FOR PETITIONER, PRO SE
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STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND BUILDING SAFETY COMMISSION

IN RE:	)	ADMINISTRATIVE CAUSE NO.
	)	
SRI SHIRDI SAIBABA SANSTHAN OF TRISTATE TEMPLE	)	14-03-FPBSC

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

The Petitioner in this matter, Sri Shirdi Saibaba Sansthan of Tristate Temple, seeks administrative review of a condition imposed as part of a variance granted by the Fire Prevention and Building Safety Commission. For the reasons explained below, the Administrative Law Judge hereby **DENIES** the Petitioner's request to lift or modify the variance condition.

Procedural Background

On October 9, 2013, the Petitioner filed an application for a variance with the Fire Prevention and Building Safety Commission. The Commission considered the variance application on November 6, 2013. The variance application was approved as Variance Number 13-11-81, but with two conditions. The Petitioner requested an administrative review of the variance conditions, which the Commission denied as being untimely.

The matter was assigned to an Administrative Law Judge for consideration of whether the Petitioner's request was timely filed. On March 21, 2014, that ALJ issued a non-final order concluding that the Petitioner filed its request within the statutory timeframe for seeking an administrative review. The Commission affirmed the non-final order without modification on July 25, 2014.

On August 1, 2014, a new ALJ assumed responsibility for this matter and conducted a telephonic pre-hearing conference on September 11, 2014. During that pre-hearing conference and in a subsequent pre-hearing order, the issues presented for administrative review were identified. Specifically, Variance Number 13-11-81 imposed a condition that the Petitioner "[p]ay all accrued charges for fire watch," and the Petitioner was challenging two of the three line items on the invoices implicated by that condition: a $500.00 charge for a fire truck and a $1,600.00 charge for a fire watch.

The matter was set for an evidentiary hearing to be held in Indianapolis, Indiana, on October 9, 2014. The parties were also advised in the pre-hearing order that the undersigned would assume responsibility for this matter. On September 16, 2014, the undersigned ALJ issued a notice of substitution as ALJ and confirmed the October 9, 2014, hearing date.

The hearing was held as scheduled. Both parties presented evidence in the form of either sworn testimony or written documents admitted as evidence. At the conclusion of the hearing, the ALJ issued a post-hearing order providing the parties until November 12, 2014, to submit proposed findings of fact and conclusions of law. Both parties did so.

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

At the October 9, 2014, evidentiary hearing, Dr. Sumalatha Satoor appeared and provided sworn testimony for the Petitioner. The Respondent did not put forth witnesses, but sought to admit into evidence three documents: the Petitioner's application for variance, including an attached engineering report and construction design release; the minutes of the Commission meeting wherein the Petitioner's application for variance was considered; and the variance with conditions that was ultimately issued by the Commission. These three documents were admitted without objection from the Petitioner. The ALJ also took official notice of all applicable statutes

and regulations, the filings and prior orders in this matter, and the findings of fact set forth in the first ALJ's March 21, 2014, non-final order.

Based on that evidentiary record, the ALJ hereby issues the following findings of fact:

1. Some time prior to July 2013, the Petitioner purchased a building located at 6299 Oak Grove Road, Newburgh, IN 47630.

2. The building had been used as a church by a prior owner/occupant, and the Petitioner intended to use the building as a temple for its religious services.

3. Under the prior owner/occupant, the building's use and occupancy classification was R-3.[1]

4. The Petitioner desired to conduct a ten-day religious ceremony in the building and on the surrounding grounds, to begin on July 14, 2013.

5. As part of the ceremony, the Petitioner wanted to emplace a large statue in the upstairs portion of the building and received a permit from a local building official to begin work reinforcing the floor in anticipation of the statue's installation. Construction work began in the week before the ceremony was to start.

6. The Petitioner then contacted the local fire marshal to seek approval for outdoor tents and fire pits for the ceremony. The local fire marshal inspected the property, noted the construction to reinforce the floor, and issued a violation because the Petitioner did not have a construction design release from the Plan Review Section of the Indiana Department of Homeland Security's Division of Fire & Building Safety.[2]

7. The Petitioner contacted the Office of the State Fire Marshal and then filed for expedited review of the violation. As a result, a construction design release was issued on July 16, 2013, identifying the building with an A-3 use and occupancy classification.[3]

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[1] An R-3 use and occupancy classification is a form of residential occupancy. 2008 Ind. Bldg. Code § 310.1 (adopted as amended by 675 Ind. Admin. Code 13-2.5-4).

[2] Dr. Satoor testified that the local fire official "red-tagged" the building. This is a common reference to the physical red notice placed by fire and building officials outside a building to show a violation of a provision of the relevant building or fire safety code.

[3] An A-3 use and occupancy classification is a form of assembly group occupancy. 2008 Ind. Bldg. Code § 303.1 (adopted as amended by 675 Ind. Admin. Code 13-2.5-4). A-3 uses are specifically intended for "worship, recreation or amusement and other assembly uses." Id.

8. The Petitioner received permission to continue construction but was required to have, and pay for, a fire watch for the duration of the ten-day ceremony.[4]

9. The Ohio Township Fire Department provided the fire watch for the ceremony period.

10. In late July 2013, the Petitioner received two invoices from the Ohio Township Fire Department.[5]

11. Invoice #2, dated July 23, 2013, stated that it was "for Fire Watch Services rendered 7/18/13 thru 7/22/13" and contained the following two charges:

    a. Forty-five hours of fire watch, billed at $25.00 per hour, for a total of $1,125.00; and
    b. Twenty hours of "Fire Truck," billed at $25.00 per hour, for a total of $500.00.

12. Invoice #3, dated July 29, 2013, contained a single charge: sixty-four hours of fire watch, billed at $25.00 per hour, for a total of $1,600.00.

13. Soon after the ceremony, the Petitioner commissioned an engineering firm to bring the building up to the code requirements for an A-3 use and occupancy classification.

14. The engineering firm conducted an evaluation of the building as required by Chapter 34 of the Indiana Building Code.[6]

15. In order to satisfy the fire safety provisions governing an A-3 use and occupancy classification, the Petitioner needed to, among other things, install a sprinkler system.

16. Without the sprinkler system, the building failed to meet the mandatory safety scores required in a Chapter 34 evaluation.

17. Installation of the sprinkler system was estimated to cost $95,000.00.

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[4] It is not entirely clear from the record who exactly imposed the fire watch requirement. The construction design release requires compliance with certain fire safety rules, but does not explicitly require a fire watch as either one of those rules or a variance from a rule. Regardless, neither party disputes that the Petitioner was required to have the fire watch during the ceremony.

[5] The invoices are labeled as #2 and #3. They were not attached as part of the exhibits entered by the Respondent at the evidentiary hearing, but were included in the record from the prior administrative proceeding related to the timeliness of the Petitioner's filing. It is not apparent that there was ever an Invoice #1.

[6] See 2008 Ind. Bldg. Code § 3410.6 (adopted as amended by 675 Ind. Admin. Code 13-2.5-33). Chapter 34 establishes a sort of scoring system for certain building features; a building may only be reclassified to a different use and occupancy classification if it meets the minimum scores for the new classification set forth in Chapter 34. 2008 Ind. Bldg. Code § 3410.9.

18. On October 9, 2013, the Petitioner filed a variance application with the Commission, seeking a variance from the Chapter 34 requirements.

19. The variance application alleged that installation of the sprinkler system would result in an undue hardship to the Petitioner. It provided that non-compliance with the Chapter 34 requirements would not be adverse to the public health, safety or welfare. It also proposed alternative actions in lieu of compliance, including installation of an alarm system and a fire barrier between portions of the building, and establishing occupancy limits.

20. The Petitioner had not paid the invoices from the Ohio Township Fire Department when it filed its variance application.

21. The Petitioner's variance application was heard by the Commission at a meeting on November 6, 2013. During the discussion of the Petitioner's application, it was brought up that the Petitioner had not yet paid the invoices from the Ohio Township Fire Department.[7]

22. The Commission approved the Petitioner's variance, but imposed two conditions: the Petitioner was required to make the exit doors of the building swing-compliant and to "[p]ay all accrued charges for fire watch."

Conclusions of Law

The Indiana Code creates the Commission and requires it to adopt statewide building and fire safety laws. Ind. Code §§ 22-12-2-1, 22-13-2-2. The Commission is also authorized by statute to "grant a variance to a rule that it has adopted." Ind. Code § 22-13-2-11(a). 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.

[7] The record does not show who raised the topic of the invoices. Dr. Satoor was not at the Commission meeting; according to the minutes from that meeting that were admitted into evidence, the Petitioner's variance application was presented by their engineer.

Ind. Code § 22-13-2-11(b).[8] "A variance granted under [Indiana Code § 22-13-2-11] is conditioned upon compliance with an alternative standard approved under subsection (b)(2)(B)." Ind. Code § 22-13-2-11(c). Moreover, "[i]f the commission grants the variance, it may, if appropriate, impose requirements other than those suggested by the applicant." 675 Ind. Admin. Code 12-5-6(g).

An order granting or denying a variance application must follow the requirements of the Indiana Administrative Orders and Procedures Act. 675 Ind. Admin. Code 12-5-6(j). If a petition for administrative review of that order is granted pursuant to AOPA, then "that order shall be deemed merely to have been a preliminary determination." Id.

The Petitioner here has challenged the Commission's variance condition that it pay all accrued fire watch charges. This actually presents two potential claims. First, and in a broad sense, is the question of whether the Commission had the authority to impose such a condition at all. And second is the more specific question of whether all of the charges on the two invoices—in particular the $500.00 fire truck charge on Invoice #2 and the $1,600.00 fire watch charge on Invoice #3—reflect services that were actually rendered and were therefore valid for the Commission to enforce.

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. This action arises out of an order issued by the Commission and granting, with conditions, a variance sought by the Petitioner. The Petitioner timely filed a petition for administrative review, which the Commission granted. The ALJ therefore has jurisdiction over this matter and the parties involved, in accordance with the provisions of the Indiana Administrative Orders and Procedures Act.

2. Had the Commission denied the Petitioner's application for a variance, the Petitioner—as the party requesting the agency take action—would certainly

[8] "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).

have borne the burden of proof in accordance with Indiana Code § 4-21.5-3-14(c). And in the ordinary course of events, the grant of a variance application would likely not result in a petition for administrative review by the applicant.

Here, however, the Commission granted the Petitioner's application but the Petitioner seeks review and—ultimately—modification of the terms of the variance. This is a somewhat unique situation. But it is unequivocal that the agency here is not seeking to impose anything akin to a punishment for a regulatory or statutory violation, and the Petitioner is most accurately described as still seeking an agency action or seeking an exemption from an agency requirement. Application of Ralston and Krantz therefore compels the conclusion that the Petitioner has the burden of proof in this matter.

3. Because the Petitioner is the party seeking agency action and carrying the burden of proof, it is not threatened with the deprivation of a property or liberty interest protected by the Fourteenth Amendment. Accordingly, the standard of proof is the standard set forth in Indiana Code § 4-21.5-3-27(d). Namely, the Petitioner must put forth substantial and reliable evidence to carry its burden.

4. The Commission is empowered by statute and regulation to grant variances to any fire or building safety rule that it promulgates, and the requirements of Chapter 34 of the Indiana Building Code constitute just such a fire or building safety rule. Accordingly, the Commission has the authority to grant a variance as to that rule.

5. The Commission also had the authority to impose certain alternative requirements on the Petitioner in addition to, or in lieu of, the actions that the Petitioner proposed taking in its variance application.

6. The Indiana Administrative Code permits the Commission to impose these alternative requirements "if appropriate," 675 Ind. Admin. Code 12-5-6(g), but there is no language in the regulation to guide analysis of when an alternative measure is "appropriate" or not.

7. The regulatory language must have some rational boundaries. See, e.g., Ind. State Ethics Comm'n, 656 N.E.2d 1172, 1176 (Ind. Ct. App. 1995) ("[a]dministrative decisions must be based upon ascertainable standards to ensure that agency action will be orderly and consistent" and an agency regulation may not be "so indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application"), trans. denied. "[P]arties are entitled to fair notice of the criteria by which their petitions will be judged by an agency, and . . . judicial review is hindered when agencies operate in the absence of established guidelines." Cnty. Dep't of Public Welfare of Vanderburgh Cnty. v. Deaconess Hosp., Inc., 588 N.E.2d 1322, 1327 (Ind. Ct. App. 1992), trans. denied.

8. Just where those boundaries lie presents a question of regulatory construction. Questions of regulatory construction are resolved in a manner similar to questions of statutory interpretation. Natural Res. Def. Council v. POET Biorefining—North Manchester, LLC, et. al, 15 N.E.3d 555, 564 (Ind. 2014). "And the foremost goal of regulatory construction—like with statutory interpretation—is to give the words and phrases in the regulations their plain and ordinary meaning, within the context of the regulatory scheme in a way that reflects the intent of the agency that promulgated the regulations." Id.

9. The regulatory scheme that permits the Commission to impose a condition on a variance is derivative of the statutory provision that governs such variances. It is rational to conclude, then, that the Commission's intent in promulgating the regulation was to permit the imposition of alternative conditions only when those conditions fall within the confines of the overarching statute.

   And that statute requires that a variance applicant show that non-compliance with the governing building or fire safety rule—or "compliance with an alternative requirement approved by [the Commission]"—"will not be adverse to the public health, safety, or welfare." Ind. Code § 22-13-2-11(b).

   In other words, a variance application may be granted if the public health, safety, or welfare is not threatened by the applicant's non-compliance with the relevant building or fire safety rule. But if non-compliance *does* threaten the public health, safety, or welfare, then the variance may be granted only if there are alternative actions—whether proposed by the applicant or imposed as conditions by the Commission—that may be taken instead of compliance with the rule, and that do *not* threaten the public health, safety, or welfare.

10. Therefore, an alternative requirement imposed as a condition by the Commission pursuant to 675 Ind. Admin. Code 12-5-6(g) is inappropriate if 1) it is not an alternative to compliance with the building or fire safety rule underlying the variance application; or 2) threatens harm to the public health, safety, or welfare.

    Framed in the inverse, to be appropriate such an alternative requirement 1) must be an alternative to compliance with the underlying rule; and 2) must not be adverse to the public health, safety, or welfare.

11. Here, the challenged alternative requirement imposed by the Commission was for the Petitioner to pay all accrued fire watch charges. This requirement must be tested against the standard set forth above.

12. The rule from which the Petitioner sought its variance was the Chapter 34 evaluation standards; specifically, the requirement to install a sprinkler system in buildings classified A-3 for use and occupancy.

It is obvious that bare non-compliance with this rule would be adverse to the public health, safety, or welfare because it would allow a high number of occupants in a multi-story building without a sprinkler system, or viable alternative, to protect them in the event of a fire. The tragic consequences of this sort of scenario are the precise reason why fire and building codes exist.

13. Requiring the Petitioner to pay accrued fire watch charges is a rational alternative to compliance with this rule.[9] It is foreseeable that the Petitioner might need fire watch services again in the future, given that the building failed to satisfy the fire safety requirements of Chapter 34. Having unpaid bills to the local fire department might mean that the department would refuse to provide that service.

    Or it might mean that the department would be hampered in its response services because of the financial loss, should the building suffer a fire. Given the tight budget constraints faced by many municipalities and public services, an outstanding debt greater than $3,000.00—as the Petitioner owed here at the time of its variance application—cannot be seen as insignificant.

14. Moreover, nothing in the alternative requirement threatens or is adverse to the public health, safety, or welfare. In fact, the opposite is true. As previously noted, this would encourage, promote, and fund the fire department in the performance of its duties to *protect* the public health, safety, and welfare—and the health, safety, and welfare of the Petitioner's membership most of all.

15. It certainly seems unusual for the Commission to exercise its regulatory powers to compel a variance applicant to pay bills owed to a third party as a condition of the Commission granting the applicant's variance request. Without limits, this practice could be vulnerable to abuse.

    For example, could the Commission similarly impose a requirement that an applicant pay its late fees to the local public library? Or pay an outstanding parking ticket? A bill owed to a private individual?

    Going forward, the test laid out above would likely prohibit all of those circumstances. But under the specific facts and circumstances presented in this case, the alternative requirement imposed passes that test and was therefore appropriate.

16. As for the second issue presented by the Petitioner's appeal—that the variance condition be modified to exclude the $500.00 fire truck charge on Invoice #2 and the $1,600.00 fire watch charge on Invoice #3—the ALJ concludes that this remedy is outside the scope of his and the Commission's authority.

[9] At least insofar as having a fire watch is also an alternative to compliance, which the Petitioner does not dispute.

17. Dr. Satoor testified that she never saw a fire truck. This might mean that a fire truck was never employed or dedicated to the religious ceremony. But just because Dr. Satoor did not *see* a fire truck does not necessarily mean that one was not dedicated or assigned to the ceremony; or in place somewhere out of her sight, ready to respond.

18. Dr. Satoor also testified that she did not know what services were rendered to merit Invoice #3. But the religious ceremony lasted ten days, and is not clear how many hours per day the ceremony went on or how many firefighters were on fire watch for a given hour.

    For example, a total of 109 fire watch hours billed between the two invoices might reflect one firefighter an hour for ten hours per ceremony day, or it might reflect two firefighters per hour for five hours per ceremony day. That would seem to indicate the possibility that Invoice #3 reflected legitimate fire watch services.

    At the same time, the forty-five hours billed in just Invoice #2 could be one firefighter for four-and-a-half hours per ceremony day. This might also be reasonable, if the daily religious services were relatively short. If that were the case, perhaps Invoice #3's additional charge was improper.

19. On the other hand, the Respondent did not present any witnesses or evidence relevant to this issue. No representative of the Ohio Township Fire Department testified as to the scope and number of fire watch hours performed; no documents were admitted that might indicate that a fire truck was assigned to the ceremony's location for a given time period.

20. Put simply, there was not substantial or reliable evidence presented by either side to reach a clear determination as to whether the invoices validly reflected services rendered.

21. For the purposes of this administrative appeal, however, this factual dispute need not be resolved.

22. The invoices reflect execution of an agreement between the Petitioner and the Ohio Township Fire Department. There is, however, nothing to show if this agreement was committed to writing, or what the specific terms of the agreement might have been.

    And while both parties seem to accept as true that the agreement was required for the Petitioner to hold its religious ceremony, there is nothing to indicate that the Commission is bound by the agreement, is a signatory to the agreement, or—most importantly—is in any position to modify the terms of the agreement.

23. Thus, the Commission could, as discussed above, properly require the Petitioner here to pay all "accrued" fire watch charges. But there is no evidence or statutory authority to say that it was, or is, in a position to determine *which* charges on the invoices were in fact properly accrued. Nor is it statutorily empowered to dictate to the Ohio Township Fire Department—which is not a party to this action—the amount of money that the Petitioner will pay in exchange for the department's services.[10]

24. The Petitioner may well have a valid dispute with the Ohio Township Fire Department as to the validity of the charges reflected on Invoices #2 and #3. But this administrative appeal is not the arena in which that dispute may be resolved.

Decision and Non-Final Order

The Fire Prevention and Building Safety Commission was within its statutory and regulatory authority to grant the Petitioner's variance application subject to the condition that the Petitioner pay all accrued fire watch charges flowing from the July 2013 religious ceremony. That authority does not, however, extend to serving as the arbiter of what amounts to a contract dispute between the Petitioner and the fire department that performed the fire watch. Accordingly, the Petitioner's request to modify the Commission's alternative requirements imposed as conditions to Variance Number 13-11-81 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.

[10] Moreover, doing so might even expose the Commission to liability for tortious interference with a contract. See Bragg v. City of Muncie, 930 N.E.2d 1144, 1147 (Ind. Ct. App. 2010) (elements of tortious interference are "(1) the existence of a valid and enforceable contract; (2) the defendant's knowledge of the existence of the contract; (3) the defendant's intentional inducement of the breach of the contract; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful inducement of the breach").

Date: November 17, 2014

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