

IN THE MATTER OF	*	BEFORE THE
TIMONIUM SAB, LLC, LEGAL OWNER AND	*	BOARD OF APPEALS
SHEETZ, INC., LESSEE AND PETITIONERS	*	
FOR SPECIAL HEARING AND SPECIAL	*	OF
EXCEPTION ON THE PROPERTY LOCATED	*	
AT 400 W. PADONIA ROAD	*	BALTIMORE COUNTY
8 TH ELECTION DISTRICT	*	
3 RD COUNCILMANIC DISTRICT	*	CASE NO: 18-316-SPHX

* * * * *

OPINION

This case comes to the Board of Appeals from a final Opinion and Order dated October 2, 2018, issued by Administrative Law Judge John E. Beverungen (the “ALJ”) wherein he approved the Petition for Special Hearing for confirmation that the ancillary uses and/or the uses in combination with the fuel service station are a convenience store and carry-out restaurant; to approve the minimum number of required off-street parking spaces for the restaurant is limited to the square footage of the enclosed structure; or in the alternative, a modified parking plan pursuant to Section 409.12.B of the BCZR to limit the required parking for indoor and outdoor seating to the ratio applicable to a carry-out restaurant; and Petition for Special Exception to approve a fuel service station on the property located at 400 W. Padonia Road.

Subsequent to the filing of the Petition and prior to the Board of Appeals hearing, the County Council enacted legislation resolving the subject matter at issue for the Special Hearing, leaving only the Special Exception relief for the Board’s consideration.

The hearing in front of the Board occurred on June 6 and June 18, 2019. Petitioners were represented by Jason T. Vettori, Esquire, of Schmidt, Gildea and Schmidt, P.A. Michael R. McCann, Esquire appeared as counsel for Protestant DGG Market, Inc. Adam D. Baker, Esquire

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and Caroline L. Hecker, Esquire of Rosenberg Martin Greenberg, LLP appeared on behalf Protestants 7-Eleven, Inc. and 9709 Beaver Dam Road, LLC.

Petitioners presented the following witnesses: Jenifer Nugent, Division Chief for Development Review and Strategic Planning within the County Department of Planning; Michael LaCesa, Regional Director of Real Estate for Sheetz; Robert Bathurst, a professional engineer for Century Engineering (received as an expert in zoning, development, and engineering); Kelly Kosino, a senior engineer for Century Engineering (received as an expert in traffic engineering); and Michael Pieranunzi, a registered landscape architect and vice-president for Century Engineering (received as an expert in zoning, development, landscape architecture and master planning).

For their collective witnesses, Protestants presented: Dale Kowalewski, a supporter of the nearby 7-11; Sarah Ragab, a manager at the nearby 7-11; Devon Hahn, a senior transportation engineer for Sabra & Associates (received as an expert in traffic engineering); and Christopher Jakubiak, president of Jakubiak & Associates (received as an expert in planning and zoning).

The property at issue is zoned Manufacturing Local, with an Industrial Major overlay (ML-IM). The subject location is at the northwest corner of Padonia Road and Beaver Dam Road, with I-83 to its west, and is primarily and immediately surrounded by other ML-IH-zoned properties, with the lone exception located cater-corner to the southeast, which is zoned MLR. The ML-IH-zoned area extends beyond the subject property to the north, up to Shawan Road and south to Wellco Road (close to the I-695 Beltway). The ML-IH zone is confined between I-83 to the west and Beaver Dam Road and/or the Light Rail to the east. There are areas in the ML-IH zone that may be fairly characterized as commercial to the northeast and southeast of Beaver Dam Road close to the subject property.

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A question arose early in the hearing: whether the proposed use qualifies as a *fuel service station* or an *automotive service station* under the Baltimore County Zoning Regulations (BCZR). That answer dictates whether Petitioners would have to satisfy BCZR §253.2(B)(1) as part of the special exception hearing in addition to the requirements under Section 405 and, of course, the factors set forth in BCZR §502.1. Petitioner alleges that Bill No. 172-93 amended BCZR and replaced “*automotive service station*” with the term “*fuel service station*”, thus in effect repealing the words “*automotive service station*” and rendering that term of no effect.

For the reasons that follow, the Board concludes that the proposed use is a fuel service station under the BCZR and therefore, Petitioners are required to satisfy with BCZR §253.2(B)(1) as part of the special exception hearing.

By way of background, BCZR §253.1 concerns uses by right in a M.L. zone. Section 253.1(C) approves by right of a fuel service station, but only if located in a planned industrial park, which the subject property is not. As is relevant to Petitioners’ argument in this case, BCZR §253.1 does not identify automotive service station. Section 253.2 governs uses permitted by special exception. Subsection (B) states:

The following auxiliary service uses, provided that any such use shall be located in a planned industrial park at least 25 acres in net area or in an I.M. District; provided, further, that it is shown that any such use will serve primarily the industrial uses and related activities in the surrounding industrial area: 1. Automotive-service stations, subject, further, to the provisions of Section 405. ...

As noted above, the subject property is not located within a planned industrial park; however, it does sit within an I.M. District, thus giving rise to the question of whether this proposed use is an “automotive service station” that requires the Petitioners to prove that the proposed use will serve primarily the industrial uses and related activities in the surrounding industrial area.

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Petitioners imply some conflict between the provisions of BCZR §253.1 and §253.2 and that within §405.2, entitled “Locations in which fuel service stations are permitted.” Section 405.2 states : “Fuel service stations on individual sites which do not comply with the requirements of Section 405.2.A are permitted by special exception, as provided below and subject to Sections 405.3 and 405.4,” and specifically identifies an IM zone inside the urban-rural demarcation line (URDL) as such a location. Without question, the subject property is within the URDL.

To avoid this consequence, Petitioners attempt to distract by arguing, correctly, that specific provisions control the general provisions. However, akin to that tenet of statutory construction, here, the facts control the general application of law.

“The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature.” Rosemann v. Salsbury, Clements, Bekman, Marder & Adkins, LLC, 412 Md. 308, 314; 987 A.2d 48, 52 (2010) (citation omitted). “Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language.’ ” Id. at 314–15, 987 A.2d at 52 (citations omitted). In interpreting a statute, a court first looks to the language, applying it where the statute’s language “is unambiguous and clearly consistent with the statute’s apparent purpose[.]” Motor Vehicle Admin. v. Gonce, 446 Md. 100, 110, 130 A.3d 436, 442 (2016); quoting Lark v. Montgomery Hospice, Inc., 414 Md. 215, 227, 994 A.2d 968, 975 (2010) (citation omitted). As is well established under Maryland law, canons of statutory interpretation forbid construction of a statute so that a word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory. Oglesby v. State, 441 Md. 673; 109 A.3d 1147 (2015).

Under Maryland law, “when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute.” State v. Roshchin, 446 Md. 128, 142; 130 A.3d 453, 461 (2016), quoting, Maryland-Nat’l Capital Park &

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Planning Comm'n v. Anderson, 395 Md. 172, 194, 909 A.2d 694 (2006) (quoting State v. Ghajari, 346 Md. 101, 116; 695 A.2d 143 (1997)). Furthermore, as recently stated by the Court of Appeals, when two statutes apply to the same situation, then the court will attempt to harmonize the statutes. Blackstone v. Sharma, 461 Md. 87, 93; 191 A.3d 1188, 1191 (2018). The Blackstone Court further established:

“Courts presume that the legislature intends its enactments to operate together as a consistent and harmonious body of law. Thus, when two statutes appear to apply to the same situation, the Court will attempt to give effect to both statutes to the extent that they are reconcilable. Nevertheless, if two statutes contain an irreconcilable conflict, the statute whose relevant substantive provisions were enacted most recently may impliedly repeal any conflicting provision of the earlier statute.

Id.

The phrase “automotive service station” appears 11 times in the BCZR, while “fuel service station” appears 14 times. The earliest references to “automotive service station” start with legislation from 1967 (Bill No. 40-1967). The earliest references to “fuel service station” start with legislation enacted in 1993 (Bill No. 172-1993). Bill No. 172-1993, now Section 405 (“Fuel Service Station”), addressed the change in service station business practices, particularly the elimination of repair garages and the inclusion of convenience stores and/or car washes as part of service station. The statement of legislative findings and policy (§405.1(C)) states:

The design and operation of service stations has changed significantly and the provisions set forth in Bill No. 40-1967 no longer reflect contemporary business practices. Due to the rise of self-service stations, the number of businesses that "service" motor-vehicles by providing repair facilities has been steadily declining, while the number of stations with convenience stores or car wash operations has been increasing. **To better reflect the evolving role of this use, the name of "automotive service station" is being changed to "fuel service station,"** and regulations which govern the permitted ancillary uses are being amended to reflect contemporary business practices and to facilitate the upgrading of existing stations. (emphasis added).

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As made abundantly clear by the statement of legislative findings and policy, the County Council intended for all references to “automotive service station” to be tantamount to “fuel service station.” Consequently, all regulations that apply to an “automotive service station” to apply to a “fuel service station.” Notably, the County Council’s elimination of “automotive service station” from and addition of “fuel service station” to the definitions in BCZR §101.1 further supports the Board’s conclusion on this point.

Petitioners also assert the County Council intended to distinguish “automotive service station” from “fuel service station,” and as such, the reference to automotive service station does not apply to the present petition, which is for a fuel service station. In addition to the reasoning above, Petitioners’ argument fails for an additional reason. As noted in Bill No. 172-93,

Going back to §405.1(C), in connection with the change from automotive service station to fuel service station, the County Council stated “regulations which govern permitted ancillary uses are being amended...”. Importantly, Bill No. 172-1993 amended BCZR §253.1 and §253.2(B). The amendment to BCZR §253.1 added “fuel service station in a planned industrial park, subject to Section 405” as a use permitted by right.

The County Council also amended the language in BCZR §253.2(B). In particular, the County Council removed language relating to “direct access to an arterial street other than a Class I Commercial Motorway.” (Petitioner’s Exhibit 49, Bill No. 172-1993). On the other hand, the County Council elected to forego any amendment or other change to the language concerning the threshold issue requiring satisfaction that the station primarily serve the industrial uses. By ignoring the language at issue while removing other language within the same provision, in conjunction with the express statement that references to automotive service station are being changed to fuel service station, the only conclusion for the Board to reach is that the County

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Council intentionally decided to keep the requirement and apply it to proposed fuel service stations within the ML-IM zone.

Turning to the evidence presented on the relevant point, that is, the proposed “use will serve primarily the industrial uses and related activities in the surrounding industrial area,” Petitioners have not presented sufficient evidence for the Board to make that finding. To the contrary, the evidence revealed that the fair expectation is that far more than the majority of the proposed Sheetz’s customer base will consist of east-west passing traffic on Padonia Road coming to and from I-83.

Petitioners’ evidence on this point originates from Mr. LaCesa, who simply testified in a conclusory manner that the uses are mostly for industrial and related activities. Mr. LaCesa testified that Petitioners did not undertake an analysis of the anticipated customers, percentages of fuel use to convenience store use, or otherwise provide some quantification regarding sources of potential customers by direction or location.

Mr. LaCesa acknowledged that the site’s proximity to I-83 was a significant factor in selecting the subject site and admitted on cross-examination that more people will come to the site as passing traffic. While it may be fair to assume that the proposed Sheetz will attract some traffic from employees, business vehicles or patrons within the industrial zone, there is nothing in the record that persuades the Board that it constitutes a substantial, let alone primary, source for the proposed use’s anticipated business. Mr. LaCesa also anticipated that most customers will arrive via car as opposed to walking, suggesting, its anticipated customer base will serve those traveling, which has been quantified to some degree, and less so a convenience store destination for nearby employees in nearby industrial office space, which has not been estimated in any event.

Padonia Road is an exit to/from I-83. As evidenced by the maps and acknowledged by Mr. LaCesa's testimony, there are "many" residential areas on the other side of I-83 that use Padonia Road. Similarly, there are employment, retail, and residential areas east of Beaver Dam/Deereco Road that use Padonia Road. The traffic impact study of Petitioner's expert, Ms. Kosino established that 78.7% of the existing traffic at the intersection closest to the subject site during AM peak hours is traveling east and west on Padonia Road as opposed to traffic north and south through the ML-IH zone.

In other words, based on this record, the Board is satisfied that most of the traffic on Padonia Road is coming from or going to areas not within the industrial zone. Sheetz would not primarily serve the industrial uses and related activities within the zone when at least "the majority," as per Mr. LaCesa, of its anticipated customers will come from passing traffic on Padonia Road. The opportunity from traffic coming from or heading north, already a minor portion of the traffic in the area close to the subject site, is further depleted by a competitor and additional access points to I-83. As such, the Board can only conclude that the proposed Sheetz will not primarily serve the industrial area and related activities within the industrial zone.

Conclusion

For the foregoing reasons, Petitioners have failed to present sufficient evidence that the proposed fuel service station will primarily serve the industrial uses and related activities in the surrounding industrial area. As such, the petitions for special hearing and special exception are DENIED.

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ORDER

THEREFORE, IT IS THIS 18th day of September, 2019, by the
Board of Appeals of Baltimore County,

ORDERED, that the Petition for Special Exception to approve a fuel service station, be
and the same is hereby **DENIED** for the reasons set forth herein, and it is further,

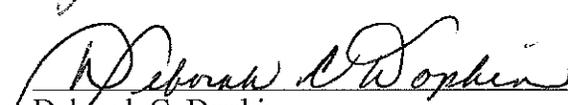
ORDERED, that the Petition for Special Hearing is **DISMISSED AS MOOT**.

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**



Jason S. Garber, Chair



Deborah C. Dopkin



Kendra Randall Jolivet



Board of Appeals of Baltimore County

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September 18, 2019

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RE: In the Matter of: *Timonium SAB, LLC – Legal Owner*
Sheetz, Inc. – Lessee
Case No.: 18-316-SPHX

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,


Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: See Distribution List Attached

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Distribution List
September 18, 2019

Kenneth J. Goodman/Timonium SAB, LLC
Brent M. Brubaker/Sheetz, Inc.
7-Eleven, Inc.
Sarah Ragab/9709 Beaver Dam Road, LLC
DGG Market, Inc.
Harry Carver
Barry Buchoff
Eric Rockel
George Linthicum
Janet Wisner
Office of People's Counsel
C. Pete Gutwald, Director/Department of Planning
Paul Mayhew, Managing Administrative Law Judge
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law