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

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

ORDER ON VERIFIED PETITION FOR JUDICIAL REVIEW

This matter came before this Court on the Petition for Judicial Review filed by Petitioner, Cutters Kirkwood 123, LLC ("Cutters"), asking this Court to reverse the decision of the City of Bloomington Board of Zoning Appeals ("BZA"). Petitioner submitted its Memorandum for Judicial Review of BZA Decision February 22, 2023. The BZA submitted its Memorandum of Law in support of Board of Zoning Appeals' Decision and Response to Petitioner's Memorandum on March 24, 2023. Petitioners submitted their Reply on April 3, 2023. The BZA submitted its Surreply on April 14, 2023. Oral argument was held on August 11, 2023. Having considered the briefs submitted by the Parties, the BZA's record, and the arguments presented, the Court now finds that there was clear error in the standard of law which was applied by the BZA. However, this Court is not a fact-finding body and believes that the BZA is the appropriate determiner of whether a variance is appropriate in this case. Therefore, this matter will be remanded to the BZA for a decision on the requested variance that complies with the applicable law.

FINDINGS OF FACT

1. The City of Bloomington ("City") is a political subdivision of the State of Indiana.
2. The City enacted zoning and development ordinances which, collectively, referred to as the City of Bloomington Unified Development Ordinance (the "UDO"), which was substantially amended in 2020.
3. The BZA is a unit or division of the City charged with hearing and deciding petitions for development standards variances from the UDO. BMC 20.06.020(d)(1)(A).
4. A variance approved by the BZA allows a property owner to deviate from the development standards of the UDO. BMC 20.07.010.
5. 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.
6. Cutters owns an undeveloped lot located at 115 E. Kirkwood Avenue, Bloomington, Indiana, in Monroe County (the "Property"). The Property is located within the City in the Mixed-Use Downtown with Courthouse Square Overlay Zoning District.
7. 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"). Each condominium owner would be deeded a parking space along with their condominium unit.

8. In 2022, Cutters requested two variances from the BZA: (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 ("Retail Variance").
9. Bloomington Municipal Code ("BMC") § 20.03.010(e)(1), which requires: 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.
10. The BZA held three meetings to consider the variances on August 25, 2022, September 22, 2022, and October 20, 2022.
11. The BZA approved the first variance but denied the Retail Variance request.
12. Cutters proposed reducing the first-floor commercial use to 19% to allow for the remainder of the first floor to be used for a parking garage. The parking would be behind the retail space, which would cover the entire length of the street façade. In other words, no one walking by the Property would see that the first floor contained anything other than retail space.
13. Condominiums are a permitted use in the Project's zoning district and parking garages are permitted.
14. Cutters, through its representative, Randy Lloyd ("Lloyd"), appeared before the BZA at each of the three meetings.

15. Cutters presented testimony and a written statement from Ryan Strauser, as a representative for the architect of the Project; a written statement from a downtown commercial landlord, CFC Properties; written statements from Brian Thompson and Kerry Feigenbaum, realtors with FC Tucker; lists of vacant downtown commercial space; and a legal memorandum.

16. The BZA voted to deny the Retail Variance and issued the following findings:

    a. 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.

CONCLUSIONS OF LAW

17. On judicial review, "the burden of demonstrating the invalidity of a zoning decision is on the party to the judicial review proceeding asserting invalidity." Ind. Code § 36-7-4-1614(a).

18. A reviewing court may disturb a BZA's zoning decision "only if the court determines that a person seeking judicial relief has been prejudiced by a zoning decision that 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(d).

19. 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 Properties, LLC v. Floyd County Board of Zoning Appeals*, 144 N.E.3d 727, 729 (Ind. Ct. App. 2020). 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).

20. A reviewing court is directed to presume that the decision of a BZA is correct. "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).

21. When reviewing a denial of a variance by a BZA, a reviewing court must find that each prerequisite for the variance was established as a matter of law. In other words, the evidence supporting the criteria must be such that no reasonable person could fail to accept each criterion as proven. *Town of Beverly Shores v. Bagnall*, 590 N.E.2d 1059, 1061 (Ind. 1992).

22. The BZA should have considered the following factors in deciding whether to approve Cutters' requested variances: (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.

23. "Practical difficulties" is a specific phrase that 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.*

24. The BZA cites the *Burton* case with regard to the practical difficulties criterion, as the most recent case on this point. The *Burton* case in turn cites to *Caddyshack Looper* and states in relevant part, "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.*
25. While it is accurate that, as a body of judicial review, this Court does not function to reweigh the evidence presented to the BZA, it is also the burden of this Court to disturb the decision of an administrative body if it makes a finding of illegality.
26. In this instance, this Court finds that Cutters has, in fact, been prejudiced by a zoning decision that is "*otherwise not in accordance with law*".
27. There are ample and unquestionable instances in the record on this matter that demonstrate that the legal guidance provided to the BZA on this issue was clearly erroneous. Among the three meetings that were conducted by the BZA it is repeatedly demonstrated that the BZA members believed that they could not consider the goals of the landowner in determining whether there were "practical difficulties" per the third prong of the variance test.

28. The BZA argues that Indiana's appellate courts did not create a mandatory, exclusive or exhaustive list of factors to consider when making a determination of practical difficulties, which is accurate. However, this is not the end of the inquiry on the legality of the decision of the BZA. In this instance, the advice given to the BZA was not brief or vague, it was in fact inaccurate. The burden is not placed on the BZA, a board of civilian volunteers with an expertise in zoning issues, to have an extensive knowledge of the appellate decisions on this issue. The burden to advise the BZA on legal issues falls to their legal counsel and staff. Not only did the legal counsel and staff for the city fail to advise the BZA that they could consider the goals of the landowner in determining the practical difficulties factor, but they also advised the BZA that they explicitly *could not* consider those goals. It is a different situation entirely for the BZA to fail to consider a factor in a non-exhaustive or non-exclusive list, rather than to be told that they *could not* consider a factor when they stated an explicit desire to do so. The record in this case clearly demonstrates that it was the latter. That is contrary to the law set forth in the *McDonald's*, *Burton* and *Caddyshack Looper* cases.

29. The BZA contends that Cutters' interpretation of the implementation of the "practical difficulties" prong that in any way considers the goals of the landowner vacates the criteria of this prong. This Court disagrees. The BZA cites *Burton* which cites *Caddyshack Looper* in their argument that "this simply cannot be the law". The BZA seems to focus on the fact that the body of *Caddyshack Looper* and *Burton* do not explicitly state the landowners goals as a consideration. However, both cases clearly state that the list of considerations is non-exhaustive and non-exclusive. Also, in the citations in *Caddyshack Looper* regarding the list of factors to be considered read as follows:

"*Edward Rose of Indiana, LLC v. Metro. Bd. of Zoning Appeals, Div. II, Indianapolis-Marion Cnty.*, 907 N.E.2d 598, 605 (Ind. Ct. App. 2009) (citing *Metro. Bd. of Zoning Appeals v. McDonald's Corp.*, 481 N.E.2d 141, 146 (Ind. Ct. App. 1985) (citations omitted), *clarified on other grounds on reh'g*, 489 N.E.2d 143, *trans. denied*), *trans. denied.* See also *Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 492 (Ind. Ct. App. 2009) *(noting the factor of "whether any feasible alternative is available, within the terms of the ordinance, which achieve the same goals of the landowner")*. These factors are not exclusive. See *Edward Rose*, 907 N.E.2d at 605".

Regardless of whether the BZA believes that this interpretation "simply cannot be the law", the appellate court clearly states that it is. It is noted in the cases to which the BZA cites repeatedly that the goals of the landowner *can* be considered in evaluating the "practical difficulties" prong. If this were a matter of the City legal and staff not affirmatively advising the BZA that they could consider the goals of the landowner, it may be a different case. However, in this instance, the BZA was advised that they explicitly could not consider this matter.

30. The BZA also contends that any error, if it did exist, was harmless. From an examination of the record, that is clearly not the case. It was repeatedly and unambiguously stated by the BZA members throughout the three meetings that were conducted on this matter that what they kept coming back to was the "practical difficulties" prong, and more specifically the other feasible alternatives consideration being made *with or without* consideration of the landowners goals. There were several statements made by BZA members, some immediately before casting their votes on the variance, that couch their positions in the

context of their inability to consider the goals of the landowners. In addition, the fallacy that the BZA could not consider the goals of the landowner created a narrative that the decision to grant the variance was somehow out of the purview of the BZA as it was a "policy" decision. It was repeated on several occasions by the BZA members that they did not believe granting this variance was in their authority or purview because it was a "policy" decision. This sentiment was reiterated repeatedly by City staff. There is ample evidence in the record that the error here was indeed harmful to Cutters.

31. As a body of judicial review, this Court may only disrupt the decision of the BZA if there is clear evidence that their decision was, as in this case, contrary to the law. However the BZA is an administrative agency with expertise in the area of zoning problems, and well suited to weigh the evidence before it to make a determination regarding the variance proposed. In this instance this Court finds that there is sufficient evidence regarding the legal standard applied by the BZA to overturn their decision, however this Court does not find sufficient evidence in the record to unequivocally state that each prerequisite for the variance was established as a matter of law. Or, as described in *Town of Beverly Shores v. Bagnall*, the evidence supporting the criteria is such that no reasonable person could fail to accept each criterion as proven.

32. This Court finds it appropriate to remand this matter back to the BZA to reconsider the proposed variance based on the evidence, reflecting the accurate legal standard. The BZA may, in fact, consider the goals of the landowner in determining the "practical difficulties" prong.

33. Based on the lengthy proceedings in this matter, the BZA is directed to deliver a decision in the most expeditious manner possible to allow the project to proceed or redesign, as their decision might require.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the BZA's Denial of the Proposed Variance is reversed. This matter is hereby remanded back the BZA to be heard at their ***next*** meeting and decided on at that meeting.

SO ORDERED, this 14th day of November, 2023.

Emily A. Salzmann, Judge
Monroe Circuit Court VIII