

<b>IN RE: PETITIONS FOR SPECIAL HEARING *</b> <b>AND SPECIAL EXCEPTION &amp;</b> <b>VARIANCE</b> (8109 Liberty Road) 2 <sup>nd</sup> Election District 4th Council District House of Der, Inc. <i>Legal Owner</i>  <b>Petitioner</b>  *   *   *   *   *   *   *   *   *	* * * * * * * * *	BEFORE THE  OFFICE OF  ADMINISTRATIVE HEARINGS  FOR BALTIMORE COUNTY  <b>Case No. 2020-0230-SPHXA</b>
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**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (“OAH”) for consideration of Petitions for Special Hearing, Special Exception and Variance filed on behalf of House of Der, Inc., legal owner (“Petitioner”). The Special Hearing was filed as follows: (1) Amend the zoning Order and approved site plan in Case No. 1984-0142-A in accordance with the relief granted herein. (2) To confirm that the use permits for commercial parking in a residential zone issued in Case Nos. 1974-236-SPHA and 1976-28-SPHA allow for the commercial parking in a residential zone as shown on the Plan to Accompany Petition for Zoning Hearing. (3) In the alternative to Special Hearing Request 2, and to the extent necessary, pursuant to the Baltimore County Zoning Regulations (“BCZR”) § 409.8.B to issue a use permit for commercial parking in a residential zone for 21 parking spaces in the D.R. 5.5 zone, as shown on the Plan to Accompany Petition for Zoning Hearing. (4) Pursuant to BCZR § 1B.01.1.B.1.C(1), determine that the amount of Residential Transition Area (“RTA”) provided is adequate, as shown on the Plan to Accompany Petition for Zoning Hearing. (5) In the alternative to Special Hearing Request 4 and Variance Requests 3 and 4, pursuant to BCZR § 1B.01.1.B.1.(2), to modify the RTA required under BCZR § 1B.01.1.B.1.e(3) and (5) to permit the storm-water management facilities, surface parking, drive

aisles, and other improvements shown on the Plan to Accompany Petition for Zoning Hearing to be located within the 50-foot RTA Buffer and the 75-ft. RTA setback otherwise required. (6) To determine that the colored striped banding shown on the service station canopy is a decorative feature that does not contribute to the message of any sign and, in accordance with the definition of "Area" as provided in BCZR § 450.3 this decorative feature should not be included in the area of the canopy signs. (7) To determine whether a variance is required for the canopy signs as shown on the Plan to Accompany Petition for Zoning Hearing. (8) To approve the proposed location of the dumpster as shown on the Plan to Accompany Petition for Zoning Hearing. (9) Such further and other relief as the nature of this case may require.

A Petition for Special Exception was filed pursuant to BCZR §§ 405.2.B and 230.3, for a fuel service station (including a convenience store less than 6,000 sq. ft. as an ancillary use permitted by right under BCZR § 405.4.D in association therewith), as shown on the Plan to Accompany Petition for Zoning Hearing.

A Petition for a Variance (1) from the BCZR § 405.4.A.1 for a site area within the BL-CCC Zone of 28,460 sq. ft. in lieu of 35,000 sq. ft. required. (2) A variance from BCZR § 405.4.A.2.b, as follows: (a) For a Landscape Transition Area ("LTA") along a public right-of-way with a minimum width of 0 ft. in lieu of 10 ft. required, including the placement of freestanding enterprise sign within the required 10-ft. LTA, as shown on the Plan to Accompany Petition for Zoning Hearing. (b) For an LTA in a side and rear yard abutting non-residentially zoned land of 0 feet in lieu of 6 feet required, as shown on the Plan to Accompany Petition for Zoning Hearing. (c) For an LTA in a rear yard within 50 feet of a residentially zoned property of 9.3 feet in lieu of 15 feet required, as shown on the Plan to Accompany Petition for Zoning Hearing. (3) In the alternative to Special Hearing Requests 4 and 5, a variance from BCZR

§1B01.1.B.1e.3 to permit an RTA Buffer of zero (0) feet in lieu of 50 feet required in order to accommodate an LTA, stormwater management facilities, surface parking, drive aisles, and other improvements, all as shown on the Plan to Accompany Petition for Zoning Hearing. (4) In the alternative to Special Hearing Requests 4 and 5, a variance from BCZR § 1B01.1.B.1e.5 to permit an RTA Setback of zero (0) feet in lieu of 75 feet required in order to accommodate an LTA, stormwater management facilities, surface parking, drive aisles, and other improvements, all as shown on the Plan to Accompany Petition for Zoning Hearing. (5) If, pursuant to Special Hearing Request No. 7, the Zoning Commissioner determines that a variance is required for the canopy signs as shown on the Plan to Accompany the Petition for Zoning Hearing, then a variance from BCZR § 450.4 for canopy signs of 51 square feet, 51 square feet, 396 square feet, and 396 square feet respectively, in lieu of 25 square feet per sign otherwise permitted.

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. Substantive Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”) indicating that it “cannot recommend approval at this time as the site is located within the Liberty Road Commercial Revitalization District as well as the Liberty Road study boundary.” The DOP recommended that Petitioner submit a revised plan whereby the fuel canopy area would be moved farther back from Liberty Road and which would provide a proper landscaping strip along Liberty Road, and, “[i]f setting back the fuel canopy is not feasible, staff recommends rotating the fuel canopy to face Millvale Lane and reducing the number of pumps.” In addition, DOP made several other recommendations concerning landscaping, crosswalks and relocating the proposed dumpster enclosure. DOP also recommended reducing the number of proposed parking spaces “in an effort to reduce the number of commercial parking spaces in a residential zone.”

Finally, DOP also asked the Petitioner to submit a narrative explaining how the plan complies with the compatibility objectives prescribed by BCC Sec. 32-4-402.

A redlined site plan, which incorporates some of DOP's recommendations, was marked and accepted into evidence as Petitioner's Exhibit 13. The Petitioner, Michael Carp, appeared at the hearing but did not testify. Matt Bishop and Keith Koscher from Kimley Horn & Associates also attended. Their *curricula vitae* were admitted as Petitioner's Exhibits 6 and 9, respectively. Numerous community members, including representatives of community associations, attended to voice their opposition to the requested Special Hearing, Special Exception and Variance relief.

#### RECORD EVIDENCE

Mr. Bishop was accepted as an expert in landscape architecture, planning, and the BCZR. He explained that the subject property is approximately 1.35 acres and split zoned BL-CCC and DR 5.5. The site is approximately 2000 feet west of I-695 on the Liberty Road corridor. It is currently the site of the Golden Dragon restaurant. The portion of the tract zoned DR 5.5 is occupied by the residence at 3529 Millvale Avenue, and by a surface parking lot that serves the restaurant by virtue of a special use permit granted in Case No. 76-28-ASPH. He explained that the plan calls for the residential structure to be razed and replaced by a stormwater management ("SWM") area and landscape transition areas. He explained that the portion of the lot in the BL-CCC zone is only 28,460 sq. ft. and that there is supposed to be a minimum of 35,000 sq. ft. per BCZR § 405.4.A.1. However, he noted that if the DR portion of the lot is included then there is over 59,000 sq. ft. He identified Petitioner's Exhibit 10 as an aerial map of the Liberty Road Commercial Revitalization District coverage in the vicinity of the site, which includes all of the site's frontage on Liberty Road. Mr. Bishop identified Petitioner's Exhibit 13 as the redlined site plan. He explained that in response to DOP's comments certain revisions were made to the original site plan, including signage and

landscaping along Liberty Road. However, the fuel canopy was not moved further back off of Liberty Road as DOP had requested because, as Mr. Bishop explained, that would have left insufficient room for parking and aisle widths. Neither does the redlined plan reduce the number of fuel pumps. Further, as noted above, DOP recommended reducing the number of proposed parking spaces “in an effort to reduce the number of commercial parking spaces in a residential zone.” However, the redlined plan only reduces the number of spaces from 39 to 37, leaving 21 spaces in the DR zone with no (“RTA”) provided.<sup>1</sup> Mr. Bishop also explained the SWM facilities that are proposed and noted that there are currently no SWM facilities on site. He testified that these facilities and the proposed landscaping would greatly improve the environmental quality of the site.

Finally, Mr. Bishop stated that in his opinion the plan meets all of the factors of BCZR § 502.1. He explained that the plan provides for good traffic flow in and out of the site from Millvale Road, Liberty Road and Milford Mill Road. He noted that there are no failing intersections in the vicinity. He reiterated that the SWM facilities and plantings would improve the environmental impacts at the site and noted that there would be less impervious surface than is currently there since the existing site is 100% impervious. He further testified that as a commercial use it will have no adverse impact on school crowding. Nor, he said, would the proposed fuel station and 7-11 store have any detrimental impacts at this locations above and beyond those inherently associated with the special exception use. In sum, he opined that the proposed site plan is not in conflict with the zoning classifications or with the spirit and intent of the BCZR.

With respect to the variance relief Mr. Bishop testified that the subject property is unique because it is split-zoned, and that the 7-11 store could only be constructed within the BL-CCC

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<sup>1</sup> Paragraph 4 of the Special Hearing request indicates that the RTA would be depicted on the site plan but it is not. Alternative variance relief seeks a complete exemption from the RTA regulations.

portion of the lot. He also noted that it is five separate parcels which creates an odd shape, and further, that it is bordered on three sides by public roads. He explained that the requested variances were necessitated by these factors and that the plan could not be built as proposed without the variance relief.

On cross-examination Mr. Bishop acknowledged that he is not a traffic engineer and that no traffic impact studies had been done. He further acknowledged that he had visited the site after the morning rush hour and during the time of Covid restrictions, so that he had not observed the normal levels of rush hour traffic. He further acknowledged that there are already a number of fuel station / convenience stores in the vicinity. He also acknowledged that his firm had not been asked to provide any alternative site designs other than the one depicted on the redlined site plan.

The community witnesses strongly oppose the proposed plan for a number of reasons. First and foremost they pointed to the proliferation of fuel/convenience stores along Liberty Road. They noted that a Royal Farms store and fuel station was recently built almost directly across the street. They testified that these businesses have attracted drug dealing and loitering and that they add nothing of value to the neighborhood. Derrick Burnett, a long-time neighborhood resident, noted that the County (DOP) is currently doing a study of the Liberty Road corridor to determine revitalization strategies. He testified that he was a member of the Design Review Panel during Jim Smith's administration, and he lamented the fact that the Liberty Road corridor has not been designated a design review area. Based on his knowledge and experience he does not believe another fuel/convenience store at this location is within the spirit and intent of the BCZR. He explained that one of the goals of the DOP study is to identify ways to attract other business uses to this corridor.

Kathleen Skullney is the Zoning Chairperson of the Greater Patapsco Community Association. She does not believe this site is sufficiently unique to warrant the requested variance relief. She also noted that this site would lend itself to any number of other permitted uses that would not need all the variances proposed in this plan. Finally, she noted that DOP does not support this plan and that they had asked the Developer to submit a compatibility narrative and that this had not been done. She does not believe the project is at all compatible with the surrounding residential uses.

Mildred Owens submitted a Statement in opposition to the proposed plan, accompanied by photos of businesses and homes in the area. She testified that she is on the Steering Committee for the DOP revitalization study that is being conducted. She believes there are already far too many fuel/convenience stores and fast food restaurants along this corridor. She and others described this area as a “food desert” and lamented the loss of several grocery stores in recent years. She testified that these businesses attract crime and that they become non-constructive hangouts for the youth in the area.

Joyce Sica is a member of the Liberty Manor Community Association and a neighborhood resident for forty two years. She too lamented the proliferation of fuel/convenience stores in the area, and echoed the other witnesses in describing the detrimental impacts. Keishauna Banks testified that this proposed 7-11/fuel station will generate much more traffic than the existing restaurant, which she said is mainly a take-out business, and not very busy. She does not believe another 7-11 is what the neighborhood needs. Finally, N. Scott Phillips testified. He explained that he was a member of the County Planning Board for seven years. In his opinion the proposed plan does not meet the uniqueness and hardship tests required under BCZR § 307.1. He testified that an attempt to rezone the property during the 2016 Comprehensive Zoning Map Process

("CZMP") failed, and that the DR zoning was retained. He noted that the earlier variances allowing parking in a DR zone were based on a different use and should not be transferred to this proposed use.

### 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. The Court of Appeals explained this as follows in *Schultz v. Pritts*, 291 Md. 1, 11 (1981):

The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

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.



The record evidence establishes that this is such a case. In my view it is clear that the construction of another fuel/convenience store at this location *would* have a greater adverse impact than that inherently associated with such a use. The DOP does not support the proposed plan because the site is located within the Liberty Road Commercial Revitalization District, and also within the Liberty Road study boundary. Their comments indicate that the proposed plan does not advance the revitalization goals. Further, and more importantly, the community passionately articulated the many reasons they are opposed to another fuel/convenience store in their neighborhood. I recognize that the proposed plan would enhance the storm water management at the site, and would otherwise clean up and modernize the site. But on balance these benefits do not offset the adverse impacts on the surrounding residences and the greater neighborhood. Of note, the redlined site plan does not even depict the RTA boundaries, and the variance relief requests a complete waiver of these provisions – although a 10’ to 15’ Landscape Transition Area is provided. Further, no compatibility narrative was provided by the Developer. Based on the record evidence I find that the plan is not compatible. The myriad forms and degrees of special hearing and variance relief requested in the Petition point this up.

Because the Special Exception cannot be granted the other requested relief is moot.

THEREFORE, IT IS ORDERED this 11<sup>th</sup> day of **March, 2021**, by this Administrative Law Judge, that the Petition for Special Exception is hereby **DENIED**.

IT IS FURTHER ORDERED, that the Petitions for Special Hearing and Variance relief are hereby **DISMISSED** as **MOOT**.

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

Signed \_\_\_\_\_  
PAUL M. MAYHEW  
Managing Administrative Law Judge  
for Baltimore County

PMM:dlm