

IN RE: <b>PETITIONS FOR SPECIAL HEARING</b> *	BEFORE THE
<b>AND VARIANCE</b>	
(10021 Reisterstown Road) *	OFFICE OF
3 <sup>rd</sup> Election District	
2 <sup>nd</sup> Council District *	ADMINISTRATIVE HEARINGS
Gordon K. Harden, <i>Legal Owner</i>	
McDonald's USA, LLC, *	FOR BALTIMORE COUNTY
<i>Contract Purchaser</i>	
Petitioners *	<b>Case No. 2014-0141-SPHA</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 and Variance filed by Caroline L. Hecker, Esquire with Rosenberg, Martin, Greenberg, LLP, on behalf of Gordon K. Harden, the legal owner, and McDonalds USA, LLC, contract purchaser, (“Petitioners”). The Special Hearing was filed pursuant to § 409.8.B.1 of the Baltimore County Zoning Regulations (“B.C.Z.R.”), to permit the use of land in a residential zone as parking serving a business use. In addition, a Petition for Variance seeks the following:

**1. Off-Street Parking:**

- 1.1 Section 409.6.A.2 to permit 35 parking spaces in lieu of the required 71 parking spaces.
- 1.2 Section 409.8.A.4 to permit 6 ft. distance to street line (R/W) from parking space for non-residential use in lieu of the required 10 ft.

**2. Signage Regulations:**

- 2.1 Section 450.4 Attachment 1, 5(a)(VI) to permit 5 wall mounted enterprise signs on building facades in lieu of the permitted 3 signs. (Signs #4 & #5)
- 2.2 Section 450.4 Attachment 1, 3(b)(VII) to permit directional sign of 10.7 ft. in height in lieu of the permitted 6 ft. (Sign #1)
- 2.3 Section 450.4 Attachment 1, 3(b)(Vii) to permit a directional sign of 9.7 ft. in height in lieu of the permitted 6 ft. (Two signs, Sign #2)
- 2.4 Section 450.4 Attachment 1, 3(II) to permit a canopy-type directional sign in lieu of the permitted wall-mounted or free-standing sign. (Two signs, Sign #3)

- 2.5 Section 450.5.B.3.b to permit erection of the sign above the face of the canopy in lieu of its erection on the face of the canopy. (Two signs, Sign #3)
- 2.6 Section 450.4 Attachment 1, 5(f)(VII) to permit two order boards of 6.75 ft. in height in lieu of the permitted 6 ft. (Two signs, Sign #7)
- 2.7 Section 450.4 Attachment 1, 3(II) to permit three projected directional signs in lieu of the permitted wall-mounted or free-standing sign. (Three signs, Sign #8)

The subject property and requested relief is more fully depicted on the site plan that was marked and accepted into evidence as Petitioners' Exhibit 1.

Appearing at the public hearing in support of the requests from McDonald's was Lee May, Area Construction Manager. Gerard Gaeng, Esquire and Caroline Hecker, Esquire, with Rosenberg, Martin and Greenberg, LLP, appeared and represented the Petitioners. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Several community members, represented by Carroll Holzer, Esquire, attended the hearing and opposed the relief.

Substantive Zoning Advisory Committee (ZAC) comments were received from the Bureau of Development Plans Review (DPW) dated December 31, 2013. That agency noted landscape and lighting plans were required prior to issuance of permits.

The subject property is zoned BL, DR 16 & RO. The site is located on Reisterstown Road (Md. 140) directly across from the proposed Foundry Row project. A Krispy Kreme store operated for several years at the site, but that business closed and the former building is vacant. Petitioners propose to open a McDonald's restaurant (a permitted use in the BL zone), but require zoning relief before they can do so.

Although there are a variety of requests at issue, I believe the petition for variance concerning the number of parking spaces is the "weakest link" in the analytical chain. As such, that will be the sole issue addressed below.

To obtain variance relief requires a showing that:

- (1) The property is unique; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

*Trinity Assembly of God v. People's Counsel*, 407 Md. 53, 80 (2008).

I do not believe Petitioners have sustained the heavy burden imposed upon them under Maryland law, and the petition will therefore be denied.

With regard to the parking, Petitioners seek variance relief to permit 35 spaces in lieu of the required 71 spaces. Petitioners correctly note that in other cases involving McDonalds, parking variances were granted to permit less than 50% of the required number of spaces. But those cases were unopposed, and whether or not it is proper to do so, the reality is that variances are frequently granted without a searching inquiry if neighboring owners are supportive and the request is reasonable. The County Council recently enacted legislation that allows the Director of the Department of Permits, Approvals and Inspections to reduce parking requirements for certain shopping centers by up to 40%, without a hearing. B.C.Z.R. § 409.13. This seems to me a tacit acknowledgement on behalf of the County that the Regulations simply require too many parking spaces for commercial ventures, which also causes unnecessary environmental impacts. But that provision is not applicable in this case, and thus the Petitioners must seek variance relief.

Here, I believe the request is reasonable, and I agree with Mr. May who testified 35 spaces would be sufficient. I do not believe McDonalds would invest significant sums of money to open a restaurant with inadequate parking, and I do not believe that granting the parking variance would in any way negatively impact the community's health, safety and welfare. Assuming for the sake of argument there was insufficient parking, the frustrated customer would simply choose another fast food restaurant located along this stretch of Reisterstown Road. But

my subjective feelings are beside the point; the only issue is whether the Petitioners have sustained their burden to obtain a variance.

In seeking variance relief, Petitioners face daunting odds; the court in Cromwell v. Ward, 102 Md. App. 691, 711 (1995) noted that since 1927, only five reported Maryland cases have upheld the grant of variance relief (or reversed the denial of a variance petition). The court in Cromwell also held that “variances are rarely appropriate.” Id.

Against this backdrop, Petitioners argue the property is unique given the approximate 14' grade change across the site, new requirements imposed for storm water management, and the proposed SHA taking along the Reisterstown Road frontage. I do not believe these attributes (individually or cumulatively) satisfy the requirements set forth in Cromwell and similar cases.

The SHA taking undoubtedly reduces the size of Petitioners' parking lot, and several parking spaces are lost in the process. But even assuming this would render the property unique, the cases require more: in citing the Rathkopf zoning treatise, the court of appeals held that the uniqueness “must be the proximate cause of the hardship.” Salisbury Bd. of Zoning v. Bounds, 240 Md. 547, 554-55 (1965). In fact, the Cromwell court held that the hardship must be “*caused* by the property’s uniqueness.” 102 Md. App. at 695 (emphasis in original). The SHA taking may account for the loss of as many as ten spaces, but that is obviously not the proximate cause of the shortage of 36 spaces at the property.

A similar analysis would apply to the other uniqueness factors cited by Petitioners. With regard to the storm water management (SWM) requirements, those are imposed by law and are not physical attributes of the land. As such, this cannot render the property unique; and even if it could, it would again not be the proximate cause of the parking space shortage. According to Petitioners, the SWM areas would result in the loss of a few spaces, which even in combination with the SHA taking would not “cause” the 35 space deficit.

The topographical change across the site is one such intrinsic factor mentioned in the case law that may render the property unique, and Ms. Zarska testified this condition does not exist on neighboring sites. The witness indicated the grade change necessitated a retaining wall on the site and the need for a “buffer.” But there was no testimony indicating that the grade change resulted in the loss of any particular number of parking spaces. As such, I do not believe that the uniqueness in this regard was the proximate cause of the parking shortage.

In the end, the small site is the cause of the hardship related to the parking shortage. Though Ms. Zarska cited this as a factor that rendered the property unique, I do not believe that the small size of the lot establishes the requisite uniqueness under the case law. If that were the case, variance relief for parking, setbacks, etc. would need to be granted in every instance where a petitioner claimed to have a small site.

THEREFORE, IT IS ORDERED this 23<sup>rd</sup> day of June, 2014, by this Administrative Law Judge, that Petitioners’ request for Special Hearing filed pursuant to §409.8.B.1 of the Baltimore County Zoning Regulations (“B.C.Z.R.”), to permit the use of land in a residential zone as parking serving a business use, be and is hereby DISMISSED without prejudice as MOOT.

IT IS FURTHER ORDERED that the Petition for Variance pursuant to B.C.Z.R §409.6.A.2 to permit 35 parking spaces in lieu of the required 71 parking spaces, be and is hereby DENIED.

IT IS FURTHER ORDERED that the remaining variance requests set forth in the Petition BE and are hereby DISMISSED without prejudice as MOOT.

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

JEB/sln

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Signed \_\_\_\_\_  
JOHN E. BEVERUNGEN  
Administrative Law Judge  
for Baltimore County