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Court of Common Pleas

BRIEF
September 11, 2025 13:41

By: JOSEPH F. RUSSO 0037923

Confirmation Nbr. 3612929

SHAKER MADISON, LLC.

vs.

CITY OF CLEVELAND, ET AL

CV 24 100089

Judge: KEVIN J. KELLEY

Pages Filed: 19

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SHAKER MADISON, LLC	) CASE NO. CV-24-100089
	)
Appellant,	) JUDGE: KEVIN J. KELLEY
	)
v.	)
	)
CITY OF CLEVELAND, et al.	)
	)
Appellees.	)
	)

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The preponderance of substantial, reliable and probative evidence on the whole record demonstrates that Appellant is entitled to receive a use variance.
2. The decision of the BZA to deny Appellants a use variance was arbitrary, capricious and unreasonable because it was not supported by a preponderance of substantial, reliable and probative evidence.
3. The BZA Hearing violated Appellant's Right to Due Process.

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I. STATEMENT OF THE CASE

Appellant, Shaker Madison. LLC. ("Appellant") owns the property located at 10022 Madison Ave. The property has been vacant for over 2 1/2 years. The property was originally zoned General Retail and Multi-family in 1929. In 1996, the property was rezoned to Local Retail (Section 343.01 of the City of Cleveland Codified Ordinances). The Pedestrian Overlay District ("PRO") was added in 2013.(Section 343.23 of the City of Cleveland Codified Ordinances).

The property was granted a use variance to construct a Reveo Drug Center in 1999, which became the CVS Drug Store. This was the last known use of the property. Prior to the Reveo Drug Store the property was used as a gas station since 1966, the most recent being a BP Gas Station. Reveo Drug Store was granted a variance because a pharmacy is not permitted in a Local Retail Business District. The Board of Zoning Appeals ("BZA") found that not granting the variance would be an unreasonable hardship on the owner. (R. Pg .48).

Prior to purchasing the property, the Appellant was specifically approached by Councilman Kelley, who initiated discussions about redeveloping the vacant site to remedy its eyesore condition. In subsequent conversations with both the Councilman and representatives from Westtown Development Corporation ("WDC"), the Appellant presented a plan for a mixed-use development featuring a Shell Gas Station with four fuel pumps and two EV charging stations as an essential anchor for supporting local retail stores, such as a bank and pizza shop. The Appellant emphasized that the anchor tenant was a prerequisite for the project's economic feasibility. Both Councilman Kelley and the WDC unequivocally stated they would support the proposal. (T. 116-117).

Appellant then applied to the City of Cleveland for permits to construct a new gas station. On January 25, 2024 the City of Cleveland denied the permits because a Gas Station is a prohibited use in a "PRO" District. (T.39,41). In February 2024, the Appellant filed an appeal with the BZA for a use variance to allow the retail development with gasoline pumps. This appeal, BZA Calendar No. 24-024, was heard on May 6, 2024. Prior to the BZA hearing, three postponements were granted from March 4, 2024 to May 6.2024. (Tr. Pg.58, 61-69) One postponement was requested by Councilman Kelly to conduct a neighborhood meeting and two

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were at Appellant's request after being informed there would only be 4 board members and not a full board of 5 members present.

The BZA denied the variance requested by Appellant. Appellant filed and was denied a request for reconsideration and/or a rehearing on May 10, 2024. On June 3, 2024 the BZA submitted the written decision denying the Appellant's variance. The Appellant is appealing that decision to this court pursuant to R.C. 2505 and 2506.

II. STATEMENT OF FACTS

A. Procedural History and Testimony in Support

The May 6, 2024 Board of Zoning Appeals ("BZA") hearing began with Elizabeth Kukla, executive secretary to the BZA, reading the preamble and other preliminary matters. She stated that since there were only 4 Board members any appellant could request a postponement. However, she stated that one board member had resigned and there was no specific date as to when that position would be filled. (Supp.Tr. Pg.4). Ms. Kukla then provided the history of the property. (Tr. Pg.22-23).

The Appellant's representative, Sam Mohammed, first gave a brief background of the variance request. He stated that the building would go from 11,000 square feet of General Retail to only 3,500 square feet of General Retail, with the remainder as local retail. He stated that the building meets the PRO requirements and submitted into the record evidence of 2 other gas stations approved by City Planning in Local Retail and PRO Districts. (Tr. Pg.24-25) (R. Pg. 237-243)..

Mr. Mohammad stated that gas stations are today's corner stores and it would be an undue hardship to meet the strict criteria of the code due to the building's design and size. He noted the building has been vacant for 2 1/2 years and that Westtown Development reached out to the Appellant to develop the property. (Tr. Pg 26). He addressed opposition concerns, stating the physical building would not change and complies with PRO Zoning, and no new curb cuts were proposed. He stated traffic is moderate and may be less than in the past. (Tr. Pg.27). He noted other gas stations exist near parks and schools. (Tr. Pg.28) Mr. Mohammed stated the adjacent

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businesses are in favor of the project. (Tr. Pg.29). He explained that the other retail establishments need a main anchor, such as Shell, to make the project viable. (Tr. Pg.30). He addressed environmental concerns by noting Ohio's brownfield superfund and stringent EPA regulations. (Tr.Pg 31, 33). The station would not be a 24 hours operation and would include 2 EV charging stations, which are not available in the area. (Tr. Pg.36).

Ms. Kukla summarized letters in support, which expressed that the community was tired of the vacant eyesore, welcomed reinvestment, and believed opposition was from outside the community. (Tr. Pg.53-54).

Chad Dasher from Westtown Development testified in favor on the variance, citing the long vacancy, lack of interested parties, and the benefits of adaptive reuse, EV stations, and creation of new jobs. (Tr.Pg.81-84).

Dave Rogers, Executive Assistant to Councilmember Danny Kelly (Ward 11), testified that most supporters live nearby while the majority of opponents do not. (Tr. Pg.87-88). He stated the property is a nuisance plagued with dumping and crime, and that filling a building of this size is difficult. (Tr.Pg. 89). He emphasized that suggestions for a dog park or green space were not viable as it is private property, and that mixed-use residential would also require a variance and could worsen traffic and sight lines. (Tr.Pg. 89-91). He testified that this type of variance is often given and that a successful CVS would generate more traffic than the proposed gas station. (Tr. Pg. 91-92).

Councilmember Danny Kelly testified about the property's status as a nuisance, describing homeless encampments, drug use, prostitution, garbage, needles, and feces. (Tr. Pg.103-104). He stressed the difficulty of attracting local retail to a building that size and stated that City Planning had not offered him any viable plans for this or other vacant properties in his ward in over 2.5 years. (Tr. Pg.106, 108). He reiterated that an anchor like Shell was needed to attract other tenants like a bank and pizza place. (Tr.Pg. 107).

B. Testimony in Opposition

Joe Naser, executive assistant to Councilmember Jenny Spencer (Ward 15), read a letter into

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the record expressing opposition based on the proposal conflicting with the long-term vision for Madison Ave, negative impacts on nearby businesses, and concerns over traffic and proximity to schools and parks. (Tr.Pg 85-86).

Nate Lull from City Planning testified about the proximity to a park and school and cited ODOT statistics showing 4 serious injuries and 2 fatal crashes at the intersection from 2017-2021. (Tr. Pg. 94-95). He discussed the purpose of the PRO District to preserve pedestrian-oriented character and minimize vehicle-pedestrian conflicts. (Tr. Pg. 95). He mentioned a vacant CVS on Lorain that was quickly redeveloped into a health clinic and noted that other gas stations in the vicinity are in General Retail except one which is in a Local Retail District. (Tr. Pg. 96-97).

Ms. Kukla, Secretary of BZA, read a letter into the record from the Director of City Planning, submitted the night before the hearing, which expressed concerns about safety near the rec center and school, environmental mitigation, and suggested residential use as a higher and better use. (Tr. Pg.101-103).

C. Rebuttal and Board Member Recusal

In rebuttal, Mr. Mohammad stated that a PRO District does not preclude a variance, that precedent exists for similar variances, and that more traffic is generated by a CVS than a 4-pump station. (Tr. Pg. 112-114). He noted that the Appellant purchased the property with the support of Councilmember Kelly and Westtown Development and based on the precedent of other allowed variances. (Tr. Pg. 116-117). He concluded by stating that no new retail development has occurred in the area since the PRO was enacted 13 years ago. (Tr. Pg.118).

At the conclusion of testimony, Board Member Ms. Holzer disclosed that she had recently been elected to the Northwest Neighborhoods Board of Directors and, due to their letter of opposition, she would abstain from the case. (Tr. Pg.119). This left only three members to vote on the appeal.

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III. LAW AND ARGUMENT

A. Standard of Review

Certain legal principles frame the issues and evidence presented in this administrative appeal. The Common Pleas Court evaluates the municipality's administrative record by examining the entire record *de novo* and does not merely presume the reasonableness of the decision below. "Thus, R.C. Chapter 2506 confers on the common pleas courts the power to examine the whole record, make factual and legal determinations, and reverse the board's decision if it is not supported by a preponderance of substantial, reliable, and probative evidence." *Cleveland Clinic Found v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 24 (2014).

Although not a pure *de novo* hearing, the proceeding "often in fact resembles a *de novo* proceeding." *Id.*, quoting *Cincinnati Bell, Inc. v. Village of Glendale*, 42 Ohio St.2d 368, 370, 328 N.E.2d 808, 809 (1975). R.C. 2506.04 confers substantial discretion upon the court to closely examine the substantive law and evidence underlying the zoning decision. This is especially important where a public purpose is used to restrict fundamental private property rights, which are strongly protected by the Ohio Constitution. *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 38 (2006).

Zoning resolutions are in derogation of common law property rights and must be strictly construed in favor of the property owner. *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259, 261, 421 N.E.2d 152, 154 (1981). They "will not be extended to include limitations by implication." *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 152, 2000-Ohio-493, 735 N.E.2d 433 (2000). Administrative discretion must be subject to a standard to operate uniformly and cannot be arbitrary. *Northern Boiler Co. v. David*, 157 Ohio St. 564, 572, 106 N.E.2d 620, 624 (1952).

The standard of review requires this Court to weigh the evidence to determine if the board's decision is supported by a preponderance of reliable, probative, and substantial evidence. *First North Corp. v. Bd. of Zoning Appeals Olmsted Falls*, 2014-Ohio-487, ¶30.

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B. The Preponderance of Evidence Demonstrates Appellant is Entitled to a Use Variance

Section 329.03(a) of the Cleveland Codified Ordinances empowers the BZA to grant a variance where there is "practical difficulty or unnecessary hardship" in carrying out the strict letter of the code. The test for a use variance is whether the zoning ordinance creates an "unnecessary hardship" for the use of the property. *Fisher-Yan v. Mason,* 11th Dist. Geauga No. 99-G-2224, 2000 Ohio App. LEXIS 4352, *12-13 (Sept. 22, 2000). An "unnecessary hardship occurs when it is not economically feasible to put the property to a permitted use under its present zoning classification due to characteristics unique to the property." *Massasauga Rattlesnake Ranch, Inc. v. Hartford Twp. Bd. of Zoning Appeals,* 2012-Ohio-1275, ¶25.

Appellant met this burden. The testimony demonstrated that due to the size of the building and the limitations of Local Retail and PRO zoning, there is no economically feasible use for the property without the variance. The property has been vacant for nearly 3 years with only three failed proposals. (Tr. Pg. 82,103). Other local retail establishments, like a bank, will not commit without a major anchor tenant. (Tr. Pg. 30). The amount of vacancies in the ward and the specific nuisance conditions at this property—homelessness, drug dealing, garbage dumping, and prostitution—further support the finding of a unique hardship. (Tr. Pg.104). Councilmember Kelly testified to the extreme difficulty of filling a building of this size with local retail. (Tr. Pg.108). By proving the lack of an economically viable permitted use, Appellant demonstrated that the denial of the variance deprives him of a substantial property right.

Furthermore, granting the variance will not be detrimental to the public health, safety, morals, and general welfare, as required by the zoning code. Gas stations are heavily regulated by the EPA and the State of Ohio, which has a superfund for brownfield cleanup. (Tr. Pg. 31,33). The proposed development complies with all zoning requirements except for the gas pumps themselves, reducing the non-conforming General Retail square footage. (Tr. Pg. 24-25). The local community development corporation and adjacent neighbors support the project as a vast improvement over the current blighted conditions. (Tr. Pg. 29, 53-54, 84). The evidence on traffic showed it is moderate and would likely be less than the previous CVS use. (Tr. Pg. 27, 91-92).

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Appellant also contends that reliance on the opposition arguments are misplaced. The vacant CVS that became a health clinic within one year is in a General Retail District with no PRO zoning requirements and would need a variance on Appellant's property. The opposition testimony of 4 gas stations within 2 miles of Appellant's proposed site failed to mention that 3 of those stations are within a couple hundred feet of each other (R Pg. 98). Finally, 4 serious injuries and 2 fatalities due to vehicle accidents over a 4 year period is not unusual or excessive compared to many intersections in the city. There are no details on any of these accidents. Did they involve pedestrians? Were any of the accidents involving vehicles entering or exiting the CVS parking lot? How many accidents caused the injuries, as multiple injuries can occur from one accident?

Despite this overwhelming evidence, the BZA denied the variance.

C. The BZA's Decision Was Arbitrary, Capricious, and Unreasonable

A decision is arbitrary where it is made without consideration of the evidence, capricious where it is unpredictable or contrary to law, and unreasonable where it lacks a sound basis in fact or policy. *Henley v. Youngstown Bd. Of Zoning Appeals, supra.* A decision based on public opinion, without supporting facts, does not constitute reliable, probative, and substantial evidence. *Kabatek v. City of N Royalton City Council,* 8th Dist. Cuyahoga No. 71942, 1998 WL 6952, *3.

Here, the BZA arbitrarily disregarded the overwhelming evidence of hardship and local support from the elected Councilmember Kelly and the relevant CDC (Westtown Development). Instead, it gave greater weight to the unsupported opinions of Councilmember Spencer and the CDC ,Northwest Development, both whom do not represent the ward where the property is located. The decision is capricious because the BZA has granted similar variances for gas stations in Local Retail and PRO Districts, such as those on Lee and Miles and West 14th and Clark, which were approved by the City Planning Department without even requiring BZA review. (Tr. Pg.25 R.Pg.87, 95-96). This inconsistent application of the code renders its decision unpredictable and contrary to its own precedent.

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The Board's emphasis on Appellant's knowledge of the zoning upon purchase is not dispositive. While knowledge is a factor, it does not automatically preclude a variance, especially where, as here, the purchaser relied on assurances from local officials and the City's history of granting similar variances. *See Ridge Rd. LLC v. Parma Bd. Of Zoning Appeals*. 2013-Ohio-4028 (noting knowledge "generally" cannot support a variance, implying exceptions).

The opposition's suggested alternative uses—multi-family housing, a dog park, green space—are not viable. As testified, multi-family housing would also require a variance and could worsen traffic. (Tr. Pg. 90-91). A dog park or green space is not an option for private property. (Tr. Pg. 89-90). City Planning offered no concrete plans or interested parties for this property despite its lengthy vacancy. (Tr. Pg.106). The BZA's decision to deny the variance based on these hypotheticals, while ignoring the actual, testified-to hardship and blight, was unreasonable and without a sound basis in fact.

The BZA incorrectly stated a reliance on a number of Duncan Factors in favor of denying the variance in their decision. The Ohio Supreme Court in *Duncan v. Middlefield*, 23 Ohio St.3d 83 (1986), established a balancing test of seven non-exclusive factors to guide boards of zoning appeals in determining whether to grant a variance. While *Duncan* involved an area variance, Ohio courts have consistently applied the same considerations in the context of use variances. See *Kisil v. Sandusky*, 12 Ohio St.3d 30, 33–34 (1984). No single factor is controlling, and each case must be evaluated on the totality of the circumstances. When the factors are applied to the present record, six weigh strongly in favor of Appellant. Only the fifth factor—knowledge of the zoning classification—arguably weighs against, but as Ohio case law makes clear, that factor is not dispositive and does not automatically preclude relief. Taken together, the Duncan analysis demonstrates that the variance should have been granted.

1. Reasonable Return or Beneficial Use Without Variance

The property has been vacant for nearly three years, despite persistent marketing efforts. Previous use as a Revco and CVS pharmacy required a variance, and the only viable option now is to re-establish a gas station anchor— without which the property cannot yield a reasonable return.

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This factor strongly favors Appellant

2. Substantiality of the Variance

Although typically assessed in area variance cases, the concept applies here too. This variance seeks only to restore a nonconforming, historically supported use consistent with neighboring properties. Given the historical usage pattern and the limited scope of relief sought, the variance is not substantial in a harmful or disruptive sense—another point in Appellant's favor.

3. Essential Character of the Neighborhood / Adjoining Property Detriment

Support from the Ward 11 councilmember Danny Kelly and the local CDC, Westtown Development, demonstrates community alignment with the request, while meaningful opposition largely originated outside the ward.

The proposed development complies with modern design, traffic, and environmental safety standards, further ensuring harmony with neighborhood norms

4. Effect on Government Services

No credible evidence indicates adverse effects on services such as traffic flow, utilities, safety, or environmental impact. In fact, gas stations adhere to stringent state and local regulations, ensuring compliance and minimal public burden

5. Whether the Property Was Purchased With Knowledge of the Zoning Restriction

This factor arguably weighs against Appellant because the property was purchased with knowledge of its zoning classification. However, Ohio courts have consistently held that such knowledge does not automatically bar relief. As the Ohio Supreme Court explained in *Consolidated Mgmt., Inc. v. Cleveland,* 6 Ohio St.3d 238, 242 (1983), "a property owner is not denied the opportunity to establish practical difficulties simply because he purchased the property with knowledge of the zoning restrictions." Similarly, in *Duncan v. Middlefield, supra,*, the Court emphasized that "[n]o single factor controls" and that

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boards must engage in a balancing of all circumstances.

More recently, the Twelfth District reaffirmed this principle in *Calista Enterprises, LLC v. Oxford Bd. of Zoning Appeals*, 2025-Ohio-1692, ¶ 42, holding that "the purchaser's knowledge of existing zoning is a consideration, but it is not controlling, and does not preclude a finding of unnecessary hardship or practical difficulty where the balance of factors otherwise favors relief."

Thus, while Appellant's knowledge of the zoning classification is acknowledged, it does not outweigh the six other Duncan factors that strongly support granting the variance. To treat knowledge as an absolute bar would effectively convert one non-dispositive factor into a rigid rule, contrary to Ohio Supreme Court precedent.

6. Ability to Obviate Hardship Without Variance

There is no feasible alternative use. The property remains vacant, and potential tenants have uniformly declined interest absent a gas station anchor. Without the variance, the property will remain unproductive—supporting this factor decisively.

7. Spirit and Intent of the Zoning Requirements / Substantial Justice

Zoning ordinances are intended to promote public welfare—not perpetuate blight. Granting this variance revives economic activity in a dormant property, aligns with historical usage, and supports neighborhood revitalization. These outcomes squarely align with the spirit of the zoning code while delivering substantial justice to the Appellant and the community

CLOSING SUMMARY OF DUNCAN FACTORS

When viewed through the lens of the *Duncan* test, the balance of equities overwhelmingly supports Appellant. The property has remained vacant and unproductive without the requested variance, despite extensive marketing efforts. The proposed development is consistent with the essential character of the neighborhood, imposes no adverse impact on adjoining properties or government services, and advances the spirit of the zoning code by returning a long-vacant site to productive use.

Although Appellant purchased the property with knowledge of its zoning classification, Ohio law makes clear that this factor alone cannot bar relief. As the Twelfth District explained in

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Calista Enterprises, LLC v. Oxford Bd. of Zoning Appeals, supra, "the purchaser's knowledge of existing zoning is a consideration, but it is not controlling, and does not preclude a finding of unnecessary hardship or practical difficulty where the balance of factors otherwise favors relief." Here, that balance indisputably favors Appellant. Granting the variance will serve both substantial justice and the public interest. Accordingly, the BZA's decision should be reversed and the requested variance granted

.

D. The BZA Hearing Violated Appellant's Right to Due Process

Due process requires a fair and impartial hearing before an administrative body. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). This mandate applies to state and local governments through the Fourteenth Amendment of the United States Constitution.and the Ohio Constitution Art. 1, Section 16.

Appellant's right to due process was violated in three critical ways:

1. **A Partial Tribunal:** Board Member Nina Holzer had a direct conflict of interest as a member of the Board of Directors of Northwest Development, which submitted a formal letter of opposition on February 27, 2024 nearly 3 months prior to the BZA hearing (R. Pg 339,341). Her failure to recuse herself upon the letter's receipt or when it was read into the record created an unacceptable appearance of impropriety (Tr. Pg. 79). Her last-minute abstention immediately before the vote, after all testimony was heard, tainted the proceedings and violated Appellant's right to a hearing before an impartial panel. *See In re Murchison*, 349 U.S. 133 (1955) (Tr. Pg.119). At a minimum, Appellant should have been given the opportunity to request a postponement once it became clear only three members would vote.
2. **Untimely Submission of Evidence:** The Director of Cleveland City Planning submitted a material letter of opposition the night before the hearing. This letter was read verbatim into the record, blindsiding Appellant and denying him any opportunity to review or respond to its contents (Tr. Pg.101-103).. This violated fundamental fairness and the rules of procedure that ensure a balanced hearing.
3. **Unfair Administration of the Hearing:** The BZA Secretary exercised undue discretion by choosing to read certain opposition letters into the record verbatim (Northwest

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Development, Nueva Luz, City of Cleveland Planning Director) while only summarizing letters of support. (Tr. Pg. 53-54, 76-79). This selective amplification of one side's position contributed to an unbalanced and unfair process.

Cumulatively, these errors deprived Appellant of the fair hearing to which he was entitled and render the BZA's decision invalid.

IV. CONCLUSION

For the foregoing reasons, the Board of Zoning Appeals' decision to deny Appellant's use variance must be reversed. The preponderance of substantial, reliable, and probative evidence in the record demonstrates a clear unnecessary hardship: the Property has sat as a blighted nuisance for years with no economically viable permitted use, and the proposed development is the only feasible path to returning it to productive service.

The BZA's decision was arbitrary and capricious, ignoring overwhelming evidence of hardship and local support in favor of unsupported opposition from non-constituents and hypothetical alternative uses that are neither practical nor permitted. This inconsistent application of the zoning code, contrary to the City's own precedent in granting similar variances, undermines the rule of law and the rights of the property owner.

Furthermore, the hearing process itself was fundamentally flawed. The last-minute recusal of a conflicted board member and the untimely introduction of significant opposition evidence deprived Appellant of a fair hearing before an impartial tribunal, violating core due process protections.

This Court should hold that the BZA's decision is unconstitutional, unlawful, unreasonable, and unsupported by the evidence. Appellant respectfully requests that this Court reverse the decision of the Cleveland Board of Zoning Appeals and order that the use variance be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2025 a copy of the foregoing *Appellant's Brief* was filed electronically. Notice of this filing will be served to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Joseph F. Russo
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