STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM 7
COUNTY OF MARION	)	CAUSE NO. 49D07-1505-PL-015205

JAIPREET INVESTMENT CORP.,

Petitioner,

v.

METROPOLITAN BOARD OF ZONING APPEALS DIVISION I OF MARION COUNTY, INDIANA, and MAPLETON FALL CREEK DEVELOPMENT CORPORATION,

Respondents.

FILED

180 DEC 15 2015

CLERK OF THE MARION COUNTY COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter is before the Court on a Verified Petition for Judicial Review filed by Jaipreet Investment Corp. ("Jaipreet"). Jaipreet appeals the decision of the Metropolitan Board of Zoning Appeals Division I of Marion County, Indiana ("BZA") granting the petition of Mapleton Fall Creek Development Corporation ("Mapleton"). Mapleton petitioned the BZA to reverse the issuance of an Improvement Location Permit ("Permit") to Jaipreet by the City of Indianapolis Department of Code Enforcement's ("DCE"). The Permit authorized Jaipreet to build a gas station.

I. Findings of Fact

1. Jaipreet applied to DCE for the Permit to build a gas station and convenience store on an undeveloped lot zoned to the C-3 Neighborhood Commercial District (the "C-3 District"). A gasoline service station is a permitted use in the C-3 District. (R. 69.)

2. The Marion County Zoning Ordinance ("Zoning Ordinance") required Jaipreet to provide six parking spaces. (R. 36.) Jaipreet's site plan ("Site Plan") included nine parking spaces, with eight spaces at gas pumps. (R. 36, 120.)

3. The Zoning Ordinance also required Jaipreet to provide interior access drives and driveways of a minimum width and to provide "sufficient width . . . for the passage of emergency vehicles." (R. 125.)

4. On January 23, 2015, DCE issued the Permit, ILP14-01220, to Jaipreet. (R. 36-37.)

5. On January 30, 2015, Mapleton filed a petition ("Petition") with the BZA, appealing DCE's decision to issue the Permit. (R. 45.)

6. The staff of the Department of Metropolitan Development Division of Planning ("Staff") reviewed the Petition and concluded that the Site Plan complied with the Zoning Ordinance. (R. 68-69.)

7. On April 7, 2015, the BZA held a hearing on the Petition ("Hearing"). (Tr. 1.) During the Hearing, Mapleton argued that not all of Jaipreet's parking spaces could be at gas pumps, and Mapleton's CEO and counsel alleged that the Site Plan did not provide adequate maneuverability for emergency vehicles. (Tr. 6-8, 11.)

8. Jaipreet provided evidence from a registered architect stating that Jaipreet's Site Plan provided adequate parking and onsite maneuverability. (R. 133.)

9. Staff testified that parking spaces at gas pumps had always been counted when determining if a site plan included adequate parking, and that there is adequate parking on site. (Tr. at 26.) Staff also testified that there was "adequate space between those vehicles and the

building for emergency vehicles." (*Id.* at 27.) Staff concluded that the Zoning Ordinance's "standards have been met," and "that ILP has to be issued. It must be issued." (*Id.* at 26.)

10. At the conclusion of the Hearing, the BZA approved the Petition thereby granting the request to revoke the ILP. (Tr. 38.)

11. On May 7, 2015, Jaipreet timely filed its Verified Petition for Judicial Review.

12. On June 2, 2015, the BZA issued the Findings of Fact on Petition to Appeal Administrative Decision ("Findings of Fact"). (R. 137.) The Findings of Fact provided three reasons for granting the Petition:

a. With the exception of a single handicap parking space, all required parking will be provided at spaces designed as fuel pumping spaces, while such parking spaces at gasoline pumps may be *included*, they may not effectively constitute *all* the required parking;

b. Inadequate parking for a convenience store; and

c. Interior access drives and driveways do not provide sufficient area for the passage and maneuverability of emergency vehicles.

13. The BZA now admits that Jaipreet's "Site Plan's access drives exceeded the minimum width requirements," and it no longer disputes that Jaipreet's Site plan provided adequate maneuverability for emergency vehicles. (BZA Answer at ¶ 12; Response at 9 n.2)

II. Conclusions of Law

A. Standard of Review

The approval of an improvement location permit is a ministerial act. *Metro. Bd. of Zoning Appeals of Marion Cnty. v. Shell Oil Co.*, 395 N.E.2d 1283, 1285 (Ind. Ct. App. 1979). "[T]he only determination to be made by" a BZA when determining whether to revoke an improvement location permit is "whether the proposed structures were in conformity with the requirements of the zoning ordinance." *Id.* A reviewing "court shall grant" a petition for judicial

review "if the court determines that a person seeking judicial relief has been prejudiced by a zoning decision that is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial evidence."

Ind. Code § 36-7-4-1614(d).

B. Timeliness of the Findings of Fact

Jaipreet first contends that the BZA's decision must be reversed because it untimely filed the Findings of Fact. Ind. Code § 36-7-4-919(f) provides that "[w]ithin five (5) days after making any decision under the 900 series, the board of zoning appeals shall file in the office of the board a copy of its decision." Jaipreet's argument is based primarily on *First Am. Title Ins. Co. v. Robertson*, 19 N.E. 3d 757 (Ind. 2014) *amended on reh'g*, 27 N.E. 3d 768 (Ind. 2015), and Jaipreet's reliance on this decision is misplaced. The statute at issue in that case was Indiana Code § 4–21.5–5–13(b), which specifically states that "[f]ailure to file the record within the time permitted by this subsection, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding." *Id.* The Indiana Supreme Court held in *First Am. Title* that a bright-line approach should be used, and because the agency record was not timely filed, the petition for judicial review should be dismissed. *Id.* at 762-763. Moreover, the Supreme Court did not extend its holding based on its interpretation of Indiana Code § 4–21.5–5–13(b) to any other statute or filing requirement. Thus, there is no bright-line rule requiring reversal of the BZA's decision

simply because its findings of fact were belatedly filed.

Nor is there any justification to do so in this case. It is well-settled that a petitioner may be entitled to reversal of an agency decision only if belated findings of fact cause them actual prejudice of a kind and degree sufficient to justify reversal on that ground alone. *See, e.g., Ad Craft Inc. v. Board of Zoning Appeals of Evansville*, 693 N.E.2d 110, 113 (Ind. Ct. App. 1998) (quoting *Ripley County Board of Zoning v. Rumpke of Indiana*, 663 N.E.2d 198 (Ind. Ct. App. 1996) (*trans. denied*)). Jaipreet again relies on *First Am. Title* to argue that no prejudice is required to reverse a board decision based on untimely findings of fact. Again, however, the Supreme Court's decision was limited to filings of administrative records under Indiana Code § 4–21.5–5–13(b), which statute is not at issue in this case. Thus, the Supreme Court did not alter the requirement that a petitioner seeking to reverse a board decision based on untimely findings of fact show actual prejudice resulting from the filing being late.

The Court concludes that Jaipreet cannot show any such prejudice in this case. It claims it was prejudiced by the belated filing by not having all information relevant to its Petition for Judicial Review when drafting it. Here, like the petitioners in *Ad Craft*, Jaipreet could have sought to file an amended Petition if it believed the delay in the filing of the findings of fact prejudiced it, but it did not. Jaipreet has had a full and fair opportunity to formulate the bases for its Petition, and has done so, as evidenced by its brief. It has suffered no prejudice by the belated filing sufficient to justify reversal.

C. Parking

Jaipreet also contends that the BZA's conclusion that it provided inadequate parking is erroneous as a factual and legal matter. The Findings of Fact concluded that Jaipreet had provided inadequate parking because "[w]ith the exception of a single handicap parking space,

all required parking will be provided at spaces designed as fuel pumping spaces, while such parking spaces at gasoline pumps may be *included*, they may not effectively constitute *all* the required parking." (R. 137.)

The Zoning Ordinance provides that "[p]arking spaces at gasoline pumps may be included in the calculation of required parking." (R. 122.) The BZA's finding is clearly erroneous because Jaipreet's Site Plan included a free standing parking space—the handicapped space—and that space counts. Zoning Order § 732-211(l). Moreover, this finding is erroneous as a matter of law because the Zoning Ordinance does not require a minimum number of free-standing parking spaces.

The BZA argues that the Zoning Ordinance grants it the discretion to not count parking spaces at gas pumps, and the BZA contends this interpretation is entitled to deference. Under Indiana law, "courts are charged with the responsibility of statutory construction and, thus, are not bound by the agency's interpretation." *Ad Craft*, 693 N.E.2d at 113. Further, the Court of Appeals has previously interpreted similar language in the Zoning Ordinance and concluded that it does not grant the BZA the discretion to deny improvement location permits. In *Metropolitan Bd. of Zoning Appeals of Marion Cnty. v. Shell Oil Co.*, 395 N.E.2d 1283, 1284 (Ind. Ct. App. 1979), Shell sought an improvement location permit to erect open canopies. The BZA argued that "it was within their discretion to interpret the [Zoning] Ordinance" and to deny Shell's application. *Id.* The Zoning Ordinance provided that "*front yards may include . . . open canopies*." *Id.* at 1285 n.4. The Court of Appeals concluded this language was a "definitive requirement of the zoning ordinance . . . that canopies may be built." *Id.* at 1286. Therefore, the BZA was "without the discretionary power to withhold a permit," and it did not "have the authority to prohibit that which the City-County Council has expressly permitted in the [Zoning]

Ordinance." *Id.*

In this case the Zoning Ordinance provides that "[p]arking spaces at gasoline pumps may be included." As the Court of Appeals has concluded, this is a "definitive requirement of the zoning ordinance" that Jaipreet could include parking at gas pumps, and the BZA is "without the discretionary power to withhold a permit." *See Id.* Therefore, the BZA's interpretation of the Zoning Ordinance must be rejected because the BZA did not have the discretion to not count Jaipreet's parking spaces at gas pumps. Jaipreet's Site Plan included adequate parking because it included nine spaces, when only six were required.

D. Maneuverability

Jaipreet next contends that the finding that the Site Plan's "[i]nterior access drives and driveways do not provide sufficient area for the passage and maneuverability of emergency vehicles" was without an evidentiary basis. (R. 137.) The BZA conceded the issue: "Respondent BZA concedes the maneuverability portion of Petitioner's argument." (Response at 9 n.2.) Therefore, because the BZA is the fact finder, Ind. Code § 36-7-4-915, its concession means this finding is no longer a valid basis for affirming the BZA's decision. *See Heyser v. Noble Roman's, Inc.*, 933 N.E.2d 16, 20 (Ind. Ct. App. 2010) (concluding that counsel's admission is binding upon the client), *trans. denied.* Even if the BZA had not conceded this issue, there is no evidence supporting the finding that Jaipreet's Site Plan did not provide adequate maneuverability for emergency vehicles. During the Hearing, Mapleton's counsel and CEO asserted, without any evidentiary basis, that Jaipreet's Site Plan failed to provide adequate maneuverability for emergency vehicles. The Court of Appeals has repeatedly held that statements of lay witnesses on technical issues are not evidence. *See, e.g., Rice v. Allen Cnty. Plan Comm'n*, 852 N.E.2d 591, 598-99 (Ind. Ct. App. 2006), *trans. denied.*

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the BZA is compelled to reverse its decision to grant Mapleton's Petition, and the BZA is compelled to deny Mapleton's Petition. Ind. Code § 36-7-4-1615.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Permit, ILP14-01220, issued by the DCE to Jaipreet, is valid and enforceable.

Dated: 12-15-15

Michael D Keele
Judge, Marion Superior Court
Civil Division, Room 7

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