

IN RE: PETITION FOR VARIANCE	*	BEFORE THE
(4622 Wilkens Avenue)		
1st Election District	*	OFFICE OF ADMINISTRATIVE
1 st Council District		
Kensington Associates	*	HEARINGS OF
c/o Kimco Realty Corporation		
	*	BALTIMORE COUNTY
Legal Owner/Petitioner		
	*	CASE NO. 2021-0053-A

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) as a Petition for Variance filed by Kensington Associates c/o Kimco Realty Corporation (the “Petitioner”) for property located at 4622 Wilkens Avenue, Baltimore (the “Property”). The Petitioner is requesting variance relief from Baltimore County Zoning Regulations (“BCZR”), §232.1 to permit a front setback of 5.62 ft. in lieu of the required 10 ft. and from BCZR, §409.8.A.1 to provide a landscape setback of 0.00 ft. in lieu of the required 10 ft.

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. Greg Reed, Vice President of Development and Construction for Kimco Realty Corporation and Michael Ogden of Kimco Realty Corporation appeared in support of the Petition, along with Michael Gesell, PE of Bohler Engineering who prepared a site plan (the “Site Plan”). (Pet. Ex. 2). Adam Baker, Esquire and Rosenberg Martin and Greenberg, LLP represented the Petitioner. There were no opposing parties or interested citizens in attendance.

Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”) and the Department of Environmental Protection and Sustainability (“DEPS”). Those agencies did not oppose the requested relief.

The case proceeded by way of modified proffer by Adam Baker. Michael Gesell, PE was admitted as an expert professional engineer with expertise in zoning and development. (Pet. Ex. 3). The Property is approximately 11.89 acres (517,869 sf) and sits at the corner of Wilkens Ave. and Maiden Choice Lane. (Pet. Ex. 2). As shown in the aerial photograph, the shopping center is known as ‘Wilkens Beltway Plaza’ and is improved with Giant food store as the anchor tenant, various retail stores as well as free standing buildings located on the perimeter of the parking lot (the “Shopping Center”). (Pet. Ex. 1). The zoning is Business, Local (BL).

Mr. Reed testified that the Petitioner has owned the Property since the 1980s. The Giant measures 55,000 sf and has renewed its lease in the Shopping Center. The proposal here is to update and renovate the Giant with a new façade and interior changes with a 9,820 sf expansion on the south eastern end of the store. Additionally, the building at 4,600 Wilkens Avenue will be removed and replaced with a parking lot for Giant employees.

Mr. Gesell testified that the requests here are for internal variances driven by the existence of a public roadway in/out of the Shopping Center from Wilkens Avenue which entrance is known as ‘Pigeon Court.’ (Pet. Ex. 2). Because Pigeon Court is a public roadway, a front setback between the proposed addition to the Giant and Pigeon Court requires a 10 ft. setback. (*Id.*). Additionally, a 10 ft. landscape setback is required between Pigeon Court and the proposed employee parking lot. Mr. Gesell explained that if this entrance/exit was a typical shopping center access point and not a ‘court,’ no variances would be required.

A second entrance to the Shopping Center from Maiden Choice Lane is ‘Grouse Court.’ Due to an environmental area with wetlands, the proposed addition cannot be constructed on the rear of the Giant. Mr. Gesell added that the Property is irregularly shaped which further limits the ability to expand the Giant. Mr. Gesell opined that if the setback regulations were strictly applied

here, the Petitioner would suffer an unreasonable hardship and practical difficulty because the addition cannot be constructed.

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).

Based on the evidence, the Property is unique due to its irregular shape and two public courts which serve as ingress and egress points to/from the Shopping Center. As aptly stated by Mr. Gesell, if Pigeon Court was not technically a public roadway, no setbacks would be required. As such, these are internal variances needed in order to expand and improve the Giant. I find the renovations to the Giant and addition of the employee parking will be a benefit to the surrounding community. I further find that the Petitioner will suffer a practical difficulty if the variance relief was denied because the proposed addition to the Giant could not be built. I also find that the requested variance relief is within the strict harmony with the spirit and intent of the BCZR and can be granted without injury to the health, safety or general welfare, particularly in light of the lack of opposition.

THEREFORE, IT IS ORDERED, this 4th day of **May 2021**, by the Administrative Law Judge for Baltimore County, that the Petition for Variance pursuant to BCZR, §232.1 to permit a front setback of 5.62 ft. in lieu of the required 10 ft. and from BCZR, §409.8.A.1 to provide a landscape setback of 0.00 ft. in lieu of the required 10 ft. are 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

their 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.

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

A handwritten signature in black ink that reads "Maureen E. Murphy". The signature is written in a cursive style with a large, looped initial "M".

MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM/dlm