

**STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND BUILDING
SAFETY COMMISSION**

IN RE:)
)
INDY STORAGE DEPOT) ADMINISTRATIVE CAUSE NO.
) 14-29-FPBSC
)
)

NOTICE OF NON-FINAL ORDER

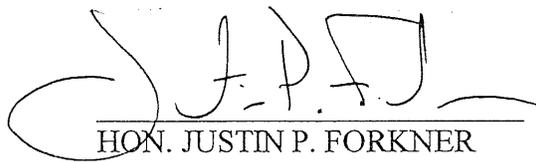
You are hereby notified that the attached document entitled **Findings of Fact, Conclusions of Law, and Non-Final Order** has been entered by the Administrative Law Judge in accordance with Indiana Code § 4-21.5-3-27.

The ultimate authority in this matter is the Fire Prevention and Building Safety Commission. Indiana Code § 4-21.5-3-29(d) requires a party seeking to preserve an objection to this order for judicial review to file a written objection that

1. identifies the basis of the objection with reasonable particularity; and
2. is filed with the Commission within fifteen days (or any longer period set by statute) after this order is served.

In the absence of an objection from a party or notice from the Commission of its intent to review any issue related to this order, the Commission shall affirm this order in accordance with Indiana Code § 4-21.5-3-29(c). **This order will be considered by the Commission on July 7, 2015, at 9:00 a.m. (EDT), in Conference Center Room B, Indiana Government Center South, 302 West Washington Street, Indianapolis, IN 46204.**

Date: June 11, 2015



HON. JUSTIN P. FORKNER

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A copy of the foregoing was served by U.S. Postal Service upon the following parties and attorneys of record:

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
NON-FINAL ORDER**

The Petitioner in this matter, Richard Douglass, d/b/a Indy Storage Depot, Inc., seeks administrative review of the Fire Prevention and Building Safety Commission's denial of the Petitioner's application for a variance. For the reasons explained below, the Administrative Law Judge likewise **DENIES** the Petitioner's application.

Procedural Background

On October 4, 2014, the Petitioner filed an application for a variance with the Fire Prevention and Building Safety Commission. The Commission considered the variance application on November 5, 2014. The Commission denied the Petitioner's application, notice of which was sent to the Petitioner on November 7, 2014. On November 23, 2014, the Petitioner filed a petition for review of the Commission's denial. The Commission granted the petition on December 2, 2014, and the undersigned Administrative Law Judge was appointed to adjudicate the appeal.

An initial prehearing conference was held on January 28, 2015. The parties indicated that informal resolution might be possible, but at a subsequent status conference they indicated that this was no longer possible. The parties mutually agreed that no formal evidentiary hearing in this matter was necessary; their evidence and arguments could be submitted by written briefs and

documentary evidence. The ALJ approved this form of proceeding and on March 20, 2015, the Petitioner filed its brief. The Respondent filed its brief and evidence on April 23, 2015. No additional briefing or evidence was requested or submitted by either side after that point.

Burden and Standards of Proof

Indiana Code § 4-21.5-3-14(c) provides that at each stage of an administrative review, “the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense.” That burden rests upon the agency when the agency is, in essence, prosecuting a petitioner for a regulatory violation. See Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). But when it is the petitioner who has sought an agency action or claimed entitlement to an exemption from regulatory requirements, the burden rests upon that petitioner. See Ind. Dep’t of Natural Res. v. Krantz Bros. Constr. Corp., 581 N.E.2d 935, 938 (Ind. Ct. App. 1991).

Proceedings held before an ALJ are de novo, Ind. Code § 4-21.5-3-14(d), which means the ALJ does not—and may not—defer to an agency’s initial determination, Ind. Dep’t of Natural Res. v. United Refuse Co., Inc., 615 N.E.2d 100, 104 (Ind. 1993). Instead, in its role as fact-finder the ALJ must independently weigh the evidence in the record and matters officially noticed, and may base its findings and conclusions only upon that record. Id.; see also Ind. Code § 4-21.5-3-27(d).

At a minimum, the ALJ’s findings “must be based upon the kind of evidence that is substantial and reliable.” Ind. Code § 4-21.5-3-27(d). “[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision.” St. Charles Tower, Inc. v. Bd. of Zoning Appeals, 873 N.E.2d 598, 601 (Ind. 2007). It is “something more than a scintilla, but something less than a preponderance of the evidence.” State ex rel. Dep’t of Natural Res. v. Lehman, 177 Ind. App. 112, 119, 378 N.E.2d 31, 36 (1978) (internal footnotes omitted).

When a Fourteenth Amendment interest is put at risk by an agency action, however, a higher standard of proof is required. Pendleton v. McCarty, 747 N.E.2d 56, 64–65 (Ind. Ct. App.

2001), trans. denied. “[I]n cases involving the potential deprivation of . . . protected property interests, the familiar ‘preponderance of the evidence standard’ [is] used.” Id. at 64. But the higher “clear and convincing” standard is required when a protected liberty interest is at stake. Id. That is to say, this standard applies when “individual interests at stake in a particular state proceeding are both ‘particularly important’ and ‘more substantial than the mere loss of money’ or necessary to preserve fundamental fairness in a government-initiated proceeding that threaten[s] an individual with ‘a significant deprivation of liberty’ or ‘stigma’.” Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind. Ct. App. 1993), trans. denied (quoting In re Moore, 453 N.E.2d 971, 972 (Ind. 1983)); see also Pendleton, 747 N.E.2d at 64.

Findings of Fact

Present in the record of proceedings is the Petitioner’s application for a variance, the Commission’s order denying the variance, the Petitioner’s petition for administrative review, the Commission’s notice granting the petition, and the orders and notices issued by the ALJ. The Petitioner submitted its brief and the Respondent submitted a brief with an exhibit—the minutes of the November 5, 2014, Commission meeting. Based solely on that evidentiary record and any additional items specifically noted below, the ALJ hereby issues the following findings of fact:

1. The Petitioner owns a self-storage facility located at 3006 West Southport Road, Indianapolis, IN 46217. The facility fronts Southport Road to its south. The Petitioner is constructing a new building at the back of its property, with the closest point of the building at least 665 feet from Southport Road and the farthest end of the building roughly 985 feet from Southport Road.¹
2. On February 5, 2014, the Petitioner filed a variance application (“Variance 14-03-23(a)”) seeking a variance from Sections 508.5.1 and 508.2 of the Indiana Fire Code, which, as detailed below, generally require a fire hydrant within 400 feet of a Class 1 building.

As an alternative, the Petitioner proposed constructing a drive lane to enable fire access from Southport Road to the new structure. The drive lane was to be constructed on the eastern side of the facility.

¹ The variance application in the record refers to attached plans, but none were included in the file received by the ALJ. The variance application, however, is a public record that is posted on the Respondent’s website. The attached plans are included in the online version and provide diagrams of the facility’s layout, an understanding of which provides useful context for this proceeding.

On April 1, 2014, the Commission granted Variance 14-03-23(a), with the condition that a fire hydrant be installed on the Petitioner's side of Southport Road, outside the facility's fire access entrance.²

3. The existing water line that would support the hydrant runs along Southport Road, but on the opposite side of the road from the Petitioner's facility. It was determined that it would cost the Petitioner at least \$35,000 to install the new hydrant and connect it under the road to the existing water line.³
4. The total project cost for the Petitioner's new building, exclusive of the hydrant, is \$270,000.
5. There is an existing fire hydrant on the water line side of Southport Road. It is directly opposite existing entrances to the Petitioner's facility, farther west along its frontage to Southport Road.
6. On October 4, 2014, the Petitioner filed the variance application at issue here ("Variance 14-11-11"). The Petitioner again sought a variance from Sections 508.5.1 and 508.2 of the Indiana Fire Code, and requested that it be permitted to omit the fire hydrant required by Variance 14-03-23(a).
7. On November 5, 2014, the Commission denied Variance 14-11-11.

Conclusions of Law

Applying the law set forth in this decision to the factual findings supported by the evidence, the ALJ hereby reaches the following conclusions of law with respect to the issues presented:

1. The Indiana Code creates the Fire Prevention and Building Safety Commission and requires it to adopt statewide building and fire safety laws. Ind. Code §§ 22-12-2-1, 22-13-2-2. In 2008, the Commission amended and

² Likewise, this procedural background is mentioned in passing in the briefs and limited evidentiary record. But the minutes of the March 1, 2014, and April 1, 2014, meetings of the Commission and Variance 14-03-23(a) are also all public records posted on the Respondent's website, and fill in the missing details. These facts, like those noted above, are presented to provide context for the starting point of this proceeding.

³ The Petitioner's brief and the Respondent's exhibit say the cost would be \$53,000, and the online materials include a quote for \$43,500. The variance application itself says \$35,000, which the ALJ accepts as a true representation of the minimum cost to install the hydrant.

adopted the International Fire Code, 2006 Edition, first printing, as the Indiana Fire Code, 2008 Edition. See 675 Ind. Admin. Code 22-2.4-1 *et seq.*

Sections 508.2 and 508.5.1 of the 2008 Indiana Fire Code address fire protection water supplies for Class 1 buildings, including the need for fire hydrants within certain distances of those buildings. See 2008 Ind. Fire Code §§ 508.2 (adopted as amended by 675 Ind. Admin. Code 22-2.4-6(21)), 508.5.1 (adopted as amended by 675 Ind. Admin. Code 22-2.4-6(24)).⁴

2. The Commission is authorized by statute to “grant a variance to a rule that it has adopted.” Ind. Code § 22-13-2-11(a). That authority includes granting a variance to Sections 508.2 and 508.5.1 of the 2008 Indiana Fire Code.
3. An applicant seeking a variance must pay a set fee and show that:
 - (1) Compliance with the rule will impose an undue hardship upon the applicant or prevent the preservation of an architecturally significant or historically significant part of a building or other structure; and
 - (2) either:
 - (A) noncompliance with the rule; or

⁴ As amended by the Commission, Section 508.2 provides:

A water supply capable of supplying the required fire flow, for firefighting purposes, as determined by local ordinance, shall be provided to all premises upon which a Class 1 building or a portion of a Class 1 building is hereafter constructed. The water supply shall be provided as follows:

(A) When a public water supply is available to a premises, there shall be provided fire hydrants and mains capable of supplying the required fire flow.

(B) When a public water supply is not available to a premises, the water supply shall consist of a pond, stream, river, canal, lake, reservoir, quarry, pressure tank, swimming pool, other fixed systems, or firefighter delivered portable system capable of providing the required fire flow. The on-site water supply shall be accessible to the fire department and be located within one hundred fifty (150) feet of the Class 1 building or structure being protected with an automatic fire extinguishing system. If the on-site water supply is not within one hundred fifty (150) feet of the structure being protected, the water supply shall be connected to the on-site fire hydrants and mains capable of supplying the required flow. The owner shall verify the water supply requirements with the servicing fire department prior to the final design and construction.

As amended by the Commission, Section 508.5.1 provides:

Where a portion of the facility or building hereafter constructed or moved into or within the jurisdiction is more than 400 feet (122 m) from a hydrant on a fire apparatus access road, as measured by an approved route around the exterior of the facility or building, on-site fire hydrants and mains shall be provided where required by local ordinance requiring a water supply capable of supplying the required fire flow for firefighting purposes.

Exceptions to this requirement included buildings or facilities with Group R-3 and Group U occupancies and also buildings equipped with an approved automatic sprinkler system, in which case the required distance is 600 feet.

(B) compliance with an alternative requirement approved by the body adopting the rule; will not be adverse to the public health, safety, or welfare.

Ind. Code § 22-13-2-11(b). “Undue hardship” is then defined by regulation as “unusual difficulty” in complying with the rule at issue because of “(1) Physical limitations of construction site or its utility services. (2) Major operational problems in the use of a building or structure. (3) Excessive costs of additional or altered construction elements.” 675 Ind. Admin. Code 12-5-2(h).

4. By claiming entitlement to a variance to one of the Commission’s rules, the Petitioner is claiming entitlement to an exemption from regulatory requirements. Accordingly, it bears the burdens of proof and production. Ind. Code § 4-21.5-3-14(c); Krantz Bros. Constr. Corp., 581 N.E.2d at 938.

Because this is not a matter in which the Commission is seeking to deprive the Petitioner of a protected property or liberty interest, however, the higher standards of proof used in those cases are not applicable here. Cf. Pendleton, 747 N.E.2d at 64. Instead, the usual standard of proof for administrative appeals set forth in Indiana Code § 4-21.5-3-27(d)—that of substantial and reliable evidence—applies.

5. The Petitioner makes no claim that its new self-storage facility has architectural or historical significance that needs to be preserved with a variance from rules governing fire hydrant placement. That aspect of Indiana Code § 22-13-2-11(b)(1) is not at issue here.

Similarly, the Petitioner is not proposing an alternative requirement to Sections 508.2 and 508.5.1. It instead seeks complete excusal from those provisions, this time without any alternative conditions or requirements being imposed.⁵

To succeed in this proceeding and be entitled to a variance from Sections 508.2 and 508.5.1 of the 2008 Indiana Fire Code, the Petitioner must therefore prove with substantial reliable evidence that compliance with these rules will

⁵ The Petitioner has already been granted a variance from Sections 508.2 and 508.5.1—by way of Variance 14-03-23(a). But that variance imposed the condition that the Petitioner install a fire hydrant outside its fire access road. So in some sense, Variance 14-11-11 was a way of belatedly appealing the alternative condition imposed by Variance 14-03-23(a) once the cost of the hydrant installation was determined. (See Pet. Brief at 2, ¶ 15.)

Though the burden of proof remains the same, the test for those sorts of claims is slightly different. See In re Sri Shirdi Saibaba Sansthan of Tristate Temple, 14-03-FPBSC at 9 (Jan. 6, 2015) (to be appropriate, alternative condition imposed in variance must be rational alternative to compliance with underlying rule and may not be adverse to the public health, safety, or welfare). But since the time to administratively appeal the imposition of Variance 14-03-23(a) has passed, see Ind. Code § 4-21.5-3-7(a)(3)(A), the ALJ treats this matter as a fresh administrative appeal solely of Variance 14-11-11.

impose an undue hardship upon it and that noncompliance with the rules will not be adverse to the public health, safety, or welfare.

6. The Respondent concedes that compliance with Sections 508.2 and 508.5.1 would impose an undue hardship because the cost to install the hydrant is twenty percent of the total cost for the building project.⁶ (Resp. Br. at 3–4.)

The ALJ agrees with this assessment. A twenty percent increase in project cost just to install a single fire hydrant here constitutes an “[e]xcessive cost[] of additional or altered construction elements.” 675 Ind. Admin. Code 12-5-2(h).⁷

7. The Petitioner’s argument that noncompliance with these rules would not be adverse to the public health, safety, or welfare has four salient points:

- The servicing fire station for the Petitioner’s facility carries over one thousand feet of hose on their fire apparatus.
- A fire truck positioned at the entrance to the new fire access drive could connect to the existing fire hydrant and reach the back wall of the Petitioner’s new building using only 925 feet of hose.
- Other variances have been approved under similar circumstances.
- The Petitioner’s new building is at least 90 feet from adjoining residential structures and poses no fire exposure risk to other properties.

(Pet. Br. at 2.)

8. The Respondent argues that these are statements that “have not been presented as evidence in any previous proceeding, were not included as exhibits with the Petitioner’s brief, and for that reason, should not be considered without being presented during an evidentiary hearing.” (Resp. Br. at 5–6.) Therefore, the Respondent says, “[t]he Petitioner failed to meet its burden by showing that noncompliance with not be adverse to public health, safety or welfare.” (Resp. Br. at 6.)

9. The ALJ agrees with the Respondent.

⁶ This assumes the hydrant cost to be \$53,000. (Resp. Br. at 4.)

⁷ The ALJ reaches the same conclusion even with the discrepancy in the hydrant cost—a \$35,000 cost would still be an increase of nearly thirteen percent just for the one hydrant and would still be excessive in this case.

It may be that the servicing fire station carries over one thousand feet of hose on its fire apparatus, and that such apparatus positioned in just the right spot could reach the back end of the Petitioner's building with seventy-five feet of hose to spare. And it may be that the new building is at least ninety feet from any residential structure and poses no risk to other properties. If these statements were true, they might be substantial and reliable evidence that noncompliance with Sections 508.2 and 508.5.1 would not be adverse to public health, safety, or welfare.⁸

But a bare assertion of a fact in a party's brief is not proof of the same. Cf. Metro. Life Ins. Co. v. Alterovitz, 214 Ind. 186, 205, 14 N.E.2d 570, 578 (1938) ("arguments of counsel are not evidence").⁹ And even though administrative appeals are informal and do not require the hurdles of the Indiana Rules of Evidence, any findings to support the Petitioner's claim must still be based on substantial and reliable evidence. Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co., 796 N.E.2d 1264, 1271 (Ind. Ct. App. 2003), trans. denied. A single opinion provided by a party "simply does not provide 'substantial and reliable' evidence." Id. Rather, it is "little more than an amorphous allegation." Id. Simply put, without actual evidence to support the Petitioner's assertions, it is impossible to draw the conclusion that they are true.¹⁰

⁸ They do, however, also raise additional questions that might merit resolution. For example, does *every* fire apparatus at the servicing fire station carry that much hose? If not, what options would be available if the properly equipped apparatus was already occupied and a fire broke out at the Petitioner's facility? What is the impact to public health, safety, or welfare when the fire hose must now run across Southport Road? Though the new building may not be within ninety feet of residential structures, is it within ninety feet of additional structures at the Petitioner's facility? Is it adverse to public health, safety, or welfare if only the Petitioner's own facility burns? Is ninety feet a safe distance to other structures if the new building burns unabated in the event the servicing fire station cannot respond with a properly equipped apparatus?

⁹ Under the Administrative Orders and Procedures Act, a party may be represented by counsel "or, unless prohibited by law, by another representative." Ind. Code 4-21.5-3-15(b). Here, the Petitioner is represented by a fire protection and building code consulting service; this is a common occurrence in matters before the Commission. And it is the ALJ's view that the long-standing rule that arguments of counsel are not evidence applies with equal force even if the party's representative is not an attorney.

¹⁰ With respect to the prior variances that the Commission has granted, the Petitioner provided as an example a "Variance 12-01-40(a)." (Pet. Br. at 2.) The ALJ was unable to locate any variance approved by the Commission with that number. With investigation of the Commission's public records, some variances were located permitting noncompliance with Sections 508.2 and 508.5.1, but they were materially different from Variance 14-11-11.

For example, Variance 11-12-33 permitted noncompliance when an addition to a high school athletic building increased the distance of the farthest point on a building's exterior wall from a fire hydrant to 469 feet, but most of the building (including the interior side of the same wall) was within 400 feet of the hydrant and it would be an undue hardship to extend a fire main and install a new hydrant for a minimal increase in safety. But here, all of the Petitioner's new building is already well outside the 400 foot distance.

And Variance 11-08-32 permitted noncompliance when the structure at issue was an open-sided outdoor 1,000-square-foot pole structure to be used as a picnic shelter, without lighting or electrical wiring, and the cost to bring a

10. The Petitioner has therefore failed to carry its burden in this proceeding. While it is undisputed that compliance with Sections 508.2 and 508.5.1 of the 2008 Indiana Fire Code would impose an undue hardship on the Petitioner, there has not been substantial and reliable evidence to show that noncompliance with those rules would not be adverse to the public health, safety, or welfare.

Decision and Non-Final Order

The Petitioner's request for a variance is **DENIED**.

The Fire Prevention and Building Safety Commission is the ultimate authority in this matter. It will consider this non-final order in accordance with the provisions of Indiana Code §§ 4-21.5-3-27 thru -29 and the terms of the Notice of Non-Final Order also issued today.

Date: June 11, 2015



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water supply to within 400 feet of the structure would exceed the total project cost. But the threat to life and property posed by any possible fire in such a structure is far different than that from a fire to the Petitioner's new building; it is hard to weigh those two variances against each other.