FILED
October 9, 2024
CLERK OF THE HAMILTON
CIRCUIT COURT

STATE OF INDIANA ) IN THE HAMILTON SUPERIOR COURT 1
) SS:
COUNTY OF HAMILTON ) CAUSE NO. 29D01-2311-PL-010391

EROS VALDOVICH, NATHANIEL MITCHELL, DEON GOOSEN, TODD COUCH, LISA COUCH, WILLIAM ASHPAUGH, NANCY ASHPAUGH, CHERRY WOOD STABLES, INC.

Petitioners,

vs.

BEAVER GRAVEL CORPORATION, D/B/A BEAVER MATERIALS, CHRIS BEAVER, ALI ALVEY, ROB SHANK,

Respondents/Petitioners Below,

PHILLIP FROYMOVICH, ETELKA FROYMOVICH,

Respondents/Owners Below

HOOSIER FUTBOL CLUB, INC., HOOSIER FUTBOL ACADEMY, LLC, JEFF ILES, JILL ILES, SPENCER SHARP, HANNAH SHARP, PAUL MURZYN, JENNA GETTYS, DEBBIE WELDY, CATHLEEN HALTERMAN, JAY HALTERMAN, LINDA MCCORMICK, JOHN CRONE, BARBARA EDDS, RENEE EIMERMAN, DAVID FRANZBLAU, DENNIS GEHLHAUSEN, ERICA IRVIN, SUSIE MCGOVERN, HEIDI MENA, MARCO MENA, TENA NASH, CYNTHIA SHONE, SUSAN STRAIT, CALVIN LEE, PAMELA SASSE,

Respondents/Remonstrators Below,

NOBLESVILLE, INDIANA BOARD OF ZONING APPEALS

Respondent, Deciding Authority Below

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND JUDGMENT IN FAVOR OF PETITIONERS**

This cause comes before the Court on Petitioners, Eros Valdovich, Nathaniel Mitchell, Todd Couch, Lisa Couch, Deon Goosen, William Ashpaugh, Nancy Ashpaugh, and Cherry Wood Stables, Inc.'s (the "Homeowners") *Verified Petition for Judicial Review of Zoning Decision.*

The Homeowners appealed Respondent, Noblesville, Indiana Board of Zoning Appeals' ("BZA") decision to approve Respondent, Beaver Gravel Corporation's ("Beaver") Variance of Land Use Application BZNA 0070-2023 (the "Application" for "Variance") allowing Beaver to put a sixty-eight (68) acre commercial gravel mine in an R-1 Residential District and on two parcels of real estate abutting and/or near the properties of the Homeowners in Noblesville, Indiana (the "Decision"). The appeal was filed under Indiana Code § 36-7-4-1601, et seq.

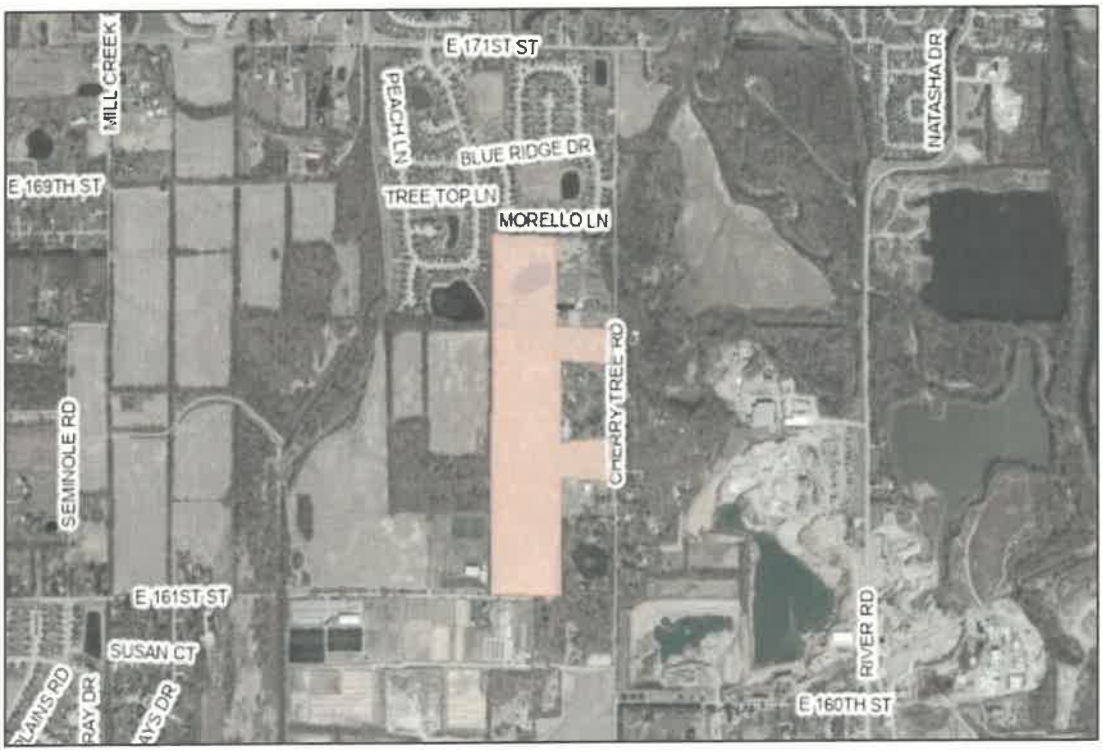
The parties have fully briefed their positions on judicial review. The parties presented oral argument on their positions on judicial review on July 31, 2024. Having reviewed the record, briefing, legal authority, and oral argument, and being otherwise duly advised, the Court now enters the following findings of fact, conclusions of law, and order and judgment in favor of the Homeowners, setting aside the BZA Decision and denying the Application for the Variance—all as permitted under Indiana Code § 36-7-4-1615.

## FINDINGS OF FACT

***The Real Estate***

1. The real estate consists of two (2) parcels of land totaling approximately sixty-eight (68) acres, owned by Phillip and Etelka Froymovich – Tax Identification Parcels 10-10-11-00-00-002.002 and 10-10-02-00-00-024.003 (the "Real Estate"). (BZNA 000108; BZNA 000113).

2. An aerial image of the Real Estate is below:




(BZNA 000141).

3. The Real Estate is zoned R-1 Residential District. (BZNA 000142). The Real Estate is designated as a "Preservation/Natural Area" by the Future Land Use Map in the Noblesville Comprehensive Plan. (BZNA 003589).

4. The Real Estate is also partially located within Zone 2 of the Wellhead Protection Area. (BZNA 000001; BZNA 000142). According to the Hamilton County, Indiana Wellhead

Protection Act, this means that the Real Estate is near a wellfield used to supply water for the public and, as a result, the land must be subject to land use controls designed to prevent site development that is injurious to the public water supply. (BZNA Record 000340).

5. Hamilton County public water supplies are completely dependent on groundwater and the County has warned that commercial and manufacturing uses, if unregulated, have immediate probability of permitting the introduction of toxic substances into the water supply. (BZNA Record 000340).

***The Application***

6. On July 14, 2023, Beaver submitted its Application, through which it sought a variance to allow it to expand its mineral, sand, and gravel mining operations to the Real Estate (the "Application" for the "Gravel Mine"). (BZNA 000108-000140).

7. Beaver required a variance because sand and gravel extraction mines are not permitted in residential zoning districts like the R-1 Residential District encompassing the Real Estate. (BZNA 000142; BZNA 003476/UDO, Appendix C). That type of activity is *only* permitted in I-2 Heavy Industrial (conditional) and I-3 Extractive Industrial (permitted) Districts. (BZNA 003223/UDO 8.D.2; BZNA 003224/UDO 8.D.3; BZNA 003478/ UDO, Appendix C).

8. In connection with the Application, Beaver represented that its soil stockpiles could reach a maximum of twenty (20) feet high. (BZNA 000117). Beaver further represented that its mining setback would be fifty (50) feet from the property lines of the adjacent properties. (BZNA 000117; BZNA 000139; BZNA 000140).

9. In connection with the Application, Beaver submitted a Description of Project Proposal providing various details associated with the proposed project—the pre-extraction,

extraction, and reclamation phases and information on noise, lighting, soil piles, air quality/dust control, water protection, construction site runoff, and hauling. (BZNA 000114-000117).

10. Beaver further submitted proposed Findings of Fact for the BZA, which significantly mirror the Findings of Fact ultimately issued by the BZA. (BZNA 000119-000121). Finally, Beaver submitted proposed Conditions of Approval for Variance of Land Use Request, which were adopted verbatim by the BZA. (BZNA 000004-000005; BZNA 000122-000124).

***The Hearings***

11. On September 5, 2023, the BZA held a public hearing at which it took comments from Denise Aschleman, the Noblesville Principal Planner; Jim Shinaver of Nelson and Frankenberger, counsel for Beaver; Chris Beaver, the owner of Beaver; and a litany of remonstrators including the Homeowners (the "September Meeting"). (BZNA 000013-000027; BZNA 000415; BZNA 000417; BZNA 000767-000890).

12. At the close of the September Meeting, the BZA closed the public hearing, but welcomed additional written submissions and continued the matter. (BZNA 000026-000027).

13. On October 2, 2023, the BZA held a public meeting at which it took comments from Ms. Aschleman and then the members of the BZA moved to approve the Variance (the "October Meeting"):

> Motion by Mr. Field, second by Mr. Burtner to approve application BZNA-0070-2023 based upon the following findings of fact:
>
> - The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
> - The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;

- The need for the proposed variance arises from some condition peculiar to the property involved;
- The strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought;
- The approval of this variance does not interfere substantially with the provisions of the Comprehensive Master Plan for the City of Noblesville, Indiana.

(BZNA 000029-000030).

14. Those members further moved to attach the following conditions to approval:

1. Operation under the terms of this variance is contingent upon the approval of a permit by Hamilton County Highway Department for the Cherry Tree Road crossing or drivecut.
2. The Applicant shall comply with all 15 Conditions/Commitments offered in Exhibit F of the Applicants application packet.
3. Upon completion of Phase 1 (to the extent necessary to allow the following), the Applicant shall install a site entrance driveway at least 150 feet in length to help prevent the dirt, mud, and debris from leaving the site. If it is found that dirt, mud, and debris are leaving the site five or more times in a year a wheel wash be installed.
4. The Applicant shall sign the Acknowledgement of Variance document prepared by the Planning and Development Department Staff within 60 days of this approval. Staff will then record this document against the property and a file stamped copy of such recorded document shall be available in the Department of Planning and Development.
5. Any alterations to the approved building plan or site plan, other than those required by the Board of Zoning Appeals (BZA), shall be submitted to the Planning and Development Department prior to the alterations being made, and if necessary, a BZA hearing shall be held to review such changes.
6. Haul Trucks only with no tail gates will bring material to or remove material from the site.
7. No screening or processing of materials will be conducted on this property. All screening will be done at the main plant.

(BZNA 000030).

15. The BZA voted to approve the Variance 3-2 with BZA members, Mike Field, Dave Burtner, and Dan MacInnis, voted in favor of approval of the Application and BZA members, Lauren Wahl and Jim Hanlon, voted against approval of the Application. (BZNA Record 000028-000030; BZNA 1306; BZNA 0001359-001360; BZNA 001902-001929).

16. Thereafter, on or about November 6, 2023, the BZA issued its Findings of Fact (the "November Meeting" collectively with the September Meeting and October Meeting are the "Hearings"). (BZNA 000001-000009; BZNA 003003-003005).

***The Petition for Judicial Review***

17. On November 1, 2023, after exhausting all administrative remedies available with the BZA, the Homeowners timely filed their Petition for Judicial Review under Indiana Code § 36-7-4-1605.

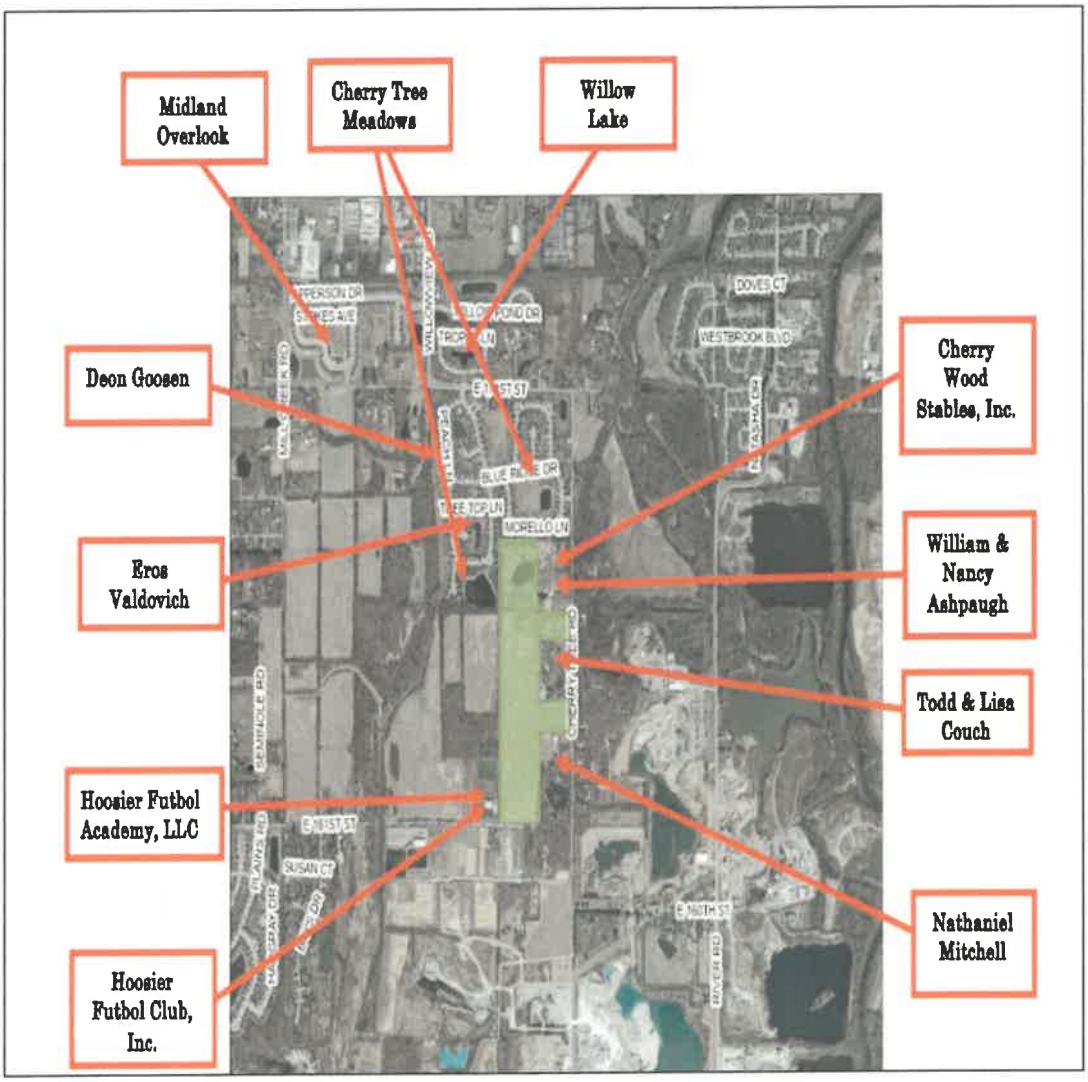
18. Venue is appropriate because this is the judicial district for the land affected by the Decision. I.C. § 36-7-4-1606.

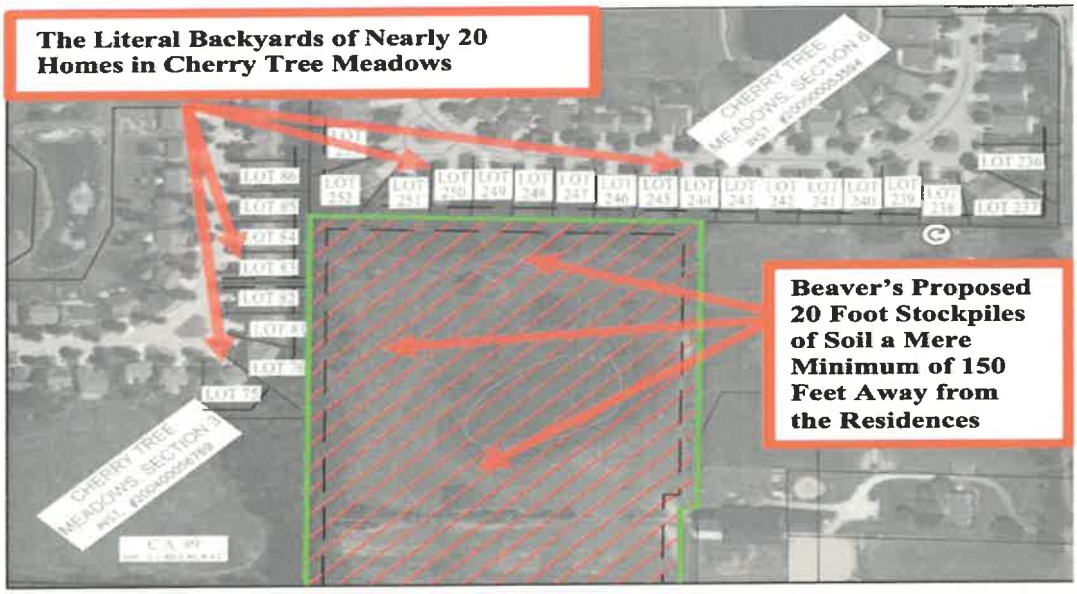
19. Notice has been provided to all persons who were automatically parties to the Petition for Judicial Review as required under Indiana Code § 36-7-4-1608.

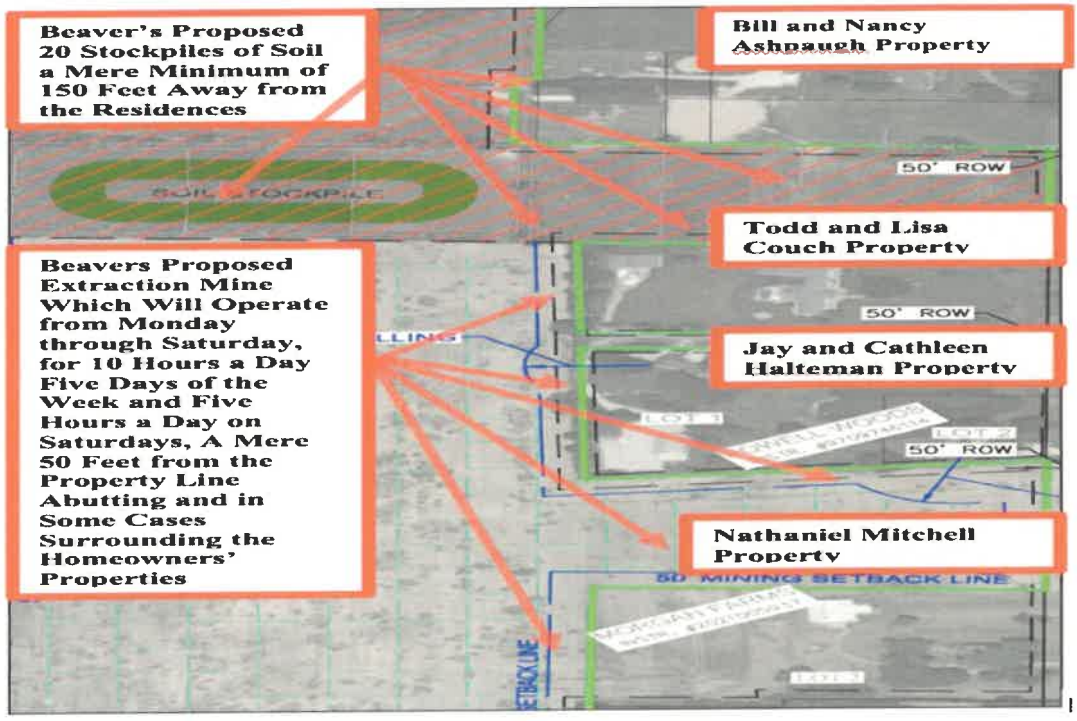
20. The record of the proceedings before the BZA (the "Record") and the transcripts from the Hearings (the "Transcripts") were timely tendered to this Court as required by Indiana Code § 36-7-4-1613. (BZNA 000001-003725).

21. The Homeowners established they have standing to obtain judicial review of the Decision because they are aggrieved by the Decision and sufficiently participated in Hearings that led to the Decision as required by Indiana Code § 36-7-4-1603. (BZNA 000017; BZNA 000021; BZNA 001496-001497; BZNA 001509; BZNA 001708; BZNA 001790; BZNA 002123).

22. Additionally, the Homeowners established they have been prejudiced by the Decision as required by Indiana Code § 36-7-4-1614. Images provided by Beaver and labeled by the Homeowners to show the close proximity of the proposed mine on the Real Estate to their properties are below:


Midland Overlook
Cherry Tree Meadows
Willow Lake
Deon Goosen
Eros Valdovich
Hoosier Futbol Academy, LLC
Hoosier Futbol Club, Inc.
Cherry Wood Stables, Inc.
William & Nancy Ashpaugh
Todd & Lisa Couch
Nathaniel Mitchell
DOVES CT
WESTBROOK BLVD
BLUE RIDGE DR
MORELLO LN
SUSAN CT




(BZNA 000001-000009; BZNA 000418; BZNA 0001361—with labels added by Homeowners; BZNA 000140—with labels added by Homeowners).

## CONCLUSIONS OF LAW

1. In reviewing the BZA Decision, the Indiana Supreme Court has ruled that this Court must employ three different standards of review: (i) *for questions of fact*, this Court should uphold the findings of the BZA if they are supported by substantial evidence; (ii) *for mixed questions of law and fact*, this Court should review the BZA's conclusions for reasonableness; and (iii) *for questions of law*, this Court should decide independently whether the BZA's action was contrary to law, including whether it stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision." *Noblesville, Indiana Board of Zoning Appeals v. FMG Indianapolis, LLC*, 217 N.E.3d 510, 513 (Ind. 2023).

2. Further, as a Court sitting in judicial review under the "1600 Series," this Court must reverse the BZA Decision if it finds that the Decision was: (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, limitation, or right; (4) without observance of procedure required by law; or (5) not supported by substantial evidence (the "Grounds for Reversal"). I.C. § 36-7-4-1614.

3. Finally, as this matter involves a variance, this Court must reverse the BZA Decision if it finds that Beaver failed to satisfy any one of the following variance requirements: (1) the approval would not be injurious to public health, safety, morals, or general welfare of the community; (2) the use and value of the area adjacent to the Real Estate would not be affected in a substantially adverse manner; (3) the need for the variance arose from some condition peculiar to the Real Estate; (4) the strict application of the terms of the zoning ordinance would constitute an unnecessary hardship if applied to the Real Estate; and (5)

the approval would not interfere substantially with the Comprehensive Plan (the "Variance Requirements"). IC § 36-7-4-918.4; (BZNA 003143/UDO 4.D.3.E.4). *Sam's East, Inc. v. United Energy Corp., Inc.*, 927 N.E.2d 960, 964 (Ind. Ct. Ap. 2010); *Maxey v. Board of Zoning Appeals*, 480 N.E.2d 589, 595 (Ind. Ct. App. 1985).

***Beaver was Authorized to File the Application for the Variance Under the UDO.***

4. Plaintiffs have challenged Beaver's standing to apply for a variance. Under the Noblesville, Indiana Unified Development Ordinance ("UDO"), an application for variance may only be filed by an owner, lessee, or someone with a legal or equitable interest in a property. (BZNA 003140/UDO 4.D.3.C).

5. Through the Application, Beaver designated itself as the Applicant for the Variance. (BZNA 000108-000110). However, Beaver did not own the Real Estate. (BZNA 000108-000109). Instead, and as Beaver expressly acknowledged in its Application, the Real Estate was owned by the Froymoviches. (BZNA 000108-000109).

6. The Court's review of the BZA Decision is limited to issues raised before the BZA. This rule is designed to ensure that the BZA has the opportunity to address any potential bases for appeal thereby avoiding the need for using judicial resources.

7. Now, for the first time on judicial review, Petitioners attempt to argue Beaver Gravel did not have authority to submit the Application because it was not an "owner" of the Property, and did not possess "legal or equitable interest in the Property" as required under Noblesville UDO 4.D.3.C., despite receiving the Owner's consent submit the Application.

8. Petitioners do not point to anything in the Record to show that this issue was raised before the BZA. And after careful review of the Record, the Court does not find anything in the Record indicating that this issue was raised.[1]

9. Indiana Code section 36-7-4-1610 provides that a person may obtain judicial review of an issue not raised before the board "only to the extent that: (1) the issue concerns whether a person who was required to be notified by this chapter[,] or (2) the interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the zoning decision." *See also Burton v. Bd. of Zoning Appeals of Madison Cnty.*, 174 N.E.3d 202, 213 (Ind. Ct. App. 2021) ("[n]othing in the express terms of [Ind. Code 36-7-4-1600, et seq.] obviates the requirement of making a timely objection before a zoning hearing in order to preserve an issue for judicial review."). Neither exception applies here.

10. Not only was Beaver Gravel's authority to submit the Application not raised before the BZA, but it also was not raised in the Verified Petition.

11. The Court's review of the BZA Decision is also limited to the issues presented in the Verified Petition (and only to the extent such issues were presented before the BZA). *Lockerbie Glove Factory Twn. Home Owners Assoc., Inc. v. Indianapolis Historic Preservation Comm'n*, 106 N.E.3d 482, 493 (Ind. Ct. App. 2018) (finding that "[b]ecause the Remonstrators did not raise [] an issue before the Commission in their remonstrance letter or before the trial court in their petition for judicial review" that it was "therefore waived," citing Indiana Code section 36-7-4-1610 as support).

[1] The Record is clear that the Petitioners were aware of ownership at the time of the hearing but chose not to challenge lack of ownership as a basis for lack of standing. ( See BZNA000820, BZNA000900, BZNA001312.) Accordingly, Petitioners' standing argument is waived.

12. Pursuant to Indiana Code section 36-7-4-1610, *Burton*, 174 N.E.3d at 213, and *Lockerbie Glove Factory*, 106 N.E.3d at 493, the Court therefore concludes that Petitioners' challenge to the BZA Decision on grounds that Beaver Gravel lacked authority to submit the Application is waived as a matter of law.

13. Even if this issue were properly preserved for review, the Court nonetheless finds Petitioners' argument to be without merit.

14. The UDO 4.D.3.C. provides that "[a]n application for a variance may be filed with the Director of Planning and Development by the owner **or** lessee of the subject property **or** other person having legal or equitable interest in the subject property." (BZNA 003140/UDO 4.D.3.C.) (emphasis added).

15. Here, the Record reveals that Beaver Gravel was under contract with the Owner or the purchase of the property. (BZNA000046.) Under Indiana law, a contract purchaser possesses sufficient legal interest in the property to seek a variance. *See, e.g.*, *Fail v. LaPorte Cnty. Bd. of Zoning Appeals*, 171 Ind.App. 192, 355 N.E.2d 455, 459 (1976); *see also Bowen v. Metro. Bd. of Zoning Appeals in Marion Cnty., Div. III*, 161 Ind.App. 522, 317 N.E.2d 193, 198-99 (1974), *abrogated and clarified on other grounds*. Petitioners neither dispute, nor challenge application of this precedent.

16. While Petitioners argue that the Owner's written consent is not sufficient to confer Beaver Gravel with the requisite legal interest, they offer no argument explaining how, or on what legal grounds, the Owner's written consent to the Application is insufficient to confer Beaver Gravel with the requisite legal or equitable interest in the Property to submit the Application.

17. A review of the UDO as a whole makes clear the BZA anticipates and expressly approves of applications for variance of land use submitted with the consent of the property owner. For instance, under the UDO, an "applicant" includes the property owner's "legal representative of land who makes application to the City of Noblesville," and in situations where the owner is not filing the application, the UDO requires "[w]ritten consent [] from the legal owner of the premises." UDO 2.2 (defining "Applicant").

18. Here, the Owner provided consent not only for Beaver Gravel's submission of the Application, but also for Beaver Gravel to serve as the Owners' legal representative (i.e., agent) in all matters, proceedings, and filings necessary for the Application. No Indiana authority provides, or suggests, that an owner's consent is insufficient to confer an applicant, such as Beaver Gravel, with the requisite interest in the property to apply for a variance of land use.[2]

19. Thus even if this issue was preserved, the Court concludes that Beaver Gravel possessed the requisite legal and/or equitable interest in order to submit the Application.

***The BZA's Decision Was in Error Because Beaver Failed to Meet All of the Variance Requirements Required Under the UDO.***

20. Our highest courts have acknowledged that variances are only to be granted under *special and extraordinary circumstances* and the legal requirements to obtain a variance are intended to be *stringent. Church of Christ in Indianapolis v. Metropolitan Bd. of Zoning Appeals of Marion County*, 371 N.E.2d 1331, 1335 (Ind. Ct. App. 1978).

[2] Indiana courts addressing written consents under these circumstances have only considered challenges to the validity of the decree based on grounds of deficiency. *See, e.g., Moss Creek Solar, LLC v. Ehrlich*, 2023 WL 4056066 (Ind. Ct. App. Jun. 19, 2023) (dispute concerned whether signatures were required to effectuate the consent, not whether the owner's consent was sufficient). Petitioners do not argue the written consent is deficient or invalid, nor does the Court find any such defect.

21. Noblesville itself codified these principles stating, "variance procedures are intended to provide *a narrowly circumscribed means* by which relief may be granted from *unforeseen particular applications of the UDO*." (BZNA 003140/UDO 4.D.3.A). And even then, the entity seeking the variance must establish that the application of the Ordinance creates "unnecessary hardship." (BZNA 003143/UDO 4.3.E.4).

22. It was Beaver's responsibility to prove the request satisfies *all* variance criteria. *Maxey v. Bd. of Zoning Appeals*, 480 N.E.2d 589, 594 (Ind. Ct. App. 1985) (providing that it is the petitioner's burden of establishing the existence of each of the five statutory prerequisites necessary for the grant of a variance under I.C. § 36-7-4-918.4).

23. This Court concludes that Beaver failed to prove and the BZA erred in concluding Beaver met all of the Variance Requirements.

***Variance Requirement (1): The Decision for the Variance is Injurious to Public Health, Safety, Morals, and General Welfare.***

24. The UDO expressly states that a Land Use Variance may be approved ***only*** upon a determination that the approval will not be injurious to the public health, safety, morals, and general welfare of the community. (BZNA 003143/UDO 4.D.3.E.4). *See* IC § 36-7-4-918.4. "The protection of health and safety are important factors." *O'Connor v. Overall Laundry*, 183 N.E. 134, 137 (Ind. Ct. App. 1932).

25. The BZA found that "[t]he approval will not be injurious to the public health, safety, morals, and general welfare of the community." (BZNA 000001-000002). In support of this finding, the BZA reasoned:

> The proposed variance will not be injurious to the public health, safety, and general welfare of the community. The evidence indicates that the petitioner will employ construction dust control on the site, and will employ a water truck o limit fugitive construction dust. The site is located within Zone 2 according to Noblesville's wellhead protection maps. The petitioner will

> follow the regulations in the wellhead protection ordinance regarding excavation techniques. During testing the petitioner did not encounter any ground water in the full depth of the drilling, but applicant has committed to not using dewatering techniques. Concerns were raised regarding blasting, but the applicant indicated no blasting will occur on the site. The petitioner has committed to using excavators and loaders but has agreed not to conduct any blasting as part of its operations. In addition to those factors, the petitioner has also put in place operational standards to lessen their impact on surrounding property owners. The Board has considered and adopted conditions/commitments, which are adopted in detail below and incorporated herein by reference (the "Conditions/Commitments").
> Additionally, mining and extraction activities occur on numerous parcels adjacent to, and in the vicinity of, the subject Real Estate, including parcels generally located south of 171st Street and north of 160th Street and parcels east and west of Cherry Tree Road. This variance would permit extraction activities which are already consistent with the use on properties in the vicinity and neighborhood of the subject Real Estate.
> Based on the totality of the record evidence and the Conditions/Commitments, approval of the request is not injurious to the public health, safety, morals and general welfare of the community.

(BZNA 000001-000002).

26. The Court has reviewed the record evidence on this Variance Requirement and in particular the evidence as it relates to health and safety concerns related to water, air, and noise. In support of its position, Beaver championed an internal memo written by the Vice President of Beaver; a letter from its vendor, August Mack Environmental, about noise and air at a different mine owned by Beaver; and authority proving to its detriment that its noise levels would exceed Environmental Performance Standards under the UDO. (BZNA 000024; BZNA 000452; BZNA 000461-000462; BZNA 003443-003444/UDO 13.1 and 13.4(A).

27. For their part, Homeowners and remonstrators submitted empirical evidence showing that other mining activity had a negative impact on the water table and private wells; significant evidence about the negative health consequences of mining dust; and both cautionary and conclusive testimony and submissions from several local industry professionals regarding the proposed mine's impact on water quantity, water quality, water contamination, water

pollution, air quality, and the environment—Rachel Walker, PhD, L.P.G. and John A. Mundell, P.E., L.P.G with Mundell & Associates; the Executive Director of the White River Alliance; and Susie McGovern with the Hoosier Environmental Council. (BZNA 000023; BZNA 000556-000557; BZNA 000801-000802; BZNA 000825-000827; BZNA 001242; BZNA 001252-001255; BZNA 002090 - Attachment 1 pages 1-8; BZNA 002798-002800; BZNA 002817; BZNA 002850-BZNA 002873; BZNA 002875; BZNA 002934 and its Attachment 1 located in the Supplemental Record submitted on February 14, 2024, in BZA Record – BZNA 0070-2023-Part 2, Exhibit A, Folder 10, Document 1491).

28. While this Court acknowledges that it may not reweigh evidence, it must determine whether findings are supported by substantial evidence. *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513; I.C. § 36-7-4-1614(5). This means it must determine whether a reasonable mind might accept the evidence as adequate to support the factual findings made. *Tipton Cnty. Board of Zoning Appeals*, 230 N.E.3d at 330.

29. This Court further acknowledges the Indiana Supreme Court's guidance indicating that, if it should be made to appear that the evidence upon which an agency acted was devoid of probative value or that the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the agency finding does not rest upon a rational basis, then the order will be set aside, not because incompetent evidence was admitted, but rather because the proof, taken as a whole, does not support the conclusion reached. *Warren v. Indiana Tel. Co. v Indiana Tel. Co.*, 26 N.E.2d 399, 409 (Ind. 1940). *See also Wright v. Northrop*, 621 N.E.2d 1142, 1145 (Ind. Ct. App. 1993).

30. Based on the totality of the evidence in this matter and the Indiana Supreme Court's guidance in *Noblesville, Indiana Board of Zoning Appeals* and *Warren*, this Court

concludes that the evidence submitted by Beaver was devoid of probative value and/or so proportionately meager as to lead to the conviction that the BZA conclusion on this Variance Requirement does not rest upon a rational basis. The proof, taken as a whole, does not support the conclusion reached by the BZA on this Variance Requirement.

31. The Court concludes that it was unreasonable for the BZA to conclude that the approval will not be injurious to the public health, safety, morals, and general welfare of the community. I.C. § 36-7-4-918.4; *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513 (For mixed questions of law and fact, this Court reviews the BZA's conclusions for reasonableness.").

32. For all of the reasons set forth above, the BZA's Decision is set aside under Grounds for Reversal (1), (3), and (5).

***Variance Requirement (2): The Decision for the Variance has an Adverse Effect on the Use and Value of the Adjacent Property.***

33. In order to obtain the Variance, Beaver was required to show that the use and value of the area adjacent to the Real Estate would not be affected in a substantially adverse manner. I.C. § 36-7-4-918.4; (BZNA 003143/UDO 4.D.3.E.4).

34. The UDO defines "use" as "the specific purpose for which land or a building is designated, arranged, intended, or for which it may be occupied or maintained." (BZNA 003208/UDO 2.2-Definition of "Use"). The UDO does not define the words "substantial," "adverse," "affect," or "value", so this Court must defer to Webster's New Collegiate Dictionary, which defines most relevantly: "substantial" as "considerable in quantity" and "significantly great;" "adverse" as "acting against or in a contrary direction" or "causing harm;" "affect" as "to produce an effect upon" or to "produce a material influence on or alteration in;" and "value" as "the monetary worth of something." (BZNA 003022/UDO

2.1.D); *see Substantial*, Merriam-Webster's New Collegiate Dictionary (11th ed. 2020); *Adverse*, Merriam-Webster's New Collegiate Dictionary (11th ed. 2020); *Affect*, Merriam-Webster's New Collegiate Dictionary (11th ed. 2020); *Value,* Merriam-Webster's New Collegiate Dictionary (11th ed. 2020).

35. The BZA found that "[t]he use and value of the area adjacent to the [Real Estate would not be affected in a substantially adverse manner." (BZNA 000002). In support of this finding, the BZA reasoned:

> The use and value of real estate adjacent to the subject site will NOT be affected in a substantially adverse manner by allowing the requested variance. Mining and extraction activities occur on numerous parcels adjacent to, and in the vicinity of, the subject Real Estate, including parcels generally located south of 171st Street and north of 160th Street and parcels east and west of Cherry Tree Road. This variance would permit extraction activities which are already consistent with the use on properties in the vicinity and neighborhood of the subject Real Estate. Accordingly, neighboring properties which are already adjacent to mining operations will not be affected in a substantially adverse manner by additional mining in this area for a ten (10) year period. In fact, a map presented by the petitioner shows that the vast majority of property in and around the proposed location are already subject to mining.
>
> Various members of the public indicated concerns about blasting, but the petitioner has committed to not using any blasting on the subject Real Estate. There were also concerns about processing of gravel, but petitioner has committed to processing gravel off-site at another location.
>
> Based on the totality of the record evidence and the Conditions/Commitments, the use and value of the area adjacent to the property included in this variance will not be affected in a substantially adverse manner. In fact, evidence presented shows this use is consistent with how other properties in the area are already used.

(BZNA 000002).

36. The Court has reviewed the record evidence on this Variance Requirement. In support of its position, Beaver submitted two national reports that are explicitly inconclusive—they state that, while they did not find a negative causal relationship between quarries and home prices, *more advanced research is needed due to a lack of meaningful data and the fact*

*that quarries are typically located away from residential density.* (BZNA 000472-000551). This disclaimer proves this study has no applicability here because the mine proposed by Beaver is **not** going to be located away from residential density, it is going to be abutting and/or in close proximity to multiple homes and residential neighborhoods. (BZNA 000125; BZNA 000418).

37. Beaver also submitted a study by Ali Beaver, the daughter of the owner of Beaver, that assesses a different mine's impact on another neighborhood's home values looking only at sale prices for sales that occurred over a decade after the coexistence of the mine and neighborhood. (BZNA 000016; BZNA 002770; BZNA 002809; BZNA 002970). This has no applicability here. The question at hand is whether putting a new gravel mine next to the homes at issue will have an immediate and negative impact on the values of those homes, not whether maintaining a gravel mine next to homes after a decade continues to cause a negative impact on the values of those homes.

38. For their part, the Homeowners and remonstrators submitted two conclusive national reports on the negative impact of gravel mines on home values; the conclusive opinion of a real estate professional with forty-four (44) years of experience and practicing in Hamilton County; the conclusive opinion of a local real estate professional with Century 21 Scheetz; nearly 1,000 petitions from local homeowners and a business owner; an aerial video of the Real Estate and area surrounding the Real Estate, and images of the current state of the Real Estate juxtaposed against images of sand and gravel mines owned by Beaver. (BZNA 000020; BZNA 000114; BZNA 000140—with labels added by Homeowners; BZNA 000416; BZNA 000418; BZNA 000438; BZNA 000453; BZNA 000557; BZNA 000570; BZNA 000574- 000753; BZNA 000815-000816; BZNA 000894-

000895; BZNA 000908-001226; BZNA 001186; BZNA 001276-001310—and in particular, BZNA 0001296; BZNA 0001361—with labels added by Homeowners; BZNA 002806-2807). The Homeowners also brought this Court's attention to Beaver's own authority from the Federal Transit Administration, which authority demonstrates that the decibel levels for the equipment Beaver plans to use at the proposed mine will exceed the Noblesville Environmental Performance Standards under the UDO. (BZNA 003443-003444/UDO 13.1 and 13.4(A); BZNA 000461; BZNA 000843).

39. While this Court acknowledges that it may not reweigh evidence, it must determine whether findings are supported by substantial evidence. *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513; Ind. Code § 36-7-4-1614(5). This means it must determine whether a reasonable mind might accept the evidence as adequate to support the factual findings made. *Tipton Cnty. Board of Zoning Appeals*, 230 N.E.3d at 330.

40. This Court further acknowledges the Indiana Supreme Court's guidance indicating that, if it should be made to appear that the evidence upon which an agency acted was devoid of probative value or that the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the agency finding does not rest upon a rational basis, then the order will be set aside, not because incompetent evidence was admitted, but rather because the proof, taken as a whole, does not support the conclusion reached. *Warren*, 26 N.E.2d at 409.

41. Based on the totality of the evidence in this matter and the Indiana Supreme Court's guidance in *Noblesville, Indiana Board of Zoning Appeals* and *Warren*, this Court concludes that the evidence submitted by Beaver was devoid of probative value and/or so proportionately meager as to lead to the conviction that the BZA conclusion on this

Variance Requirement does not rest upon a rational basis. The proof, taken as a whole, does not support the conclusion reached by the BZA on this Variance Requirement.

42. The Court concludes that it was unreasonable for the BZA to conclude that the use and value of the area adjacent to the Real Estate would not be affected in a substantially adverse manner. I.C. § 36-7-4-918.4; *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513 ("For mixed questions of law and fact, this Court reviews the BZA's conclusions for reasonableness.").

43. Therefore, the BZA erred in granting the Variance through the Decision and the BZA's Decision is set aside under Grounds for Reversal (1), (3), and (5).

***Variance Requirement (3): There is No Presence of a Condition Peculiar to the Real Estate.***

44. In order to obtain the Variance, Beaver was required to show that there is the presence of a condition peculiar to the Real Estate. I.C. § 36-7-4-918.4; (BZNA 003143/UDO 4.D.3.E.4).

45. The UDO does not define the word "peculiar." Therefore, this Court must look to Webster's New Collegiate Dictionary, which defines "peculiar" as "characteristic of only one person, group, or thing" and "different from the usual or normal." (BZNA 003022/UDO 2.1.D); *see Peculiar*, Merriam-Webster's New Collegiate Dictionary (11th ed. 2020). The UDO provides additional guidance as to the meaning of the term through a set of factors it mandates that the BZA consider in deciding upon a request for variance. (BZNA 003143/UDO 4.D.3.E.2(b)). The UDO provides that the Real Estate must be "exceptional as compared to other lots subject to the same provision by reason of a unique

physical condition [] or other extraordinary physical conditions peculiar to and inherent in the subject lot that amount to more than a mere inconvenience to the owner and that relate to or arise out of the lot rather than the personal situation of the current owner of the lot." (BZNA 003143/UDO 4.D.3.E.2(b)). Indiana common law also provides guidance on "peculiarity" in the context of variances saying it relates to the specific features of the property not just the owner's desired use. *See I-465, LLC v. Metro. Bd. of Zoning Appeals Div. II of Marion Cnty.*, 36 N.E.3d 1094, 1100 (Ind. Ct. App. 2015); *Sam's E., Inc.*, 927 N.E.2d at 964.

46. Through its Decision, the BZA concluded that Beaver's need for a Variance for its Gravel Mine did in fact arise from "some condition peculiar to the property." (BZNA 000002). In support of this finding, the BZA reasoned:

> The need for the variance does arise from a condition peculiar to the property involved: namely that the property contains sand and gravel materials which are a natural resource, cannot be manufactured, and must be mined if they are to be extracted. Not all property contains this type of sand and gravel. Providers of these materials must go to the areas where the deposits exist and extract the material for processing. These materials are an important component to construction projects of all varying degrees. The subject Real Estate has geological characteristics that are peculiar to the property, and (consistent with mining in and around the property currently) is uniquely situated to provide the important natural resources. Accordingly, approval allows for the important mining and extraction activities to occur in an area that already has such operations, as opposed to new locations where mining may not be occurring currently. Further, the demand in Hamilton County and the central Indiana area for aggregate materials continues to be strong, such that these resources (which are uniquely present on this property) is important to the growing Hamilton County and surrounding area.
>
> Based on the totality of the record evidence, the need for the variance arises from some condition peculiar to the property involved.

(BZNA 000002).

47. The Court concludes that the BZA findings are not based on substantial evidence. There is no evidence in the Record to support a finding that the presence of sand and gravel in

the Real Estate is *peculiar* or a *unique physical condition* to the Real Estate—in fact the evidence demonstrates otherwise. (BZNA 000137; BZNA 000393; BZNA 000399; BZNA 000558; BZNA 002911; BZNA 002944-002947; BZNA 003725). Likewise, there is no evidence in the Record to support that there is presently mining at the Real Estate—again the evidence in the record demonstrates otherwise. (BZNA 000002). Finally, there is no evidence in the Record to support that mining the Real Estate will prevent mining at new locations. Thus, the BZA abused its discretion in issuing these findings. *Wastewater One, LLC,* 947 N.E.2d at 1051 (internal citation omitted) (holding that a zoning board abuses its discretion when it makes findings that have no evidentiary support); *Burcham v. Metropolitan Bd. of Zoning Appeals Div. I of Marion County*, 883 N.E.2d 204, 208 (Ind. Ct. App. 2008) (internal citation omitted) (holding that there must be a correlation between evidence presented at a BZA hearing and a Board's finding—some rational basis for the BZA finding—otherwise such finding is an abuse of discretion); *S & S Enterprises, Inc. v. Marion Cnty. Bd. of Zoning Appeals,* 788 N.E.2d 485, 491 (Ind. Ct. App. 2003) (internal citation omitted) (holding there must be a rational relationship between the facts found and conclusions reached by a board of zoning appeals).

48. The Court further concludes that the remaining findings about sand and gravel minerals in general and the sand and gravel industry as a whole do not equate to "peculiarity" in the Real Estate—as that term is defined by the UDO and Indiana law. BZNA 003022/UDO 2.1.D); *Peculiar*, Merriam-Webster's New Collegiate Dictionary (11th ed. 2020; BZNA 003143/UDO 4.D.3.E.2(b)). *See I-465, LLC,* 36 N.E.3d at 1100; *Sam's E., Inc.*, 927 N.E.2d at 964. Nor does the proximity of the Real Estate to Beaver's other mine. (BZNA 003143/UDO 4.D.3.E.2(b)); *Sam's East, Inc.*, 927 N.E.2d at 964 ("[P]eculiarity must at

least relate to the specific features of the property, not just the owner's desired use of the property.").

49. The Court concludes that it was unreasonable for the BZA to conclude that there is the presence of a condition peculiar to the Real Estate. I.C. § 36-7-4-918.4; *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513 ("For mixed questions of law and fact, this Court reviews the BZA's conclusions for reasonableness.").

50. For all of the reasons set forth above, the BZA's Decision is set aside under Grounds for Reversal (1), (3), and (5).

***Variance Requirement (4): The Strict Application of the Zoning Ordinance Does Not Constitute an Unnecessary Hardship to the Real Estate.***

51. In order to obtain the Variance, Beaver must establish that the strict application of the terms of the zoning ordinance would constitute an unnecessary hardship if applied to the Real Estate. I.C. § 36-7-4-918.4; (BZNA 003143/UDO 4.D.3.E.4).

52. "Hardship" is defined as "the exceptional burden that would result from the failure to grant a variance." (BZNA 003057/UDO 2.2-Definition of "Hardship"). The UDO stresses that "the need for a property owner to build elsewhere or put the property to a different use than originally intended does not constitute a hardship." (BZNA 003141/UDO 4.D.3.E.2(a)). Further, the UDO provides that the alleged hardship must be more than "the inability of the owner or occupant to enjoy some special privilege or additional right not available to owners or occupants of other lots subject to the same provision" and more than "merely the inability of the owner to make more money from the use of the subject lot." (BZNA 003142/UDO 4.D.3.E.2(a)). Likewise, Indiana common law imposes equally rigorous standards when it comes to hardship.

53. Our highest courts have concluded that no single fact determines the existence of a hardship, but all relevant factors taken together must indicate that the property for which the variance is sought cannot reasonably be put to conforming use. *Bowman v. Metropolitan Bd. of Zoning Appeals of Marion County, Division III*, 331 N.E.2d 739, 742 (Ind. Ct. App. 1975) (citing *City of E. Chicago, Indiana v. Sinclair Refining Co.*, 111 N.E.2d 459 (Ind. 1953)); *Board of Zoning Appeals of City of Whiting, Lake Cnty. v. McFadden*, 337 N.E.2d 576, 579 (Ind. Ct. App. 1975) (*quoting Light Co.*, 226 N.E.2d at 343-344); *see also I-465, LLC*, 36 N.E.3d at 1102.

54. Through its Decision, the BZA concluded that "[t]he strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the Real Estate." (BZNA 000002-000003). In support of this conclusion, the BZA indicated:

> The strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought, because the zoning ordinance does not permit mining. Accordingly, without the variance, the important natural resources which is peculiarly located on this property could not be extracted.
> Notably, excluding the single-family residential parcels along Cherry Tree Road, the majority of the parcels touching the subject Real Estate have or are being used for some type of mining quarrying, or gravel/sand extraction. The properties to the west and south are part of the underground mine being operated by Martin Marietta with the entrance to the mine located approximately 2400 feet southwest of this property. On the east side of Cherry Tree Road, the majority of the parcels touching the subject Real Estate have or are being used for some type of mining, quarrying, or grave/sand extraction. The properties to the west and south are part of the underground mine being operated by Martin Marietta with the entrance to the mine located approximately 2400 feet southwest of this property. On the east side of Cherry Tree Road there are a few residences, but east of them along both sides of River Road there are numerous sites that have been mined. The first signs of mining/excavation appear on the 1956 aerial photographs and the area east and to the south have shown mining operations since. The subject property has to this point been used for agricultural uses, but both 161st Street and Cherry Tree Road are in need of extensive repair due to poor soils in the area that have caused subsidence of the road that is resulting in constant repairs/patches. The condition is so

> poor that it is unlikely that a residential neighborhood in compliance with the zoning ordinance would be allowed to begin construction without significant investment in the road.
> The Conditions/Commitments account for the processing of materials offsite and the transport of materials in a manner that is consistent with the existing infrastructure (and coordination with the county on the same).

(BZNA 000002-000003).

55. The Court concludes that the BZA findings are not based on substantial evidence. The Record does not support the finding that the majority of the parcels touching the Real Estate have been or are being mined. (BZNA 000002-000003). In fact, the Court finds this conclusion to be untrue. To the north, they are all residential neighborhoods, untouched by mining. (BZNA 000137; BZNA 000418; BZNA 0001361—with labels added by Homeowners). To the east, they are residences untouched by mining and flanked further to the east by Cherry Tree Road and then more homes on the other side of Cherry Tree Road. (BZNA 000137; BZNA 000418; BZNA 0001361—with labels added by Homeowners). To the South, they are residences untouched by mining and businesses flanked by 161st Street. (BZNA 000137; BZNA 000418; BZNA 0001361—with labels added by Homeowners). Finally, to the West, they are residences, a business, and a parcel without any apparent existing surface mining. (BZNA 000418; BZNA 0001361—with labels added by Homeowners). A video submitted by remonstrators shows the insulation of the Real Estate and the adjacent parcels from other mining activity in the area. (BZNA 000570).

56. The Court concludes that the BZA's conclusion is contrary to binding precedent from the Indiana Supreme Court. The evidence in the Record shows the Real Estate is and can be put to conforming uses — residential and agricultural. (BZNA 000108; BZNA 000113; BZNA 002788-002789; BZNA 000558). Dispositively, both Beaver and the BZA have

readily acknowledged that the Real Estate can be used, presently is being used, and in the future is planned to be used for agriculture—a conforming use in a R-1 Residential District under the UDO. (BZNA 000001; BZNA 000108; BZNA 000113; BZNA 000116; BZNA 000558; BZNA 002788-002789; BZNA 003479/UDO, Appendix C-Official Schedule of Uses). Under the ruling in the *City of E. Chicago*, these facts precluded any finding or conclusion of unnecessary hardship in this case. (BZNA 000001; BZNA 000108; BZNA 000113; BZNA 000116; BZNA 000558; BZNA 002788-002789; BZNA 003479/UDO, Appendix C-Official Schedule of Uses); *City of E. Chicago, Indiana*, 111 N.E.2d at 465; cited by *Bowman*, 331 N.E.2d at 742. *See also Board of Zoning Appeals of City of Whiting, Lake Cnty.*, 337 N.E.2d at 579 (*internal quote omitted).*

57. The Court concludes that it was unreasonable for the BZA to conclude that the strict application of the terms of the zoning ordinance would constitute an unnecessary hardship if applied to the Real Estate. I.C. § 36-7-4-918.4; *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513 ("For mixed questions of law and fact, this Court reviews the BZA's conclusions for reasonableness.").

58. For all of the reasons set forth above, the BZA's Decision is set aside under Grounds for Reversal (1), (3), and (5).

***Variance Requirement (5): The BZA's Decision Substantially Interferes with the Noblesville Comprehensive Plan.***

59. In order to obtain the Variance, Beaver must also establish that the approval of the Variance would not interfere substantially with the Comprehensive Plan. I.C. § 36-7-4-918.4; (BZNA 003143/UDO 4.D.3.E.4)

60. The Noblesville Comprehensive Plan (the "Plan") designates the Real Estate as a "Preservation/Natural Area." (BZNA 003589). The stated purpose of these areas is to

preserve wildlife and waterways and they are to be buffered and separated from high intensity uses. (BZNA 003588).

61. Through its Decision, the BZA concluded that "[t]he approval does not interfere substantially with the comprehensive plan adopted by the Noblesville Plan Commission." (BZNA 000002-000003). In support, the BZA indicated:

> The approval does not interfere substantially with the comprehensive plan. The property is shown on the future land use map as a preservation/natural area. This is the same future land use designation that appears on all the property along River Road and Cherry Tree Road, and yet numerous of those parcels include current mining or mineral extraction. Thus, mining and/or mineral extraction are not inconsistent with the preservation/natural area designation. In addition, the petitioner's proposed use would only be on the site for the next ten years leaving the site open to development or use as preservation/natural area following the completion of the excavation. It is anticipated that the future use of the southern portion of the site would be for an open space, recreational, agricultural, or natural space.
>
> Moreover, petitioner introduced its planned reclamation efforts after extraction activities have been completed. Pursuant to that plan, the subject Real Estate would be placed back into a natural condition at the conclusion of the ten-year period approved by these findings of fact.
>
> The Conditions/Commitments account for additional parameters that will help to make the area appear natural including: (i) perimeter landscaping and buffering treatment; (ii) entirety of the Real Estate will not be used for extraction activities (including areas closest to denser residential being left un-mined; (iii) transport and hauling of extracted materials from the Real Estate can only occur across Cherry Tree Road to the east and transport and hauling of materials from and to the subject Real Estate is prohibited on 161st Street and along Cherry Tree Road; and (iv) gravel processing (i.e., blasting, crushing, or west processing) is prohibited on the Real Estate.
>
> Based on the totality of the record evidence, approval of the variance does not interfere substantial with the provisions of the Comprehensive Master Plan.

(BZNA 000002-000003).

62. The Court concludes that the Comprehensive Plan's stated purpose for Preservation/Natural Areas is in direct conflict with the evidence in the Record showing

that mining is a high intensity use and "[m]ining is one of the most significant land altering forces on the planet, contributing heavily to environmental issues such as [] water pollution." (BZNA 000141-000471; BZNA 00825-000826; BZNA 002873).

63. The Court concludes that it was unreasonable for the BZA to conclude that the strict application of the terms of the zoning ordinance would not interfere substantially with the Comprehensive Plan. I.C. § 36-7-4-918.4; *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513 (For mixed questions of law and fact, this Court reviews the BZA's conclusions for reasonableness.").

64. For all of the reasons set forth above, the BZA's Decision is set aside under Grounds for Reversal (1), (3), and (5).

***The BZA Decision was in Error Because Beaver's Own Authority Established that the Use Approved by the Variance Will Violate the UDO.***

65. The UDO imposes Environmental Performance Standards upon "all uses in all zoning districts."[3] (BZNA 003443-003444/UDO 13.1 and 13.4(A)).

66. In R-1 Residential Districts like the zoning district of the Real Estate, the Performance Standards set a decibel limit during the day of 55 dB(A)s and during the night of 45 dB(A)s (the "Decibel Limits"). (BZNA 000142; BZNA 002911; BZNA 003443-003444/UDO 13.1 and 13.4(A); BZNA 003725).

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[3] The Court concludes the Performance Standards apply to the Real Estate. The UDO defines "District (Zoning)" as "[s]pecific areas within the jurisdiction of the Plan Commission for which uniform regulations governing the use [] of land [] standards that are established by this ordinance." (BZNA 003043/UDO 2.2-Definition of "District (Zoning")). In this case, the Noblesville Zoning Map establishes that the Real Estate is within the "Noblesville Planning Jurisdiction" and is designated as an R-1 "Zoning District"). (BZNA 003725). The Court acknowledges the parties disagree on this point. The Court does not find ambiguity in this language but, to the extent ambiguity exists in this language, this Court construes it in favor of the Homeowners as required by Indiana law. *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 515-516); *Cracker Barrel*, 848 N.E.2d 285, 290 (Ind. Ct. App. 2006) (*citing Story Bed & Breakfast v. Brown County Area Plan Comm'n*, 819 N.E.2d 55, 66 (Ind. 2004)).

67. The Court concludes that, because Beaver admitted it would be using haul trucks and bulldozers at the proposed mine on the Real Estate and its own authority from the Federal Transit Administration demonstrates that such equipment produces sound that will far exceed the Decibel Limits at fifty (50) feet, one hundred (100) feet, two hundred (200) feet, and even three hundred (300) feet (which distance certainly reaches and extends into the adjacent properties, including the properties of Homeowners), the use proposed by Beaver violates the Performance Standards under the UDO. (BZNA 000461-000462; BZNA 000843.

68. The BZA is a quasi-judicial body with no authority to amend the UDO. *English v. City of Carmel, Indiana*, 381 N.E.2d 540, 542 (Ind. Ct. App. 1978); *Schlehuser v. City of Seymour*, 674 N.E.2d 1009, 1014 (Ind. Ct. App. 1996) ("Any acts of the BZA that exceed the powers enumerated by the Indiana Code and the local zoning ordinance are *ultra vires* and void."). The BZA does not have the discretion to grant a variance that will inherently violate other provisions of the UDO[4]. *Town of Newburgh v. Stephenson*. 316 N.E.2d 855 (Ind. Ct. App. 1974) (while a board of zoning appeals has the discretion to grant a variance to a zoning ordinance, "this power is limited by the provisions in that ordinance."); see also *Nelson v. Board of Zoning Appeals,* 162 N.E.2d 449 (Ind. Ct. App. 1959); *Light Co. v. Houghton*, 226 N.E.2d 341 (Ind. Ct. App. 1967); *Metropolitan Development Commission of Marion Co. v. Camplin*, 288 N.E.2d 569 (Ind. Ct. App. 1972); *Schlehuser*, 674 N.E.2d at 1014

[4] The Court acknowledges that the BZA's Findings of Fact incorporated Conditions of Approval made and agreed to by Beaver, which state that Beaver must comply with the noise regulations in Hamilton County and Noblesville. (BZNA 000009). But, Beaver has admitted and its own authority submitted to the BZA on the decibel levels of its equipment proves that is impossible. (BZNA 000142; BZNA 000461-000462; BZNA 000843; BZNA 002911; BZNA 003443-003444/UDO 13.1 and 13.4(A); BZNA 003725.

(emphasizing that conditions or restrictions in granting of a variance should "not offend any provision of the zoning ordinance . . . .").

69. The Court concludes that the BZA Decision was contrary to law. *Noblesville, Indiana Board of Zoning Appeals*, 217 N.E.3d at 513 (indicating that for questions of law, this Court owes no deference to the BZA and should decide independently whether the BZA's action was contrary to law, including whether it stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision). *Id.*

70. For all of the reasons set forth above, the BZA's Decision is set aside under Grounds for Reversal (1), (2), (3), and (4).

**ORDER AND JUDGMENT IN FAVOR OF PETITIONERS**

This Court, having made the foregoing Findings of Fact and Conclusions of Law, hereby ORDERS, ADJUDGES, AND DECREES that the BZA Decision is set aside and Beaver's Application for the Variance is DENIED, all as permitted by Indiana Code § 36-7-4-1615. THE COURT FURTHER ORDERS THAT any finding of fact that should be a conclusion of law and any conclusion of law that should be a finding of fact shall be treated as such and is hereby restated as such. FINALLY, THE COURT ORDERS THAT there is no just reason for delay and directs the entry of this final judgment.

**SO ORDERED**, this 9th day of October, 2024.

HON. MICHAEL A. CASATI
HAMILTON SUPERIOR COURT 1

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