

RECOMMENDED ORDER

Pursuant to IC 4-21.5 this Recommended Order is not final and shall be presented to the ultimate authority for issuance of a final order.



FILED: March 1, 2022

STATE OF INDIANA OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS

Administrative Cause No.: DHS-1021-002100
Underlying/State Agency Action No.: 21-09-46

Final Agency Authority: Fire Prevention and Building Safety Commission

W. R. Beach Inc.,
Petitioner,

v.

Indiana Department of Homeland Security
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

An evidentiary hearing was held on this matter on December 14, 2021, at 10:00 am EST via audio conferencing. W. R. Beach Inc. ("Petitioner") appeared by representative Melissa Tupper and the Indiana Department of Homeland Security ("Respondent") appeared by counsel Justin Guedel. The undersigned Administrative Law Judge ("ALJ") for the Office of Administrative Law Proceedings ("OALP"), Hon. Ann Pagonis, having heard, reviewed, and considered all of the evidence, now renders a decision.

Ms. Tupper testified on behalf of Petitioner in the narrative style and offered two exhibits into the record, which are identified as Petitioner's exhibits (PX) 1 and 2 and were admitted without objection.

- PX 1, consisting of twenty (20) pages is the variance application and attachments.

- PX 2, consisting of four (4) pages is the Notice of Proposed Order of Denial and Petitioner's response to Notice of Proposed Denial.

Mr. Guedel, on behalf of Respondent, offered three exhibits into evidence which are identified as Respondent's exhibits (RX) 1 through 3. Respondent's proposed exhibits 4 through 13 were not admitted into evidence.

- RX 1, consisting of three (3) pages, is section 507.5.1 of the 2012 International Fire Code and Commentary
- RX 2, consisting of two (2) pages, is an affidavit of Department of Homeland Security Employee Denise Fitzpatrick who oversees the variance program established under Ind. Code 22-13-2-11.
- RX 3, consisting of three (3) pages, is an affidavit of Indiana State Fire Marshal Joel Thacker.

Based upon the evidence presented at said hearing, the ALJ now makes and issues the following Findings of Fact, Conclusions of Law, and Recommended Order.

FINDINGS OF FACT

1. Petitioner requested a variance from Respondent to avoid the requirement to install a fire hydrant in compliance with code near a newly constructed commercial pole barn building ("repair shop") that will be used to service Petitioner's company automobiles. (PX1)
2. Petitioner constructed this repair shop to replace a facility that was taken by the State in eminent domain for completion of the I-69 project. (PX 1, Melissa testimony.)
3. The repair shop is a one (1) story, 2,400 square foot, Type V-B Construction¹, Class 1 Structure² which is 2,640 feet away from the nearest fire hydrant and public water supply. (PX 1) The nearest structure to the repair shop is 150 feet away. (PX 2)
4. The repair shop is not open to the general public and typically two (2) employees of the company will be in the repair shop. There is no waiting room or customer area. (Melissa testimony.)
5. Petitioner requests a variance of 2014 IFC, 507.5.1 because it would be a financial hardship to install a fire hydrant to comply with the code. (PX 1) The purpose of the code is to ensure that

¹ Type V-B Construction is unprotected wood frame. <https://dps.mn.gov/divisions/sfm/programs-services/Documents/Sprinkler%20Applications/ConstructionTypeDefinitions.pdf>

² A Class 1 Structure is any structure that is used or occupied by: the public, employees, three or more tenants, site improvement that affects persons with disabilities, storage facilities, tanks and dispensing equipment for flammable and combustible liquids or gases. <https://www.in.gov/dhs/fire-and-building-safety/building-plan-review/buildings-class-1-structures/>

that no more than 400 feet of fire hose would need to be laid out to meet every exterior of a building. The nearest water supply is a hydrant that is 2,640 feet away (PX 1, Joshua, testimony.) The estimated cost of installing a fire hydrant that would meet the code is \$1.4 to \$1.8 million. (PX 1, PX 2.)

6. The installation of a fire hydrant or alternative water supply is necessary for the fire department to effectively respond to a fire. (Joshua testimony, RX 3.)
7. Respondent has not received “any comments, from either the applicant or the local fire department indicating that a reliable alternative water supply is readily available for the local fire department to utilize in response to fire events at the structure covered by” the variance request. (RX 2)
8. The Indiana State Fire Marshal does not believe that Petitioner has demonstrated that “noncompliance with the rule requiring fire hydrants to be provided for facilities more than 400 feet from a hydrant on a fire apparatus access road will not be adverse to public health safety, or welfare.” The code needs to be enforced in order to protect “(1) against the spread of fire to other structures or property, (2) first responders, (3) employees, and (4) from other environmental impacts that may result or be increased due to no or insufficient response” to a fire event. (RX 3)

CONCLUSIONS OF LAW

1. Indiana Code mandates that statewide fire safety codes be adopted. I.C. 22-13-2-2. The international Fire Code (“IFC”) is adopted by reference under 675 IAC 22-2.5-1, so the rules of the IFC are required by Indiana regulations under the Indiana Administrative Code (“IAC”), unless the rule falls under an IAC exception. Employees of the Department of Homeland Security are required to follow the IFC. I.C. 22-12-7-1.
2. Additionally, an application for approval must demonstrate compliance with all safety laws, unless a variance is granted. I.C. 22-14-1-2.
3. IFC 507.5.1 states that, “where a portion of the facility or building hereafter constructed...within the jurisdiction is more than 400 feet from a hydrant on a fire apparatus access road...on-site fire hydrants and mains shall be provided where required by the fire code official.” The nearest fire hydrant to the repair shop is 2,640 feet away.
4. Comments to IFC 507.5.1 state that, a fire code official may approve an alternative water supply. No such approval has been offered in this matter.

5. In order to qualify for a variance, an applicant must demonstrate that: “compliance with the rule will impose undue hardship upon the applicant...and...noncompliance with the rule...will not be adverse to public health, safety, or welfare.” 675 IAC 121-5-6.2, I.C. 22-13-2-11. Petitioner has demonstrated that compliance with the rule will impose undue financial hardship upon Petitioner, but Petitioner has not shown that noncompliance with the rule will not be adverse to public health, safety or welfare. Employees and first responders would be endangered if there is no water supply for the fire department to use to properly respond to a fire event. In addition, damage to other properties or environmental damage may occur or be worsened if the fire department is not able to properly respond to a fire event. The nearest structure to the repair shop is only 150 feet away.
6. The Petitioner is the party requesting that the agency act by granting a variance request. Therefore, Petitioner has the burden of proof. I.C. 4-21.5-3-14(c). Petitioner did not meet its burden of proving that the variance should be granted because although compliance with the rule will impose undue hardship upon the applicant; noncompliance with the rule will be adverse to public health, safety, or welfare because the fire department would not be able to adequately respond to a fire event.

RECOMMENDED ORDER

IT IS THEREFORE RECOMMENDED:

In consideration of the foregoing Findings of Fact and Conclusions of Law as stated, the Administrative Law Judge now recommends to the **Fire Prevention and Building Safety Commission** that the denial of variance number 21-09-46 be upheld.

This recommended order is not final. This matter is now before the ultimate authority, the Fire Prevention and Building Safety Commission, who has the final authority over this matter and shall review this recommended order then issue a final order to all parties.

To preserve an objection to this order for judicial review, you must object to the order in a writing that: 1) identifies the basis for your objection with reasonable particularity; and 2) is filed with the ultimate authority, the Fire Prevention and Building Safety Commission, within fifteen (15) days from the date of this Order. IC 4-21.5-3-29

SO ORDERED: March 1, 2022



Hon. Ann Pagonis, Administrative Law Judge
Indiana Office of Administrative Law Proceedings

Distributed to the Parties:

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