

Memo To: Town of Clear Lake Town Council / Board of Zoning Appeals
From: Michael Hawk, attorney to BZA
Date: March 30, 2023
Re: Certain Development Standards Variance Request

It is my understanding that there is some question and/or concern as to why residents are able to file variance requests for standards or uses that are clearly prohibited by the Unified Development Ordinance (“UDO”).

As provided for in the Indiana Citizen’s Planners Guide:

What is the Board of Zoning Appeals? The board of zoning appeals (BZA) is the local government body that is empowered by State Law to consider granting relief from the requirements of the zoning ordinance. From a practical standpoint, it is almost impossible to create zoning regulations that universally make sense on all parcels of land. The board of zoning appeals allows property owners with unique conditions on their parcels to seek relief.

Most of the BZA’s caseload is devoted to variance requests, but the BZA is under no obligation to grant those variance requests. The board is under an obligation to hear the request and then make a decision based on the facts of the case and the applicable criteria.¹

Indiana Code § 36-7-4-918.4 provides, in relevant part:

A board of zoning appeals shall approve or deny variances of use from the terms of the zoning ordinance. The board may impose reasonable conditions as a part of its 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;
- (3) the need for the variance arises from some condition peculiar to the property involved;

¹ The foregoing is derived from the Indiana Citizen’s Planners Guide.

- (4) the strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought; and
- (5) the approval does not interfere substantially with the comprehensive plan adopted under the 500 series of this chapter.

Likewise, Indiana Code §§ 36-7-4-918.5 provides, in relevant part:

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.

The legislature’s use of the word “shall” is not permissive (such as the use of the word “may”), it is imperative. Accordingly, under Indiana law, if we wish to have a zoning ordinance, by law we must afford property owners the ability to seek variances from that ordinance. This does not mean they must be granted, but they must be considered. The foregoing statutes provide the legal criteria that must be met in order for any variance request to be granted.

The law recognizes that each property is unique and, as such, it would not make sense to preemptively deny property owners the right to seek relief from zoning laws that, when applied, have unintended or undesirable consequences. A variance is not automatically a bad thing. It is a way a community can solve problems created by applying the generalities of the zoning ordinance to specific situations — it introduces some needed flexibility to zoning regulations. That being said, variances are meant to be a safety valve, and should not be allowed to become a “backdoor” way of thwarting the zoning ordinance. Examples of this are asking for a variance to allow more

density in a residential zoning district, instead of asking for the property to be rezoned to a district with a higher density.

As such, rather than denying individuals the right to seek variances, which would run afoul of the laws cited above, the Town should educate our BZA so that variance requests are not granted without first complying with the statutory criteria.