floor space for commercial use. To that end, Scanlan testified,

> So, for example, in the last one we saw, you know, it has a historic building that has an adjacent driveway that is already there, it is already being used and has been designated in some way as important by the community, so to change that is peculiar to that property. This property is vacant, there's nothing here, they're planning to do a new build.

Petitioner's Ex. 1, 23-24:20-25, 1.

In support of the notion that feasible development alternatives are available on this undeveloped property, the staff presented evidence that directly adjacent properties are successfully dedicating 100% of their ground floor space to commercial uses.

> The square footage of adjacent commercial spaces was analyzed, with one example being the Book Corner which contains approximately the same square footage of what is currently being proposed as commercial space for this proposal, however the Book Corner uses the entirety of the ground floor for its commercial space.

Petitioner's Ex. 5. There are no peculiar conditions that create practical difficulties in setting aside fifty percent of ground floor space for commercial use. In an exchange between Board member Barre Klapper and Scanlan, Scanlan provided further testimony that the property in question simply is not peculiar:

> MS. KLAPPER: Is there anything peculiar about the size of the site?
>
> MS. SCANLAN: No.
>
> MS. KLAPPER: Okay.
>
> MS. SCANLAN: I can show you the, I mean so for reference the, let's see. Just a sec. The site's about 90 feet wide. The CVS site is about 55, 56.

Petitioner's Ex. 2, 47-48:22-25; 1-6. Testimony shows that the Book Corner site on the same side of the same block had no difficulty complying with the requirement to reserve far more than 50% of street level space for non-residential and non-parking garage uses, and further reveals that the size of the Petitioner's site was not unique in comparison to neighboring properties.

Even though the BZA's third finding supporting the denial of Petitioner's variance request need not be supported by substantial evidence, in this case there is ample evidence in the record to demonstrate that there are no practical difficulties peculiar to the property in question that require the BZA to grant the variance. The property at issue does not appear to be at all uniquely situated with regard to the 50% ground floor commercial requirement.

Nullification

Finally, Respondent feels it is imperative to note as a general matter that BZAs are not intended to operate in a way that nullifies local zoning regulations. BZAs are not legislative bodies, nor are the judges who review BZA decisions. Neither the BZA nor this Court are charged with making difficult normative zoning decisions—like the percentage of space in Bloomington's downtown that should be reserved for commercial uses, and the percentage we should allow be converted to residential uses, such as student housing or condominiums. The elected City Council is the legislative body charged with making normative judgments regarding downtown Bloomington's future development.

In its treatise on zoning law, Rathkopf's The Law of Zoning and Planning notes that finding something exceptional or unique is imperative before BZA grants a petitioner relief from following zoning laws. Otherwise, the BZA would be taking the place of Bloomington's elected legislators and nullifying their enactments, which was never intended.

> Where the element of uniqueness is absent, i.e., where the restriction imposes the same hardship upon a substantial number of properties in the area, then it would seem that the legislative judgment as to how the area should be restricted, as evidenced by the zoning district in which the area was placed and the restrictions applicable to properties in that district, was erroneous. For the board of appeals to grant a variance to a parcel of land in the area affected would constitute an attempt to review the legislative act. By granting a use variance, the board itself acts legislatively, which is completely contradictory of the purpose for which it was established and unauthorized by the provisions of the enabling act.

Necessity of finding an exceptional or "unique" condition, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 57:16 (4th ed.). In such circumstances, if the BZA grants a variance, "the board itself acts legislatively," which is highly inappropriate. *Id.* The BZA cannot serve as an end-run to cut Bloomington's legislature—the City Council—out of zoning decisions.

If the Petitioner believes that the City Council's directive to reserve fifty percent of ground floor space for commercial purposes on East Kirkwood Avenue is inappropriate or onerous, the Petitioner should contact their local elected representatives and seek a legislative change. To that end, Respondent notes that at this very moment, Bloomington's Plan Commission and City Council are considering legislative modifications to the downtown ground floor commercial requirement. The BZA encourages the Petitioner, and all other members of our community, to engage in the legislative process that establishes our community's downtown zoning regulations—including the fifty percent ground floor commercial requirement—rather than asking a judge to decide what degree of commercial space should be reserved on the ground floor of downtown developments. Difficult, normative decisions about Bloomington's downtown zoning districts are appropriately vested in our elected councilmembers, and helpfully for the Petitioner, our elected representatives are presently discussing these very regulations.

Conclusion

For the foregoing reasons, Respondent City of Bloomington Board of Zoning Appeals asks the Court to uphold the Board of Zoning Appeals' denial of Petitioner's request for relief from the requirement to dedicate at least fifty percent of total ground floor area to a nonresidential use other than a parking garage use, and for any and all other appropriate relief.

Respectfully Submitted,

/s/ Michael Rouker
Michael Rouker, Attorney No. 28422-53
City Attorney
City of Bloomington
401 N. Morton St.
Bloomington, IN 47404
(812) 349-3556
roukerm@bloomington.in.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2023, the foregoing document was electronically served upon the following persons via the Indiana E-Filing System (IEFS):

Attorney for the Petitioner:

Christine Bartlett
clb@ferglaw.com

/s/ Michael Rouker
Michael Rouker
City Attorney
Attorney No. 28422-53

CITY OF BLOOMINGTON
401 N. Morton St.
Bloomington, IN 47404
(812) 349-3556
roukerm@bloomington.in.gov