

IN RE: PETITION FOR VARIANCE	*	BEFORE THE
NE/side of Back River Neck Road @		OFFICE OF ADMINISTRATIVE
the corner of the SE/side of Poles Rd. *		HEARINGS FOR
(215 Back River Neck Road)		BALTIMORE COUNTY
15 th Election District	*	
6 th Election District	*	
Daniel W. Hubers & Charlotte W. Pine,	*	
<i>Legal Owners</i>	*	
Zaremba Group, LLC,	*	
<i>Contract Purchaser</i>	*	
Petitioners		CASE NO. 2012-0038-A

* * * * *

ORDER AND OPINION

This matter comes before the Administrative Law Judge as a Petition for Variance filed by the legal owners of the property, Daniel W. Hubers and Charlotte W. Pine, and the contract purchaser, Robert W. Shearer with Zaremba Group, LLC, Petitioners. The Petitioners are requesting Variance relief pursuant from the Baltimore County Zoning Regulations (B.C.Z.R.) as follows:

- From Section 409.6.A.2 to permit 34 parking spaces in lieu of the 53 spaces required;
- From Section 409.8.4 to permit a parking space in a surface parking facility for a non-residential use 6 feet from a right-of-way of a public street in lieu of the required 10 feet;
- From Section 232.2 to permit an interior side yard of 3 feet where the property abuts a lot in a residential zone in lieu of the required 25 feet

Or, in the alternative:

- From Section 409.6.A.2 to permit 42 parking spaces in lieu of the 53 spaces required;
- From Section 409.8.4 to permit a parking space in a surface parking facility for a non-residential use 6 feet from a right-of-way of a public street in lieu of the required 10 feet;

- From Section 232.2 to permit an interior side yard of 4 feet where the property abuts a lot in a residential zone in lieu of the required 25 feet.

The subject property and requested relief is more fully depicted on the site plan that was marked and accepted into evidence as Petitioners' Exhibits 1 and 2.

Appearing at the requisite public hearing held for this case were Robert Shearer, on behalf of the contract purchasers, the Petitioners, and Kenneth Colbert with Colbert Matz Rosenfelt, Inc., the consulting firm who prepared the site plan for the Petitioners. The Petitioners were represented by Deborah C. Dopkin, Esquire. The file reveals that the Petition was properly advertised and the site was properly posted as required by the Baltimore County Zoning Regulations. There were no Protestants or other interested persons in attendance at the hearing.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. Comments were received from the Department of Environmental Protection and Sustainability (DEPS), dated September 7, 2011, and indicate as follows:

"Development of the property must comply with the Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 33-3-101 through 33-3-120 of the Baltimore County Code).

Development of this property must comply with the Forest Conservation Regulations (Sections 33-6-101 through 33-6-122 of the Baltimore County Code)".

Comments were also received from the Office of Planning, received September 7, 2011, and are as follows:

"The Office of Planning has reviewed the petitioner's request and accompanying site plan. This office prefers the site design as shown on drawing number: **ZON-1** as it appears to have less of an impact to the wetlands. However, staff defers to Environmental Protection and Sustainability for that determination. The Office of Planning does not oppose the requested variances provided that the following

information is submitted for review and approval prior to the application for any building permits:

- Architectural elevations including building materials and exterior finish;
- A landscape plan that includes dumpster screening;
- All proposed signage, in a sign package;
- Sidewalk connections to Back River Neck and Poles Road”.

At the outset of the hearing, counsel for the Petitioners determined to press for approval of option 1, which counsel described as the least environmentally intrusive option.

Kenneth Colbert of Colbert Matz Rosenfeld, Inc., engineers and planners, was called as a witness and was qualified as an expert in land use, the subdivision process and zoning matters, including variances as they relate to the Baltimore County Zoning Regulations (B.C.Z.R.). The witness presented the redlined plan to accompany the petition (Petitioners’ Exhibit 1). He described the site as approximately 1.25 acres, zoned B.L.-A.S./D.R.10.5 and D.R.16 in parts. Formerly a restaurant, the parcel is now vacant and is served by public water and sewer. Power and telephone are also located at the site. He described the surrounding area as highly developed, with numerous retail stores, restaurants and other commercial enterprises, including a Rite-Aid and a 7-Eleven across Back River Neck Road from the subject site. In addition, to the northeast and southwest of the property is high density D.R.16 apartments and to the rear, townhouses and other D.R.10 development.

In further explanation as to why Petitioners are proceeding to request relief under option 1 (as opposed to the “alternate” site plan), Mr. Colbert pointed out that under option 1 Petitioner would utilize only the area of the site that was already concrete covered, thereby minimizing any effect the new project would have on the wetlands that also make up a portion of this site.

Turning to the instant proposal, Mr. Colbert described it as a 10,590 square foot Dollar General Store, selling a wide range of products. Petitioners intend to remove the existing

building and replace it with a masonry structure. He noted that the proposed new construction would actually be farther away from the nearest apartment development than the existing structure. He pointed out that demographic and marketing studies done by Petitioners identify the demographic of their typical customer as one who will primarily utilize public transportation or walk to their stores. The proposed site, he observed, was served by three bus stops and is three miles and just less than 4 miles from two other Dollar General Stores.

The witness explained the traffic arrangements for the proposed use on the site. He related closing existing entrances and replacing them with new ones (as set out in the plan to accompany the petition), determined in consultation with County planning staff in order to improve and direct the safe flow of traffic. He described in detail the routine that will be followed to bring merchandise onto the site, organized to maximize traffic flow and safety on and off the site from the public street.

I wish to note that a communication regarding traffic considerations relative to Petitioners' request was received from People's Counsel. Attached to his letter was an email from the Chief of Traffic Engineering. This "communication" was not a formal comment done in the normal course of review of the project by the several County agencies to which the opportunity to comment is extended by County procedure. Moreover, Mr. Zimmerman points out in his cover letter that some of the "concerns" described in the email needed "adjustment" upon his learning that the County staff were in concurrence and supported the Petitioners' plan in regard to the entrances and traffic arrangements for the site. Counsel for the Petitioners was herself "concerned" by this "unofficial" comment and, with some justification, wished it to be disregarded. Nevertheless, Mr. Colbert responded to the issues raised therein regarding parking on the site in addition to that which he had already presented in the course of his testimony.

Given the unorthodox form in which the communication was presented to me as well as the comments of Mr. Colbert, I afforded the email no further consideration.

Turning finally to the issue of the variance request, Mr. Colbert testified that, based upon a number of factors, including the long and narrow shape of the subject property, the convergence of three zoning classifications on the site and the imposition of wetlands on approximately 1/3 of the property, rendered it unique in comparison to the other properties in the immediate area. He pointed out that as a result of these constraints, the number of parking spaces required by Section 409.6.A.2 and the distances called for in Section 409.8.4 and 232.2 of the Baltimore County Zoning Regulations (B.C.Z.R.) would present a real and insurmountable practical difficulty to the Petitioners' use of the subject property for an otherwise permitted purpose. Finally, he opined that based upon the totality of the details of the project, it was in harmony with the B.C.Z.R. and would have no detrimental effect on the public health, safety or welfare.

The testimony of Robert Shearer, on behalf of the contract purchasers, was proffered by counsel. He would have explained the "General Store" concept of the Petitioners' stores, located in 35 states and employing over 85,000 people nationwide. He would describe the particulars regarding this location, including three to four employees working three shifts, store hours at 8:00 AM to 9:00 PM and a well-lighted secure parking area. As a result of their own internal traffic and marketing studies, the 34 parking spots on site would be optimum for their customer demographic, which would include those walking and using public transportation. Finally, he would confirm that all signs would comply with County regulations and that all comments by the Office of Planning and the Department of Environmental Protection and Sustainability (DEPS) would be adhered to.

Considering all of the testimony and evidence presented, I am persuaded to grant the requested relief. I find special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request. Moreover, I find that strict enforcement of the B.C.Z.R. would cause the Petitioners to suffer practical difficulty and undue hardship. Therefore, I also find that the variances requested can be granted in strict harmony with the spirit and intent of the said regulations, and in such a manner as to grant relief without injury to the public, health, safety, and general welfare. In all manner and respect, the variances requested meet the requirements of Section 307 of the B.C.Z.R. as well as those requirements established in *Cromwell v. Ward*, 102 Md. App. 691 (1995) and *McLean v Soley*, 270 Md. 208 (1973).

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

THEREFORE, IT IS ORDERED, this 27th of September, 2011 by the Administrative Law Judge for Baltimore County, that the Petition for Variance seeking relief from the Baltimore County Zoning Regulations (B.C.Z.R.) as follows:

- From Section 409.6.A.2 to permit 34 parking spaces in lieu of the 53 spaces required;
- From Section 409.8.4 to permit a parking space in a surface parking facility for a non-residential use 6 feet from a right-of-way of a public street in lieu of the required 10 feet;
- From Section 232.2 to permit an interior side yard of 3 feet where the property abuts a lot in a residential zone in lieu of the required 25 feet, be and hereby is GRANTED.

IT IS FURTHER ORDERED that the alternative request for Variance is therefore rendered MOOT.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for their building permit 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. Petitioners shall comply with the ZAC comments received from DEPS, dated September 7, 2011, and the Office of Planning, received September 7, 2011 respectively; copies of which are attached hereto and made a part hereof.

Signed
LAWRENCE M. STAHL
Managing Administrative Law Judge for
Baltimore County

LMS:dlw