

IN RE: PETITIONS FOR SPECIAL HEARING,	*	BEFORE THE
SPECIAL EXCEPTION & VARIANCE	*	OFFICE OF
(10901 McCormick Road &	*	ADMINISTRATIVE HEARINGS
10825 Beaver Dam Road)	*	FOR BALTIMORE COUNTY
8 th Election District	*	
3 rd Council District	*	
Dan Mar Enterprises, LLC	*	Case No. 2020-0211-SPHXA
10825 Beaver Dam Road, LLC	*	
<i>Legal Owners/Petitioners</i>	*	

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) for consideration of Petitions for Special Hearing, Special Exception and in the alternative for Variance relief filed on behalf of Dan Mar Enterprises, LLC and 10825 Beaver Dam Rd., LLC (“Petitioners”) for the properties located at 10901 McCormick Rd. (the “McCormick Rd. Property”) and 10825 Beaver Dam Rd. (the “Beaver Dam Property”) (collectively, the “Properties”).

The Special Hearing requests the following to:

- (1) amend the zoning order and approved site plan in Case No. 2018-0346-SPHXA in accordance with the relief granted herein.
- (2) confirm that the special exception for fuel service station granted in Case No. 2018-0346-SPHXA has been utilized with respect to 10825 Beaver Dam Road (front and rear parcels, Tax Map 42, Parcels 19 and 450) within the required time period pursuant to BCZR § 502.3 and as such the special exception use is vested, or, in the alternative, to extend the special exception for fuel service for an additional three years as provided in BCZR § 502.3.
- (3) extend the special exception approval for fuel service station granted in Case No 2018-0346-SPHXA with respect to 10901 McCormick Road (Tax Map 42, Parcel 62) for an additional 3 years, as provided in BCZR § 502.3.
- (4) approve the expansion, reconstruction, and reuse of a fuel service station legally existing on the effective date of Bill 172-1993, including (1) the provision of additional fuel service previously

approved by special exception in Case No. 2018-0346-SPHXA; (2) uses in combination permitted by special exception under BCZR §405.4.E to be approved by special exception in this case (convenience store greater than 6,000 sq. ft. and a fast food restaurant); (3) the expansion of the uses beyond the confines of the site into 10901 McCormick Road (Tax Map 42, Parcel 62) as provided in BCZR §405.6.A.2, all as shown on the Plan to Accompany Petition for Zoning Hearing.

- (5) approve a modified site plan under BCZR § 409.12.B containing 73 parking spaces as shown on the Plan to Accompany the Petition for Zoning Hearing to serve the proposed uses on the property which would otherwise require 77 parking spaces.
- (6) approve non-conforming landscape transition areas along the public right of way as narrow as 7 ft. wide in one instance and 8 ft. wide in one instance in lieu of the required 10 ft. under BCZR §§ 104.1 and 405.5.4.A.2.b.

A Special Exception requested for:

- (1) a combination of a convenience store and carry out restaurant, with a gross floor area larger than 6,000 sq. ft. inclusive of accessory storage, as shown on the Plan to Accompany Zoning Hearing, as a use in combination with a fuel service station, pursuant to BCZR § 405.4.E.1.
- (2) a fast food restaurant including outdoor seating, as shown on the Plan to Accompany Zoning Hearing, as a use in combination with a fuel service station, pursuant to BCZR § 405.4.E.10.

Variance relief requested the following:

- (1) In the alternative to Special Hearing Request No.5, a Variance from BCZR § 409.6 to permit 73 parking spaces in lieu of 77 required.
- (2) In the alternative to Special Hearing Request No. 6, a Variance from BCZR § 405.4.A.2.b for a Landscape Transition Area along a public right-of-way with a minimum width of 7 ft. in one instance and a minimum width of 8 ft. wide in one instance in lieu of 10 ft. required.

Due to the COVID-19 pandemic, a public WebEx hearing was conducted virtually in lieu of an in-person hearing. The Petition was properly advertised and posted. Jesse Newman appeared at the hearing in support of the Petitions along with Wayne Newton, PE of Messick & Associates

(Pet. Ex. 1) who prepared and sealed a 3-sheet site plan (the “Site Plan”). (Pet. Ex. 2). Dino C. LaFiandra, Esquire represented the Petitioners. There were no Protestants or interested citizens in attendance.

Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”), from the Department of Environmental Protection and Sustainability Development Coordination (“DEPS”), from Office of Zoning Review (“OZR”) and from Department of Public Works (“DPW”). DEPS did not oppose the requested relief. DOP did not oppose the requested relief subject to conditions. OZR and DPW opposed the requested relief.

FACTUAL FINDINGS

The case proceeded by way of modified proffer by Mr. LaFiandra. On the Beaver Dam Property, there is an existing Highs Store and gas and service station. It is an irregularly shaped parcel resembling a trapezium. (Pet. Ex. 2). It is approximately 1.298 acres and is zoned manufacturing, light - industrial, major (ML-IM). The Beaver Dam Property obtained special exception approval in 1972 for an automotive service station. (Pet. Ex. 6). It has 12 fuel dispenser pumps in the front of the store and 2 diesel pumps on the side. The Highs store is 8,450 sf with four (4) service bays in the front and a small convenience store with office space. (Pet. Ex. 4). There are two (2) curb cut access points from Beaver Dam Rd. The McCormick Rd. Property is a triangular shape measuring is .377 acres and is also zoned ML-IM. (Pet. Ex. 2). It has two (2) commercial buildings currently used by a dry cleaner and an auto body shop.

In Case No. 2018-0346-SPHXA, the Properties were granted Special Hearing relief for additional fuel dispensers in an existing fuel service station, for Special Exception relief to use the Properties for a fuel service station with a full service car wash and fast food restaurant as uses in combination with a fuel service station, and Variance relief in regard to a side yard setback and

two (2) freestanding enterprise signs. The car wash was to be constructed on the McCormick Rd. Property as depicted in the site plan provided in Case No. 2018-0346-SPHXA. (Pet. Ex. 5). The fast-food restaurant was to operate within the Highs store. However, neither the car wash nor the fast food restaurant materialized.

The proposal in this case is to remove the existing service bays which are no longer needed and to replace those service bays with one (1) entrance door facing Beaver Dam Rd. The renovated store front will resemble the Highs store at 6207 N. Charles St. as reflected in the photo provided. (Pet. Ex. 4). The proposal would renovate the existing 8,450 sf store and provide a larger area for a convenience store (4,746 sf) and fast food restaurant (1,544 sf) along with separate spaces for retail tenants (2,160 sf). (Pet. Ex. 3). The exterior and interior of the store will be upgraded. An outdoor dining area will be added (551 sf). (Id.). The existing 12 fuel pumps in the front of the store will remain and the 2 diesel pumps plus an additional diesel pump will be moved behind the store. Moving the diesel pumps from the side to the rear will improve traffic flow. (Pet. Ex. 2, Sheet 2).

In regard to parking spaces and Bulk Regulations, the buildings on the McCormick Rd. Property will be removed and that area will become parking spaces. As reflected on the Site Plan (Pet. Ex. 2 – Sheet 2), the required number of parking spaces is 75 based on the requested uses and 73 parking spaces can be provided (convenience store – 23.71 spaces; fast food restaurant 33.52 spaces; ATM – 1 space; self-service vacuum area – 1 space; retail 10.8 spaces; and 4 spaces for number of employees on the largest shift.¹ Additionally, there are 14 stacking spaces for the fuel and diesel pumps. (Pet. Ex. 2, Sheet 3). On the eastern side of the Beaver Dam Property are 13

¹ At the time of filing the Petitions for Zoning Relief, the Site Plan which accompanied that Petition proposed 6 parking spaces for 6 employees which totaled to 77 required parking spaces. However, at the time of hearing, the number of employees was reduced to 4 thereby reduced the required number of parking spaces.

oversized parking spaces for trucking customers. In regard to OZR's comment, the Petitioner verified that those truck parking spaces will not be used as a trucking facility under the BCZR and is agreeable to a condition in the Order to that effect. The Properties meet the Bulk Regulations for lot area as the minimum lot area is 53,554 sf and the total lot area provided is 132,694 sf. All of the required setbacks have been met.

In regard to landscaping, the DOP requested that the Petitioners retain the existing mature evergreen trees on the south eastern end of the Beaver Dam Rd. and the Petitioners are agreeable to this condition. Additionally, the Petitioners will provide a landscape buffer along Beaver Dam Rd. of 7 ft. in one place and 8 ft. in another place in lieu of the required 10 ft. buffer because there is an existing curb which has been in that location prior to the 1992 Fuel Service Regulations. (Pet. Ex. 2, Sheet 2). Mr. LaFiandra stated that all other requests for additional landscaping from DOP have been addressed.

During the review by DPW of the proposed development, DPW raised the issue of a potential floodplain in the eastern end of the Beaver Dam Property in the location where the oversized truck parking spaces, curb and storm water management facilities are proposed. (Dev. Ex. 2 – Sheet 2). DPW recognized that the Site Plan references FEMA - Flood Insurance Rate Map (Firm) Map 2400100235F dated September 26, 2008 which shows the area to be developed is not in the riverine floodplain area and has minimal flooding. However, in reviewing the proposed Site Plan, DPW provided a comment dated September 10, 2020 which stated that Preliminary FIRMs released on August 12, 2020 shows the same area to be improved is in a Special Flood Hazard Area. Citing the Baltimore County Design Manual dated August 2, 2010, DPW emphasized that floodplain studies must be conducted and submitted based on 'ultimate conditions' for verification of the flood plain boundary.

As a result of the September 10, 2020 DPW comment, the hearing was held open to obtain a supplemental report from DPW in regard to the potential floodplain issue. By supplemental comment dated February 17, 2021, DPW clarified that the Preliminary FIRMs for Baltimore County referenced in the September 10, 2020 comment have not been adopted by the County Council and are pending review by county agencies. Accordingly, DPW verified that the FEMA FIRM Panel 2400100235F referenced by the Petitioners on the Site Plan is the governing document adopted by the County Council in Bill 42-15 dated May 4, 2015.

Importantly, DPW confirmed that the proposed site improvements in the flood plain (i.e. storm water management facilities, paving along with curb and gutter and utilities) are permitted within the flood plain pursuant to BCC, §32-4-414(c)(2) and §32-4-107. DPW will require the Petitioners to submit engineering computations to prove that there will be negligible impacts to upstream and downstream properties.

SPECIAL HEARING

Based on the testimony and exhibits adduced at the hearing, I find that the requested Special Hearing relief No. 2 to confirm that the special exception for fuel service station granted in Case No.: 2018-0346-SPHXA has been utilized with respect to 10825 Beaver Dam Rd. (front and rear parcels, Tax Map 42, Parcels 19 and 450) within the required time period pursuant to BCZR, §502.3. The fuel service station has been operating at the Beaver Dam Property since 1972. In 2018, the OAH also granted the Special Hearing relief in that case for additional fuel dispensers in an existing fuel service station. As such, there is no need to extend the Special Exception for the fuel service station because there is no dispute as to its continued use.

While the fuel service station use has continued since 1973, the car wash (as a use in combination with a fuel service station) was not constructed on the McCormick Rd. Property; a

dry cleaners and auto body shop have continued to operate in those buildings since 2018. Additionally, the fast food restaurant was also granted in 2018 as a use in combination but it never materialized within the Highs store. (Pet. Ex. 2, Sheet 1). Consequently, while the fuel service station has met the two (2) year utilization period, the car wash and fast food restaurant have not. In order to be ‘deemed to have been used within the authorized time,’ BCZR, §502.3 requires the commencement of construction during the two (2) year period and the pursuit of construction to completion with reasonable diligence. Additionally, BCZR, §502.3 authorizes OAH to extend the utilization period prior to its expiration. With regard to the car wash, it is no longer being proposed; therefore no extension is needed. With regard to Special Hearing request to confirm the Special Exception for a fast food restaurant, Petitioner is simultaneously requesting in this Petition, a Special Exception for a ‘fast-food restaurant’ which is duplicative of this Special Hearing relief and will be addressed below. Accordingly, the confirmation of the Special Exception for the fuel service station previously granted in Case No. 2018-0346-SPHXA, and utilized within the statutory period, will be approved, including the parking on the McCormick Rd. Property, but that same request for the car wash is moot and for fast food restaurant will be denied.

The remaining Special Hearing requests 1, 3, 4, 5, 6, 7 are duplicative of the Special Exception and Variance relief and therefore will be denied.

SPECIAL EXCEPTION

Under Maryland law, a special exception use enjoys a presumption that it is in the interest of the general welfare, and therefore, valid. *Schultz v. Pritts*, 291 Md. 1 (1981). The *Schultz* standard was revisited in *Attar v. DMS Tollgate, LLC*, 451 Md. 272, (2017), where the court of appeals discussed the nature of the evidentiary presumption in special exception cases. The court again

emphasized a special exception is properly denied only when there are facts and circumstances showing that the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the special exception use.

Petitioner filed relief for two (2) Special Exception uses: (1) a combination of a convenience store and carry out restaurant, with a gross floor area larger than 6,000 sq. ft. inclusive of accessory storage, as shown on the Plan to Accompany Zoning Hearing, as a use in combination with a fuel service station, pursuant to BCZR § 405.4.E.1; and (2) a fast food restaurant including outdoor seating, as shown on the Plan to Accompany Zoning Hearing, as a use in combination with a fuel service station, pursuant to BCZR § 405.4.E.10. Both of the Special Exception uses contemplate parking on the McCormick Rd. Property to support these uses as well as the retail tenants. As such, the McCormick Rd. Property is included within the Special Exception relief. Under BCZR, §101.1, the definitions of ‘carry-out restaurants’ and ‘fast-food restaurant’ differ only in that carry out restaurants envision customers eating the food off the premises and ‘fast-food restaurants’ permit dine-in options.

The Proposal here is to renovate and remodel the existing Highs store, thereby removing the service bays and installing one main entrance facing Beaver Dam Rd. Petitioner desires to create space for a larger convenience store and carry-out restaurant along with tables and seating areas both inside and outside. (Pet. Ex. 2 - Sheet 2; Pet Ex. 3). The interior renovations will be contained within the existing 8,450 sf footprint. Those renovations will also include two (2) spaces for retail tenants. The exterior of the store will also be refurbished to resemble the Highs store on N. Charles St. (Pet. Ex. 4). I find the detailed depiction of the improvements to the Properties as set forth on the Site Plan (Pet. Ex. 2, Sheet 2) are not detrimental to within the health, safety and general welfare of the locality involved.

Based on the evidence, I find that the Special Exception uses of a convenience store, carry-out restaurant and fast-food restaurant will not create congestion in the roads, will not create a potential for fire, panic or other danger, will not overcrowd the land or cause undue concentration of population, will not interfere with adequate public facilities or improvements, will not interfere with light or air, are consistent with the ML-IM zoning classification and are consistent with impermeable surface and vegetative retention provisions. (BCZR, §502.1, A-H). In short, the existing Beaver Dam Property has been improved and used as a fuel service station since 1972 and as a fuel service station and convenience store since at least 2018. Other than superficial improvements and interior renovations, the Property will remain the same in terms of use and intensity.

With regard to environmental and natural resources of the Beaver Dam Property (BCZR, §502.1, I), the issue of the floodplain on the south eastern corner was resolved by DPW's supplemental comment dated February 17, 2021. As stated by DPW therein, the improvements made to that area including storm water management facility, paving for truck parking along with curbs and gutters and utilities are permitted under BCC, §32-4-414(c)(2) and §32-4-107. Thus, the Petitioner correctly referenced FEMA FIRM Map 2400100235F dated September 26, 2008 because it is the governing document adopted by the County Council. The preliminary maps referenced in DPW's September 10, 2020 are not the current law. As a result, I find that proposed improvements in that environmental area as set forth on the Site Plan (Pet. Ex. 2, Sheet 2) are permitted and will not be detrimental to the floodplain.

Accordingly, the Special Exceptions requested will be approved.

VARIANCE

A variance request involves a two-step process, summarized as follows:

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995).

As described above, the Properties are unique due to their peculiar shapes: the McCormick Rd. Property is triangular shaped and the Beaver Dam Property is a trapezium; it has unequal sides. The McCormick Rd. Property will be improved with parking spaces after the buildings are removed to support the fuel service station, convenience store, carry-out restaurant and fast-food restaurant. The parking variance requests 2 less spaces than is required under BCZR, §409.6. Mr. LaFiandra explained that because the number of employees has been reduced from 6 to 4, the required number of parking spaces is 75 rather than 77. I find the deficiency of 2 spaces is due to the desire to improve traffic flow and to otherwise renovate the Property including landscaping and oversized truck parking. Additionally, the request for variance from the 10 ft. landscape transition area along Beaver Dam Rd. is directly tied to the existing curb and as such, meeting the 10 ft. landscape transition area becomes practically difficult. As a result of the unique shapes of the Properties, I find that the Petitioners will suffer a practical difficulty and unreasonable hardship if the parking and landscape transition area variances are not approved. I also find that the proposed renovations and upgrades are a benefit to the locality. Thus, the variances here can be granted within the spirit and intent of the ML-IM zone, and without injuring the health, safety or general welfare.

ORDER

THEREFORE, IT IS ORDERED this 15th day of **March, 2021**, by this Administrative

Law Judge, the Special Hearing requests to:

- (1) amend the zoning order and approved site plan in Case No. 2018-0346-SPHXA in accordance with the relief granted herein, be and it is hereby **DENIED**.
- (2) confirm that the special exception for fuel service station granted in Case No. 2018-0346-SPHXA has been utilized with respect to 10825 Beaver Dam Road (front and rear parcels, Tax Map 42, Parcels 19 and 450) within the required time period pursuant to BCZR § 502.3, be and it is hereby **GRANTED** in accordance with the Site Plan which is incorporated herein; *excluding however*, the full service car wash and fast food restaurant as uses in combination with a fuel service station which are hereby **DENIED**; and *excluding* the request to extend the special exception for fuel service for an additional three years as provided in BCZR § 502.3 which is **MOOT**.
- (3) extend the special exception approval for fuel service station granted in Case No 2018-0346-SPHXA with respect to 10901 McCormick Road (Tax Map 42, Parcel 62) for an additional 3 years, as provided in BCZR § 502.3 be and it is hereby **DENIED**.
- (4) approve the expansion, reconstruction, and reuse of a fuel service station legally existing on the effective date of Bill 172-1993, including (1) the provision of additional fuel service previously approved by special exception in Case No. 2018-0346-SPHXA; (2) uses in combination permitted by special exception under BCZR §405.4.E to be approved by special exception in this case (convenience store greater than 6,000 sq. ft. and a fast food restaurant); (3) the expansion of the uses beyond the confines of the site into 10901 McCormick Road (Tax Map 42, Parcel 62) as provided in BCZR §405.6.A.2, all as shown on the Plan to Accompany Petition for Zoning Hearing, be and it is hereby **DENIED**.
- (5) approve a modified site plan under BCZR § 409.12.B containing 73 parking spaces as shown on the Plan to Accompany the Petition for Zoning Hearing to serve the proposed uses on the property which would otherwise require 77 parking spaces be and it is hereby **DENIED**.
- (6) approve non-conforming landscape transition areas along the public right of way as narrow as 7 ft. wide in one instance and 8 ft. wide in one instance in lieu of the required 10 ft. under BCZR §§ 104.1 and 405.5.4.A.2.b, be and it is hereby **DENIED**.

IT IS FURTHER ORDERED that the Petition for Special Exception:

- (1) for a combination of a convenience store and carry out restaurant, with a gross floor area larger than 6,000 sq. ft. inclusive of accessory storage, as a use in combination with a fuel service station, which includes the proposed parking on the McCormick Rd. Property, as shown on the Site Plan which is incorporated herein, pursuant to BCZR § 405.4.E.1, be and it is hereby **GRANTED**.
- (2) for a fast food restaurant including outdoor seating, as a use in combination with a fuel service station, which includes the proposed parking on the McCormick Rd. Property as shown on the Site Plan which is incorporated herein, pursuant to BCZR § 405.4.E.10, be and it is hereby **GRANTED**.

IT IS FURTHER ORDERED, Variance relief which requests:

- (1) In the alternative to Special Hearing Request No.5, a Variance from BCZR § 409.6 to permit 73 parking spaces in lieu of 75 required, including the proposed parking on the McCormick Rd. Property, be and it is hereby **GRANTED**.
- (2) In the alternative to Special Hearing Request No. 6, a Variance from BCZR § 405.4.A.2.b for a Landscape Transition Area along a public right-of-way with a minimum width of 7 ft. in one instance and a minimum width of 8 ft. wide in one instance in lieu of 10 ft. required, be and it is hereby **GRANTED**.

The relief granted herein shall be subject to the following:

- (1) Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at its own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioner would be required to return the subject property to its original condition.
- (2) No part of the Beaver Dam Rd. Property or the McCormick Rd. Property, including but not limited to the oversized parking spaces as depicted on the Site Plan shall be used for a trucking facility (Class I or Class II) as those terms are defined in the BCZR.
- (3) Prior to issuance of Permits, Petitioners must comply with ZAC comments submitted by DOP dated September 9, 2020, a copy of which is attached hereto and made a part hereof.

- (4) Prior to issuance of Permits, Petitioners must comply with ZAC comments submitted by DPW dated February 17, 2021, a copy of which is attached hereto and made a part hereof.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

Signed _____
MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM:dlm