

STAFF REPORT

Department of Metropolitan Development Division of Planning Current Planning Section

Case Number: 2022-UV2-009
Address: 1251 West 96th Street (approximate address)
Location: Washington Township, Council District #2
Zoning: C-1
Petitioner: Reagan Outdoor Advertising, by Michelle Noppenberger
Request: Variance of use and development standards of the Consolidated Zoning and Subdivision Ordinance to provide for 40-foot tall, 14-foot by 48-foot digital off-premise advertising sign (off-premise signs not permitted in C-1, digital off-premise sign not permitted), with an 7.9-foot setback from 96th Street (10-foot setback required), within 200 feet of a protected district (300-foot separation required for off-premise signs, 600-foot separation for digital signs), within 250 and 1,306 feet of other off-premise advertising signs along I-465 (1,500 separation required along I-465), with 436 feet of separation from another off-premises advertising sign (1,000 feet of radial separation required) and to allow for digital messages to display for minimum of eight seconds (minimum of ten second display permitted).

ADDENDUM FOR DECEMBER 13, 2022

Due to the lack of a quorum, this petition was continued for cause from the September 13, 2022, hearing to the December 13, 2022 hearing at the request of the petitioner. Staff **continues to recommend denial** of this request.

In summary, the Petitioner is requesting multiple development standard variances and to allow a billboard with digital display. To remind the Board, in 2019 the City-County Council considered and explicitly rejected amendments to the Sign Ordinance that would allow the type of digital display sought by the Petitioner. It is Staff's opinion that if the Petitioner wants billboards with digital display anywhere in Marion County, they need to once again ask the City-County Council to amend the Sign Ordinance. Instead, the Petitioner has come to this Board and ask them to make a policy decision contrary to the City-Council's 2019 decision. The role of the BZA is to uphold the Zoning Ordinance or require the Petitioner to prove that each statutory finding of fact has been met in order to grant the variance. After a thorough review, Staff believes the Petitioner has failed to meet each and every required finding of fact and therefore recommends denial of this Petition.

ADDENDUM FOR SEPTEMBER 13, 2022

This petition was continued for cause from the August 9, 2022, hearing to the September 13, 2022, hearing at the request of the petitioner. Staff **continues to recommend denial** of this request.

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STAFF REPORT 2022-UV2-009 (Continued)

August 9, 2022

This petition was automatically continued from the May 17, 2022, hearing to the June 14, 2022, hearing at the request of a registered neighborhood organization.

This petition was automatically continued from the June 14, 2022, hearing to the July 12, 2022, hearing at the request of the petitioner.

This petition was continued for cause from the July 12, 2022, hearing to the August 9, 2022, hearing at the request of the petitioner.

RECOMMENDATIONS

Staff **recommends denial** of this request.

SUMMARY OF ISSUES

LAND USE

EXISTING ZONING AND LAND USE

Metro	C-1	Nursing Home / Off-Premise Advertising Sign
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SURROUNDING ZONING AND LAND USE

North	Hamilton County	Single-Family Dwellings
South	D6-II	Multi-Family Dwellings
East	D6-II / D-P	Multi-Family Dwellings
West	C-1	Office Commercial

COMPREHENSIVE PLAN

The Comprehensive Plan recommends Office Commercial uses for the site.

- ◇ The grant of the petition would allow for an off-premises sign to be erected along the Interstate 465 beltway, on a site that is closer to West 96th Street, closer to two other existing off-premise signs, and closer to a protected district than the Ordinance's minimum separation distances would allow, and to display digital images that change more frequently than the Ordinance's minimum duration requirement would allow.
- ◇ In April 2022, The Supreme Court of the United States held that local Zoning Ordinances can draw a distinction between off-premise and on-premises signs that is based on the location of the sign in question while still remaining content neutral and observant of the sign owner's First Amendment rights. (CITY OF AUSTIN, TEXAS v. REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC, ET AL.(2022).

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◇ Section 36-7-4-918.5(a) of the Indiana Code provides:

(a) A board of zoning appeals shall approve or deny variances from the development standards (such as height, bulk, or area) of the zoning ordinance. The board may impose reasonable conditions as a part of the board's approval. A variance may be approved under this section only upon a determination in writing that:

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community.

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and

(3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the "practical difficulties" standard prescribed by this subdivision.

◇ This statute does not give the Board discretion to act on an application to vary development standards for grounds other than satisfaction of § 36-7-4-918.5(a) (1), (2) and (3). "Because a petitioner for a variance must establish the existence of **all** of the prerequisites, the failure of proof on any one will be sufficient to defeat the request." *Sam's E., Inc. v. United Energy Corp.*, 927 N.E.2d 960, 964 (Ind. Ct. App. 2010) (emphasis added).

Practical difficulties

◇ Regarding the third of these statutory preconditions for departures from development standards, the petitioner's proposed findings of fact state that there are no objective standards by which to determine whether strict application of the terms of this title will result in practical difficulties in the use of the property. That assertion is incorrect. Indiana's appellate courts have defined the concept of "practical difficulties in the use of property," making it unnecessary for the City or the State to have done so. In the most recent published decision on this topic, the Indiana Court of Appeals defined it in a way that focuses primarily on three considerations:

We have articulated several factors for a reviewing court to consider in determining whether compliance with a zoning ordinance will result in practical difficulties:

- (1) whether "significant economic injury" will result if the ordinance is enforced;**
- (2) whether the injury is self-created; and**
- (3) whether there are feasible alternatives.**

◇ *Caddyshack Looper, LLC v. Long Beach Advisory Bd. of Zoning Appeals*, 22 N.E.3d 694, 704 (Ind. Ct. App. 2014) (emphasis added). The Indiana Court of Appeals continues to apply these criteria for practical difficulties.

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- ◇ Because Indiana law gives the Board the benefit of a specific definition of the key terms of the third requirement (practical difficulties), making that requirement (as defined by Indiana law) relatively more precise than the first and second requirements, and because a failure to establish even one of the statutory requirements deprives the Board of authority to grant a departure from development standards, Staff recommends that the Board start (and perhaps end) its consideration of the variance petition by analyzing whether the application satisfies the “practical difficulties” statutory requirement.
- ◇ First, regarding whether some or all of the three *Caddyshack* factors are satisfied by this application, the Board should consider that in 2019, the City amended the Ordinance to make otherwise-compliant off-premises signs permitted uses in many locations along freeways and expressways or inside places zoned Industrial, C-4, C-5, and C-7, so long as they are located outside the I-465 beltway.
- ◇ It is also relevant that even after a 2016 federal court order upheld the constitutionality of the City’s ban on digital off-premises signs, the City relaxed that ban in 2019. Specifically, the City replaced it with a combination of (1) conditions on the location and operation of digital off-premises signs; and (2) conditions on the operation of all digital displays. See Sections 744-911 & 744-907(C)(4). Petitioner’s pending petition seeks to take advantage of the City’s replacement of its former ban, but proposes a sign that—because of its size, location, and shorter duration between images—would not satisfy the conditions imposed by the 2019 amendment that replaced the ban.

Self-created injury

- ◇ One of the three *Caddyshack* factors is “whether the injury is self-created.” In several different respects, the structure’s violations of applicable standards are the result of choices made by the petitioner.
- ◇ As Staff understands petitioner’s business model, it is not tied to its ownership of a particular location, as would be the case for a petitioner that holds fee title to a parcel and would therefore be in a more difficult position to sell the parcel to acquire a site in a differently zoned area of the City. Instead, petitioner’s business model involves acquiring non-fee interests in particular sites that it identifies and then negotiating leaseholds with the fee owners of such sites. In these circumstances, even if the petitioner has already entered into leases for locations within the beltway despite the City’s prohibition, that effect is self-created. If the petitioner has not yet entered into such leases, it is free to pursue the leasing of parcels where the type of use is lawful.
- ◇ Second, the property currently is, and can continue to be developed with C-1 uses by right as zoned without the need for variances. This is a further reason why building an unpermitted structure on that site would be a self-created injury.

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- ◇ Third, the petitioner has requested variances to allow for digital messages to display for minimum of eight seconds where a minimum of ten-second display is permitted. The reduction to the time of digital display is a drastic departure from what is permitted by the Ordinance for digital signs. Seeking to build a sign with more frequent changes in displays, in violation of the applicable standards, creates the need to seek additional variances from standards. Because the petitioner could also choose to build a compliant sign, the need for the duration variance is a self-created injury.
- ◇ The submitted petition does not address the need for a variance from the duration requirements,
- ◇ Fourth, the petitioner has requested a variance to allow for a 7.9-foot setback from West 96th Street, where a 10-foot setback is required. The site, at approximately 100 feet wide at the location of the existing sign, could accommodate the required setback. The purported need for the setback variance is a self-created difficulty since the newly constructed/installed signs could be developed to meet the Ordinance standards by right without the need a setback variance.

The existence of feasible alternatives

- ◇ The third *Caddyshack* factor is “whether there are feasible alternatives.” The burden of satisfying the requirements for obtaining a variance lies with the petitioner. “It is the burden of the petitioner for a variance to establish the existence of each of the statutory prerequisites.” *Maxey v. Bd. of Zoning Appeals*, 480 N.E.2d 589, 592 (Ind. Ct. App. 1985). The petitioner has not demonstrated that there are no alternative, feasible location for the subject sign.
- ◇ The existing C-1 zoning does not allow for a billboard on site with a standard vinyl changeable face. However, because the existing sign was zoning compliant when it was erected, it is considered legally non-conforming, and since it could continue to meet the standards of the Ordinance as erected, there are feasible alternatives to the proposed structure. That further prevents the petitioner from satisfying the “practical difficulties” test as defined in *Caddyshack*.

Whether significant economic injury will result

- ◇ There may be financial advantages to petitioner in their choosing of a site in the City where its proposed use is prohibited and then obtaining, through a variance, what is effectively a license to do something lawfully that remains forbidden to the petitioner’s competitors. But the inability to obtain that kind of competitive advantage through a variance is not a “significant economic injury” to the petitioner.

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Injurious to safety

- ◇ As noted above, the Board is justified in denying the variance request on the basis of petitioner's failure to satisfy the "practical difficulties" criterion alone. However, the petitioner's failure to satisfy the requirement that the variance not injure the "public health, safety, morals, and general welfare of the community" furnishes additional grounds for denial. Although this statutory prong includes some imprecise phrases, it cannot be satisfied where the petitioner is unable to show that approval would not be injurious to safety. There are reasons to believe that the variance, if granted, would indeed be injurious to public safety. The proposed digital outdoor advertising sign would be located adjacent to Interstate I-465. In order to prevent unnecessary distractions and promote public safety, the Sign Regulations prohibit signs of the kind proposed. In Staff's opinion, at this location the proposed sign would unnecessarily distract motorists, traveling at a high speed, from other traveling vehicles in traffic, thereby negatively affecting public safety.
- ◇ This portion of Interstate I-465 has a large amount of Interstate traffic. It is visually difficult to take in any signage at this location, while continuing to maneuver safely in the travel lanes. If a large digital sign is added, it could severely distract attention away from legally installed directional signage and other commercial signage making them less effective to those established businesses.
- ◇ Providing for the reduced setback from West 96th Street would not be supportable, as it would increase the intensity of the sign by locating it closer to motorists that would be distracted by the changing content. Additionally, it would bring the activities on the site closer to adjacent properties, including protected districts, without adequate buffering
- ◇ The Ordinance has been constructed to limit these signs near protected districts, because of their scrolling displays, brightness, and aesthetic impact.
- ◇ The Sign Regulations "facilitate an easy and agreeable communication between people...and serve an important function." The purpose of the Sign Regulations is to "eliminate potential hazards to motorists, and pedestrians; to encourage signs which, by their good design, are integrated with and harmonious to the buildings and site which they occupy; and which eliminate excessive and confusing sign displays." Proliferation of signs causes those signs that are permitted and legal to become less effective and reduces their value. Additionally, the Sign Regulations preserve and improve the appearance of the City as a place in which to live and work.
- ◇ In this case, a D6-II is located approximately 200 feet to the south and east, and a S-1 district in the City of Carmel is located approximately 200 feet to the north. The Ordinance was developed to limit the incidence of these signs near protected districts because of their scrolling displays, brightness, and negative aesthetic impact for 24 hours a day, 365 days a year.
- ◇ The 1,000-foot off-premise advertising sign separation requirement is designed to mitigate the proliferation of freestanding signs and the visual conflicts and negative aesthetics associated with signs in close proximity to one another. Decreasing sign separation inhibits the ability of motorists to properly read and react to sign messages in a safe and efficient manner. Given the size of each of the respective signs that would be present in this area if the variance is approved, and the close proximity to one another, Staff cannot conclude that approval would not be injurious to safety.

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- ◇ At the proposed increase in height to 40 feet, there are no buildings or evergreen landscaping that would obscure the proposed digital sign from the impacted protected districts to the south and north. This sign, therefore, would clearly impact those protected districts because of its changing and/or scrolling display, brightness, and aesthetic impact.
- ◇ This site has existed as a nursing home facility for approximately the past 27 years without the need for a digital sign. The requested change in separation from the protected districts would degrade the quality of life in the area. The proposed 40-foot tall sign has no physical barriers that limit the view of the sign from the nearby protected districts. There is no reason that a sign that meets the Sign Ordinance could not be used, along with alternative communication methods.
- ◇ In Staff's opinion, the requested sign height increase coupled with the separation deviations would result in signage that would not reflect the character of the area and would continue to be detrimental to the surrounding neighborhood.

GENERAL INFORMATION

THOROUGHFARE PLAN

This portion of West 96th Street is classified in the Official Thoroughfare Plan for Marion County, Indiana as a secondary arterial, with a 70-foot existing and proposed half right-of-way.

This portion of I-465 is classified in the Official Thoroughfare Plan for Marion County, Indiana as a freeway, with a 150-foot existing half right-of-way.

SITE PLAN

File-dated April 8, 2022.

FINDINGS OF FACT (Revised)

File-dated June 22, 2022.

ZONING HISTORY

2009-UV2-022; 1329 West 96th Street (west of site), requested a variance of use to provide for a catering business for on-site events of up to 200 people and off-site events, **granted**.

2005-UV3-036; 1329 West 96th Street (west of site), requested a variance of use to provide for a beauty salon and day spa, in C-1, **granted**.

2000-UV2-032; 1355 West 96th Street (west of site), requested a variance of use and development standards to provide for the construction of a 10,000-square foot physical training center, with 46 parking spaces, with two spaces located within the front transitional yard, in C-1, **granted**.

89-ZON-139; 9592 Ditch Road (west of site), requested the rezoning of 5 acres, being in the A-2 District, to the D-5 classification to provide for the development of 20 detached single-family homes, **approved**.

89-CV-22; 9592 Ditch Road (west of site), requested a variance of development standards to provide for the development of a single-family residential subdivision with private streets, fifteen-foot interior front setbacks, minimum perimeter setbacks of twenty-five feet along Ditch Road, and to reduce minimum lot width and eliminate the requirement for 30 feet of public street frontage, **granted**.

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2022-UV2-009: Location Map





2022-UV2-009; Photographs



Subject site, existing sign, looking north



Subject site, existing nursing home, looking southwest.



Multi-family dwellings protected district to the south.



Subject site, existing sign location setback from West 96th Street, looking south.



Single-family dwelling S-1 protected district to the north.



Separation from existing sign along I-465 to the east / southeast.