STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND BUILDING SAFETY COMMISSION

IN RE:	)	**CAUSE NO.**
	)	
GOOSETOWN RESTAURANT	)	**DHS-1518-FPBSC-013**
	)	
	)	
	)	

NOTICE OF NON-FINAL ORDER

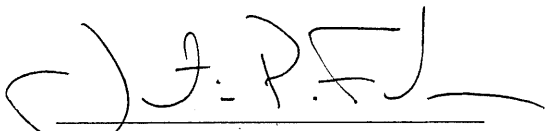
You are hereby notified that the attached document entitled **Findings of Fact, Conclusions of Law, and Non-Final Order** has been entered by the Administrative Law Judge in accordance with Indiana Code § 4-21.5-3-27.

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 October 6, 2015, at 9:00 a.m. (EST), in Conference Center Room B, Indiana Government Center South, 302 West Washington Street, Indianapolis, IN 46204.**

Date: September 16, 2015



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

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

IN RE:	)	ADMINISTRATIVE CAUSE NO.
GOOSETOWN RESTAURANT	)	DHS-1518-FPBSC-013

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

The Fire Prevention and Building Safety Commission denied Goosetown Restaurant's application for a variance related to the venting mechanism for a wood-fired pizza oven. Goosetown Restaurant petitioned for review of this action and, based on the evidence presented and for the reasons set forth below, the Administrative Law Judge now **GRANTS** the variance application.

Procedural Background

On May 4, 2015, the Petitioner in this matter, Goosetown Restaurant, filed an application for a variance with the Fire Prevention and Building Safety Commission. The Commission considered and denied the variance application on June 2, 2015, notice of which was sent to the Petitioner the same day. The Petitioner filed a petition for review of the Commission's denial, which the Commission granted as timely on July 7, 2015. The undersigned Administrative Law Judge was appointed to adjudicate the appeal.

An initial prehearing conference was held on August 12, 2015, with the Indiana Department of Homeland Security as the Respondent. The parties indicated that informal resolution might be possible, but at a subsequent status conference they indicated that this was no

longer an option. 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 August 28, 2015, the Petitioner filed its brief and evidence. The Respondent filed its brief and evidence on September 4, 2015. On September 11, 2015, the Petitioner filed a reply brief (styled as a "rebuttal") with additional evidence.[1]

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

[1] On August 20, 2015, the ALJ issued an Order Setting Briefing Schedule that provided the deadlines for the Petitioner and Respondent to file their initial briefs. The Order also stated that "additional briefing or evidence may be submitted only with prior leave from the ALJ." The Petitioner did not seek leave to file its reply brief, but the Respondent has not objected as of the date of this non-final order.

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 Commission's order denying the Petitioner's application for a variance, the Petitioner's petition for administrative review, the Commission's notice granting the petition for administrative review, and the orders and notices issued by the ALJ. The Petitioner submitted as evidence with its brief an article concerning solid-fuel cooking systems; the specifications for a Mugnaini wood-burning oven; a prior order from the Commission stating that no variance was required for a given application; the specifications for a Napoli Series wood-burning oven; and a floor plan for the Petitioner's restaurant.[2] The Respondent submitted as evidence with its brief the Petitioner's application for a variance and an unsigned copy of the minutes of the Commission's meeting on June 2, 2015.[3] In its reply, the Petitioner submitted as

[2] These exhibits are marked and—in the absence of any objections—admitted as Petitioner's Exhibits 1, 2, 3, 4, and 5, respectively.

[3] These exhibits are marked and—in the absence of any objections—admitted as Respondent's Exhibits 1 and 2, respectively.

evidence a cost estimate for its project.[4] Based solely on that evidentiary record and any additional items specifically noted below, the ALJ hereby issues the following findings of fact:

1. On April 9, 2012, an Indianapolis restaurant—Coal Pizza—filed a variance application with the Commission seeking a variance from Section 506.1 of the 2008 Indiana Mechanical Code ("Variance 12-05-26").[5] Variance 12-05-26 was submitted in order to allow Coal Pizza to install a self-contained pizza oven without using a Type I hood.[6] On May 2, 2012, the Commission voted that no variance was required for this request.[7]

2. The Petitioner in this matter, also a restaurant, is located at 956 Parrett Street, Evansville, Indiana 47713. It is undergoing a remodel of its interior and, as part of that remodel, also wishes to install a stone and ceramic pizza oven—a Forno Bravo Napoli Series pizza oven. The Napoli oven can be installed with either a UL103HT-listed vent or a Type I hood and will use either wood or gas as fuel. The oven is to be installed in the southwest corner of the restaurant, in the kitchen area.

3. On May 4, 2015, the Petitioner filed a variance application ("Variance 15-06-50"), seeking a variance from 675 Indiana Administrative Code 12-4-12(c)(9) which, as explained in greater detail below, sets limits on the impact an addition or alteration to a structure may have on that structure's fire and explosion suppression systems. Specifically, Variance 15-06-50 sought permission to install the oven using only the UL103HT-listed vent—not the Type I hood.

4. Installation of the Type I hood would cost $10,318.00. Installation of the UL103HT-listed vent would cost $1,431.00.

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[4] This is marked as Petitioner's Exhibit 6. Notwithstanding the Petitioner's failure to request leave to file its reply brief, in the absence of any objection from the Respondent and in light of the exhibit's particular relevance to the issue at hand, the Petitioner's Exhibit 6 is admitted.

[5] Section 506 of the 2008 Indiana Mechanical Code sets the requirements for commercial kitchen hood ventilation systems. 2008 Ind. Mech. Code § 506 (adopted as amended by 675 Ind. Admin. Code 18-1.5-1, -5(g)–(q)).

[6] A hood is "[a]n air-intake device used to capture by entrapment, impingement, adhesion or similar means, grease and similar contaminants before they enter a duct system." 2008 Ind. Mech. Code § 202 (adopted as amended by 675 Ind. Admin. Code 18-1.5-1, -3). A Type I hood is "[a] kitchen hood for collecting and removing grease vapors and smoke." Id. Type I hoods are designed to automatically activate an exhaust fan during cooking operations by means of a heat sensor or other method, and also are equipped with grease filters and collecting equipment. See generally 2008 Ind. Mech. Code § 507 (adopted as amended by 675 Ind. Admin. Code 18-1.5-1, -6).

[7] The Petitioner's evidence includes the Commission's letter to Variance 12-05-26's proponent, but the letter did not specify the nature of the underlying variance application—that was contained in the Petitioner's brief as a quote from the minutes of the Commission's May 2, 2012, meeting. Those minutes, however, are public records posted on the Respondent's website and in any case, the fact that the Commission determined that no variance was required in response to Coal Pizza's request is not in dispute. Moreover, this particular matter does not turn on its comparison to Variance 12-05-26.

5. On June 2, 2015, the Commission denied Variance 15-06-50.

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 permits it to adopt administrative rules in order to carry out its responsibilities. Ind. Code §§ 22-12-2-1, 22-13-2-13. 675 Indiana Administrative Code 12-4-12(c) ("Rule 4-12(c)") is one such rule adopted by the Commission and provides, in pertinent part, that

> [n]o addition or alternation shall cause an existing building, structure, or any part of the permanent:
> * * *
> (9) fire or explosion suppression;
> systems to become noncompliant under the provisions of the current rules of the commission for new construction or with the applicable rules of the commission or its predecessor agencies in effect at the time the original construction or installation was made.

2. Additionally, 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 675 Indiana Administrative Code 12-4-12(c). 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
> **(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).

3. By claiming entitlement to a variance to Rule 4-12(c), 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.

4. The Petitioner makes no claim that its restaurant has architectural or historical significance that needs to be preserved with a variance. That aspect of Indiana Code § 22-13-2-11(b)(1) is not at issue here.

5. And while the Petitioner's application originally submitted to the Commission claimed only that noncompliance with Rule 4-12(c) would not be adverse to the public health, safety, or welfare, the Petitioner is now proposing to undertake alternative requirements in lieu of compliance in order to protect the public health, safety, or welfare. Specifically, the Petitioner certifies in its briefs that:

    - Installation of the vent would exceed all clearance requirements and the vent will pass through a steel stud, cement board, and stainless steel enclosure before venting through a solid brick wall. The vent would be the only opening in the oven except for a steel door through which pizzas would be inserted and removed. This steel door could be closed to smother any fire inside the oven that began burning too hot.

    - Fire extinguishers specified by the Evansville Fire Department would be mounted in close proximity to the oven. The oven itself would be installed on a concrete slab floor with over thirteen feet of clearance to the second story of the building and fully protected by a sprinkler system.

    - The Petitioner will submit a notarized letter to the Local Fire Official attesting that the oven will only be used to cook pizza and other similar baked products; no raw meats would be cooked in the oven; only virgin wood would be used in the oven; and the vent would be inspected monthly for the first year (or more frequently as required by the LFO). The Petitioner also asserts that the products baked would not contain grease and therefore no grease-laden vapors or smoke would be produced.

    (Pet. Br. at 4; Pet. Reply Br. at 1–2.)

6. To succeed in this proceeding and be entitled to a variance from Rule 4-12(c), the Petitioner must therefore produce substantial and reliable evidence that compliance with this rule will impose an undue hardship upon it and that noncompliance—or adherence to its proposed alternatives—will not be adverse to the public health, safety, or welfare.[8]

7. The Respondent concedes that at this stage of the proceeding, the Petitioner has at least presented substantial and reliable evidence that installing the Napoli oven with the UL103HT-listed vent instead of a Type I hood, under the additional conditions and stipulations presented by the Petitioner, would not be adverse to the public health, safety, or welfare. (Resp. Br. at 5.) The ALJ agrees and therefore concludes that the Petitioner has met its burden with respect to Indiana Code § 22-13-2-11(b)(1).

8. The Respondent argues, though, that the Petitioner has not met its burden in producing evidence that the Petitioner would face "undue hardship" by complying with Rule 4-12(c). (Resp. Br. at 5.) The ALJ agrees with the Respondent, at least in part.[9]

9. "Undue hardship" is 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). The Petitioner's application asserts undue hardship pursuant to the second and third of those categories.

10. As to the claim of major operational problems in the use of the building or structure, the Petitioner's application asserts that the "[d]omed ceramic pizza oven will be [the] focal point of [the] partially open kitchen," and that the "hood would block [the] view to the public." (Resp. Ex. 1.) And it does appear from the floor plan that the oven will be at least somewhat visible—to the outside via either a glass wall or windows to the west of the oven and possibly out into the dining area to the north. (Pet. Ex. 5.) But this is not enough to prove an undue hardship.

    For one thing, it is not clear from the floor plan whether the oven is entirely separated from the dining area by a floor-to-ceiling wall, in which case very little of it would be visible, or by more of a pony wall or bar-height wall, over which the oven would be almost entirely on display to the dining area. Additionally, there is no indication of what the Type I hood would look like

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[8] The particular rule at issue here, it should be noted, is very broad and could potentially encompass any number of additions or alterations occurring during the Petitioner's remodel. For purposes of this proceeding, however, the addition or alteration under consideration is limited strictly to the requirement of a Type I hood on the Napoli oven.

[9] The ALJ recognizes that the Respondent's position was formulated before the Petitioner filed its reply and additional evidence.

when mounted above the oven—or where specifically it would be mounted so that its aesthetic impact can be gauged.

More importantly, however—and even assuming proof existed that use of a Type I hood would be unsightly—aesthetic issues do not necessarily equate to "major operational problems in the use of the building."

There is no evidence, for example, that the hood would impede the ability of customers—many of whom, according to the floor plan, would not be facing the kitchen anyway—to enter the building, be seated, or eat. And there is no evidence that the building could not still be used as a restaurant generally, that the kitchen would no longer function for food preparation, or that the oven could not be used to cook pizzas. In short, the Petitioner is not faced with "unusual difficulty" with respect to the essential operational functions of a restaurant in this particular building, regardless of whether a vent or a Type I hood were installed.

The Petitioner has therefore failed to prove an undue hardship under 675 Indiana Administrative Code 12-5-2(h)(2).

11. But the Petitioner also claims undue hardship in that installation of a Type I hood would result in excessive costs—and argues that this is the more critical factor. (Pet. Reply Br. at 2.) Specifically, its claim is that the Type I hood would cost $10,318.00 to install, whereas the UL130HT-listed vent would cost $1,430.00 to install, and "in a start-up operation this is a huge difference." (Pet. Reply Br. at 2.) The ALJ agrees that this differential cost—$8,888.00—creates an unusual difficulty in light of the particular facts of this case, and notwithstanding any aesthetic impact of the Type I hood.

    As noted above, the vent—when installed in accordance with the additional conditions, obligations, and limitations provided by the Petitioner—is, as the Respondent agreed, "a safe alternative" to using a Type I hood. (Resp. Br. at 5.) So it seems axiomatic that requiring a greater-than-700% increase in cost just to reach the same level of safety is excessive.[10] Cf. In re Indy Storage Depot, 14-29-FPBSC at 7 (June 8, 2015) (Respondent conceded that "twenty percent increase in cost" to install fire hydrant under facts of case constituted excessive cost resulting in undue hardship).

    The Petitioner has therefore carried its burden in proving an undue hardship under 675 Indiana Administrative Code 12-5-2(h)(3).

12. In sum, the Petitioner has presented substantial and reliable evidence that compliance with 675 Indiana Administrative Code 12-4-12(c)(9) would impose

[10] In fact, the result of the increased cost might be a *lower* level of safety because the Petitioner would not necessarily be bound to follow its proposed additional conditions.

an undue hardship by requiring an excessive cost for this project, and also that compliance with its proposed alternatives would not be adverse to the public health, safety, or welfare. It has met its burden of proof in this proceeding and satisfied the requirements of Indiana Code § 22-13-2-11(b).

The ALJ therefore concludes the Petitioner's application for a variance should be granted, conditioned upon compliance with the alternative standards and actions set forth in the Petitioner's briefs and in accordance with Indiana Code § 22-13-2-11(c).[11]

Decision and Non-Final Order

The Petitioner's application for a variance from 675 Indiana Administrative Code 12-4-12(c)(9) is **GRANTED** subject to the conditions, obligations, and limitations identified above.

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: September 16, 2015

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[11] The Petitioner also argues that the installation of such pizza ovens in accordance with their manufacturer's instructions—e.g., without a Type I hood—complies with Indiana's various safety codes and thus no variance should be required at all. It also argues that this approach has been taken by the Commission in the past and provides Variance 12-05-26 as an example. These arguments might be valid: the Commission is prohibited from granting variances to applications when there is no violation of its rules, 675 Ind. Admin. Code 12-5-6(i), and should certainly be consistent in its treatment of like matters. But this particular claim need not be addressed by the ALJ as a part of this proceeding. It involves a question primarily of policy best suited, if anywhere, for the Commission's consideration and expertise through the rule-making process, and the immediate issue—whether the specific variance application in this matter should be granted or denied—can be resolved based on the evidence presented in this proceeding.