



Board of Appeals of Baltimore County

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August 11, 2016

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RE: In the Matter of: *Treasure Coast Management, LLC – Legal Owner*
25 Midway, Inc. – Lessee
Case No.: 16-122-A

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington Ham".

Krysundra "Sunny" Cannington
Administrator

Enclosure
Duplicate Original Cover Letter

c: Treasure Coast Management, LLC
25 Midway, Inc.
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Sharyn Jenkins
Steve Lucknet
Jackie and Rick Brewster

IN THE MATTER OF:
2713 & 2715 North Point Road
12th Election District
7th Council District
Treasure Coast Management, LLC,
Legal Owner;
25 Midway, Inc., Lessee

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
*
* Case No. 16-0122-A

* * * * *

OPINION

This matter comes to the Baltimore County Board of Appeals (the “Board”) as an appeal of the Administrative Law Judge’s Opinion and Order issued on January 11, 2016 following a hearing on Petitioner’s Request for a Variance. In particular, Petitioners requested variance relief to permit 22 parking spaces instead of the required minimum of 63 parking spaces, which was denied. The Board of Appeals conducted a *de novo* hearing on May 4, 2016 and then deliberated on June 8, 2016. Petitioner was represented by Kelley M. James, Esquire of Maslan, Maslan & Rothwell, P.A. Carole S. Demilio, Deputy People’s Counsel for Baltimore County, participated on behalf of People’s Counsel.

By way of background, a prior variance concerning the subject property was granted by the Deputy Zoning Commissioner on April 9, 1973 (the “1973 Variance”, Case No. 1973-233-A). The zoning variance permitted the subject property to have 25 parking spaces in lieu of 56 parking spaces and permission to install parking spaces six feet from the property line instead of the required eight feet. Since that time, the subject property had been primarily operated as social hall and a restaurant, Papa Leone’s, until 2014, when the site was purchased by Petitioner. Petitioner then opened “Papa’s Smokehouse Saloon,” and operated it as a restaurant, bar and catering service.

Petitioner desired to have outdoor seating/patio, ultimately resulting in the variance request at issue in this matter.

Petitioner's property is comprised of six lots (Lots 7-12), as depicted on the site plan (Petitioner's Ex. 1.1), with 2713 North Point Road consisting of Lots 7 & 8 and 2715 North Point Road consisting of Lots 9-12. (Petitioner's Ex. 1.2, Property Description by Engineer Pearnell Wilson).¹ The property at issue is zoned BL CCC and is located on the NW corner of the intersection of North Point Road and Oakwood Road. Oakwood Road is a residential, one-way street, with traffic turning onto Oakwood via North Point Road and traffic exiting via Gray Manor Terrace. Oakwood Road and Gray Manor Terrace are zoned DR 5.5. Testimony revealed that parking for the residents on Oakwood Road and Gray Manor Terrace is limited to one-lane driveways or street-side parking. Oakwood Road in particular is a narrow road. There was testimony that those that live on Oakwood try to park their vehicles in a staggered formation on both sides of the one-way street and know to be snug against the curb so that vehicles may pass and so that vehicles can successfully make it in and out of driveways.

Alexander Friedman is an owner and manager for the legal owner of 2713 & 2715 North Point Road, Treasure Coast Management, LLC; and the lessee, 25 Midway, Inc. Mr. Friedman has other business interests, including ones in Florida, and has others manage Papa's Smokehouse Saloon during his absences. Mr. Friedman undertook extensive renovations of the property when purchased, including a new kitchen. The former social/catering hall (Lots 7 & 8) is now partially used for storage. The testimony presented revealed that Mr. Friedman's renovations have attracted more patrons to the restaurant than were visiting previously. In addition, Papa's Smokehouse

¹ Mr. Wilson did not appear for the hearing. An Affidavit, along with the site plan and Property Description, were submitted on behalf of Petitioner. The reference here is to establish uncontested facts regarding the property and is not an indication that the Board gave any significant evidentiary weight to Mr. Wilson's Affidavit as the averments concern the merits or that the Board made any credibility determination.

Saloon has hosted private events as well as certain themes (such as holding itself out as a sports bar) or attractions (e.g. karaoke, trivia, etc.) to boost the customer base. One such customer, Harry Elliott, testified on behalf of the Petitioner, relaying that he is there several nights a week and that the changes to the property have been good for the neighborhood.

Three residents who live on Oakwood², however, appeared and testified in opposition to the Petition. The main issue raised by all three concerned patrons: parking on Oakwood; thereby depriving residents of sufficient parking and at least one resident expressed a concern that the patrons' parking on Oakwood would potentially jeopardize emergency responders from being able to get down the narrow road. As such, if Petitioner was permitted to have outdoor seating, the residents believed even more patrons would require side-street parking, exacerbating the periodic difficulties they, and other residents, encountered. Photographs were introduced into evidence of the parking conditions on a night where Papa's Smokehouse Saloon had an event. (People's Counsel Ex. 2-7). The residents could tell which vehicles belonged to residents on Oakwood and which cars had visitors, first, because they would recognize certain cars, but second, because other cars stood out as they did not adhere to the usual practices of Oakwood residents parking their vehicles in a staggered manner and being snug up against the curbs. Moreover, one of the testifying residents identified a car parked at the intersection of North Point Road and Oakwood, which created turning radius issues for vehicles attempting to turn on to Oakwood. (See People's Counsel Ex. 2). Petitioner's restaurant, by all accounts, has had a positive impact on the area and is enjoyed by many of the nearby residents, even those that opposed Petitioner's variance request.

² Jackie Brewster, Rick Brewster and Steve Lucknet.

Variance Law

In order to grant a variance in Baltimore County, Baltimore County Zoning Regulations § 307.1 states, as relevant:

“...The County Board of Appeals...shall have and they are hereby given the power to grant variances from height and area regulations, from off-street parking regulations, and from sign regulations only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning regulations for Baltimore County would result in practical difficulty or unreasonable hardship...Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area, off-street parking or sign regulations, and only in such manner as to grant relief without injury to public health, safety and general welfare...”

In short, in order to obtain a variance in this instance, Petitioner first would have to prove the uniqueness of the property and then that such uniqueness results in practical difficulty. See Cromwell v. Ward, 102 Md. App. 691, 703-722; 651 A.2d 424, 430-440 (1995). The uniqueness element requires that the subject property have an inherent characteristic not shared by other properties in the area, such as: shape, topography, sub-surface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. Id., at 710-11; 651 A.2d at 433-34, citing North v. St. Mary’s County, 99 Md. App. 502, 514-15; 638 A. 2d 1175 (1994). On the other hand, the uniqueness cannot be caused by improvements upon the property or a neighboring property. Id. at 710; 651 A.2d at 433-34.

With respect to practical difficulty, there is a three-part inquiry: (1) whether compliance with the strict letter of the restrictions governing area, setbacks, etc., would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; (2) whether a grant of the variance would do substantial justice for the applicant as well as to other property owners in the district, or whether a lesser

relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and (3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. Trinity Assembly of God of Baltimore City, Inc. v. People’s Counsel, 407 Md. 53, 83-84; 962 A.2d 404, 422 (2008), citing McLean v. Soley, 270 Md. 208, 214-15; 310 A.2d 783, 787 (1973). The hardship at issue cannot be self-inflicted. Cromwell, 102 Md. App. at 721-22; 651 A.2d at 439-40. In addition, financial considerations also do not necessarily justify a petitioner’s entitlement to variance relief. See, Green v. Bair, 77 Md. App. 144, 151; 549 A.2d 762, 765 (1988) (“Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting a variance,” citing, Daihl v. County Board of Appeals, 258 Md. 157, 167; 265 A.2d 227, 232 (1970) (other citations omitted)).

Opinion

A review of the evidence can only lead to one conclusion--- Petitioner has failed to prove the uniqueness of the subject property. Petitioner did not submit any evidence to illustrate that some characteristic is peculiar to the subject property when compared to other area properties. Petitioner, in a conclusory fashion, merely asserted that the property had an irregular shape. Petitioner did not submit any documentary or demonstrative evidence for comparison to other area properties. On the other hand, People’s Counsel submitted an aerial map (People’s Counsel Ex. 1) of the area. The aerial map revealed that the angle of North Point Road prevents Petitioner’s property from being a square or a rectangle.

However, it is apparent on the aerial map that the neighboring properties to the northwest, 2701 Old North Point Road and 2707 North Point Road have the exact same characteristic. (See, People’s Counsel Ex. 1). Moreover, the properties to the southeast, in particular 2725 Old North

Point Road and 2727 Old North Point Road, have a similar angular frontage with North Point Road, even if to a lesser degree as the road curves. The properties across the street also appear to have a similar issue. Even still, the angular frontage has not prevented this property from being used as a restaurant, as a restaurant has existed at that location since, more or less, 1973.

Instead, Petitioner argues that the 1973 Variance establishes that the property is unique. For the decision to be barred by *res judicata*, Petitioner would need to show that: (1) the parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must be the same cause of action as the first; and (3) there must have been a valid final judgment on the merits in the first case. Cochran v. Griffith Energy Servs., Inc., 426 Md. 134, 140; 43 A.3d 999, 1002 (2012). Maryland Courts utilize a transactional analysis, that is, whether the facts are related in time, space, origin or motivation. See, e.g. FWB Bank v. Richman, 354 Md. 472, 293; 731 A.2d 916 (1999). As illustrated by People’s Counsel, there has been a change in law, there is no evidence that the parties are either identical or in privity with one another, the uses are somewhat different³, and the motivations are different. For similar reasons, the doctrine of collateral estoppel is also inapplicable. In short, the Board finds that this case is sufficiently different than the 1973 Variance. Therefore, the 1973 Variance has no preclusive effect upon this case and the Board finds that Petitioner has not met their burden with respect to proving the property’s uniqueness.⁴

Even if it is assumed that the property is unique, to which the Board disagrees, and Petitioner has shown practical difficulty, to which the Board did not reach, the Board finds that the variance sought here cannot be granted in harmony with the spirit and intent of the Baltimore

³ The property also used to serve as a meeting hall and that was the use identified in the 1973 Variance Petition.

⁴ As such, there is no need to review whether Petitioner can satisfy the second element of practical difficulty. Nevertheless, it should be noted that if the Board reached this issue, there would be an unanswered question regarding the causal connection between the uniqueness, the practical difficulty and relief sought.

County Zoning Regulations and in such manner as to grant relief without injury to the public health, safety and general welfare. The testimony from the surrounding neighbors reveals that parking for residents is complicated without overflow parking from the restaurant. When there is overflow parking on Oakwood, the evidence presented demonstrated that people park their vehicles in a manner that jeopardizes safe turns on to Oakwood, potentially hinders emergency vehicles from proceeding on Oakwood, and otherwise disrupts welfare of the residents.

Under Maryland law, variance requests are to be granted sparingly and only under exceptional circumstances. *Trinity*, 407 Md. at 79; 962 A.2d at 419 (citation omitted). Such circumstances are not supported by the evidence presented by Petitioner. For this reason, the Board denies the variance petition seeking relief from the off-street parking regulations.


ORDER

THEREFORE, ON THIS 14th day of August, 2016, by the Board of Appeals of Baltimore County, it is hereby:

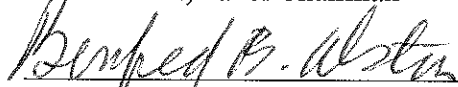
ORDERED that the Petition for Variance to permit 22 parking spaces instead of the required minimum of 63 parking spaces be and the same is hereby **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.


**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew Belt, Panel Chairman



Benfred Alston



Jason S. Garber