

IN RE: PETITION FOR SPECIAL EXCEPTION *		BEFORE THE
(10609 Reisterstown Road)		
4 th Election District	*	OFFICE OF
2 nd Councilman District		
William D. & Mary Groff	*	ADMINISTRATIVE HEARINGS
<i>Legal Owners</i>		
DMS Tollgate, LLC	*	FOR BALTIMORE COUNTY
<i>Contract Purchaser</i>		
Petitioners	*	Case No. 2013-0080-X

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County as a Petition for Special Exception filed for property located at 10609 Reisterstown Road. The Petition was filed by G. Scott Barhight, Esquire, on behalf of the owners of the subject property, William D. and Mary Groff, and the contract purchaser, DMS Tollgate, LLC, (“Petitioners”). The Special Exception Petition seeks relief pursuant to §§ 230.3 and 405 of the Baltimore County Zoning Regulations (B.C.Z.R.), to permit an automotive service station in combination with a convenience store greater than 1,500 sq. ft. The subject property and requested relief are more fully described on the red lined site plan which was marked and accepted into evidence as Petitioners’ Exhibit 2.

Appearing at the hearing in support of the petition was David Schlachman, Bruce Rice, Cheryl Aaron, George Harman, Gary Lenz, Ken Schmid, Rick Richardson, and Joe Ucciferro. G. Scott Barhight, Esquire and Adam Baker, Esquire attended and represented the Petitioners. Several members of the community (whose names are listed in the case file) attended the hearing and opposed the petition. G. Macy Nelson, Esq., represented these citizens. The file reveals that the Petition was advertised and the site was posted as required by the B.C.Z.R.

The Zoning Advisory Committee (ZAC) comments were submitted as Petitioners' Exhibit 1. The Department of Planning (DOP) made several substantive comments, but opined the project was compatible with the surrounding community and would not be detrimental to the health, safety or welfare of the neighborhood. The Department of Environmental Protection and Sustainability (DEPS) indicated Petitioners must comply with the environmental regulations set forth in Article 33 of the Baltimore County Code (B.C.C.), and noted that a floodplain variance would also be required.

Testimony and evidence offered at the hearing revealed that the subject property is 8.51+/- acres and is zoned BL-AS. In fact, the property was rezoned to its current designation in the 2012 Comprehensive Zoning Map Process. The Petitioners propose to construct and operate a service station with convenience store, which is permitted in the zone by Special Exception.

SPECIAL EXCEPTION LAW

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 People's Counsel v. Loyola College, 406 Md. 54 (2008), where the court emphasized that 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. I do not believe the Protestants rebutted this presumption, as discussed below.

PETITIONERS' CASE

David Schlachman, on behalf of the contract purchaser, testified in general about the plans for the site and his meetings with the community, which led to the covenant agreement, marked as Petitioners Exhibit No. 3. Bruce Rice, a regional manager with Wawa, was the next witness. Mr.

Rice described the proposed layout of the site, making reference to the site plan, Petitioners Exhibit No. 2. The witness indicated the store would have between 40-60 employees on 3 shifts. Mr. Rice was questioned on cross examination about his disagreement with the DOP over the signage for the site. Mr. Rice testified Wawa , like all convenience retailers, relies on signage to identify the store to passing motorists, and he said that Wawa wanted to erect a sign as permitted by the B.C.Z.R. rather than a ground mounted sign as requested by DOP.

Ken Schmid, a traffic engineer, was the next witness in Petitioners' case. After describing his background and experience, the witness indicated he prepared a traffic study for this site and is awaiting State Highway Administration (SHA) comments. Mr. Schmid opined the proposed traffic signal would be a vast improvement over existing conditions, and he felt the site was an "ideal location" and that the road network was sufficient to handle anticipated traffic. On cross examination, the witness stated that the proposed store would add traffic to Groff Lane, but would (with the proposed roadway re-alignment) make it safer.

The final witness in Petitioners' case was Rich Richardson, a Professional Engineer accepted as an expert witness. Mr. Richardson opined the proposal satisfied all of the requirements set forth in B.C.Z.R. §405.4. He also believed the Petitioners satisfied the special exception requirements in B.C.Z.R. § 502.1, and he noted there are no abandoned gasoline stations within one mile of the subject property.

On cross examination, Mr. Richardson confirmed the site is currently located in a floodplain shown on the Federal Emergency Management Administration (FEMA) maps. He stated that generally speaking one cannot build within a floodplain, but that Petitioners had filed for approval with County and State authorities to relocate the floodplain to the edge of the subject property.

The Protestants presented several witnesses in their case, including the owners of the Gulf service station (Malik Imram) and Exxon station (Afshin Attar), both of which are immediately adjacent to the subject property. Both owners testified regarding the congested traffic conditions near the site, and also believed that the Wawa would cause an increase in both traffic and crime. Both owners testified there is an abundance (perhaps as many as ten) of gasoline stations within the immediate vicinity, and they both believed there is no need for the proposed Wawa.

The Protestants called three additional witnesses, each of whom is employed at the Gulf or Exxon stations mentioned above, and these witnesses also stressed that the traffic in the area was very congested and that crime was increasing in the area. They believed the proposed Wawa would exacerbate these problems.

Applying these facts to the law, I believe the petition for special exception must be granted. I found each of the Protestants to be sincere and credible witnesses, and it may well be that the Wawa would cause an increase in both traffic and crime. But these are impacts that are inherent in the operation of a gasoline/convenience store. In fact, these are exactly the type of inherent adverse effects that the legislature was presumed to have anticipated when it allowed the use by special exception. In other words, most uses for which a special exception is required are regarded as “potentially troublesome because of noise, traffic, congestion....” Montgomery County v. Butler, 417 Md. 271, 297 (2010). There was no testimony or evidence presented which would establish that these negative impacts (adverse effects) would be any greater at this site than at another BL-AS zoned property in the area. In their post-hearing memorandum, the Protestants argue that the potential impact upon and reconfiguring of the adjacent floodplain (discussed above) is such a non-inherent effect.

Part of the problem, in determining whether the Protestants’ floodplain argument has

validity, is that the “caselaw is silent” on what effects are inherent versus non-inherent in any particular special exception use. Id. at 303. This has caused some counties---such as Montgomery County—to amend their zoning law to specifically provide whether any given impact is inherent or non-inherent in the use. Id. Baltimore County has not done so, nor does the BCZR impose a “stricter standard” than that set forth in Schultz, which of course provides for a presumption of compatibility. Id.

But I do not believe that the Protestants’ flood plain argument can rebut the Schultz presumption in this case. As an initial matter, the only testimony on the issue was provided by lay witnesses who own and operate gasoline service stations, and none of the witnesses indicated they had any experience or training in engineering or environmental analysis. And, perhaps more importantly, whether or not the flood plain is negatively impacted by the proposed Wawa is the very inquiry that will be undertaken by state and federal authorities who are reviewing the Petitioners’ application. See Petitioners Exhibit. No.8. The County Code (§ 32-8-101 et. seq.) makes clear that—as required by state and federal law—revisions to floodplain maps will only be granted when there is no adverse effect upon the safety and welfare of the citizenry. The proposed Wawa should not be allowed to have an adverse effect upon neighboring properties by negatively impacting the 100-year floodplain. If—in the studies being conducted by state and federal authorities—it is determined that it would have such an effect, then the Petitioners’ application will no doubt be denied.

In any event, the relief granted herein will be made subject to the approval by the relevant authorities of the flood plain study and/or map amendments. Additional conditions, as suggested in Petitioners’ post-hearing memorandum, will also be included in the Order below. The DOP expressed a preference for a ground-mounted sign, which it felt would be more compatible with

the nearby historic structures. While the Order will not require such a sign, it will condition the special exception relief upon the DOP's approval of the final sign design for the site.

Pursuant to the advertisement, posting of the property, and public hearing on this petition, and after considering the testimony and evidence offered, I find that Petitioners' Special Exception request should be granted.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this 31st day of October, 2013, that the Petition for Special Exception relief under §§ 230.3 and 405 of the Baltimore County Zoning Regulations ("B.C.Z.R."), to permit an automotive service station in combination with a convenience store greater than 1,500 sq. ft., be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for appropriate permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition.
2. Unless extended by subsequent order, the special exception granted herein must be utilized within two (2) years from the date of this Order.
3. The "special exception area" shall include the 1.70 acre (74,088 SF) area of the proposed Wawa service station and convenience store, but shall not include the 0.43 acre (18,628 SF) area of proposed relocated Groff Lane.
4. Approval by Baltimore County of a landscape and lighting plan for the site.
5. Approval by county, state and federal authorities of the floodplain study and/or floodplain map amendment or revision as sought by Petitioners.
6. Approval and issuance of all necessary permits by the State Highway Administration.

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

JEB/sln

Signed _____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County