

**IN RE: PETITIONS FOR SPECIAL
EXCEPTION AND VARIANCE
(10620 Reisterstown Road)
4th Election District
4th Council District
CEC Tollgate, LLC
*Legal Owner***

Petitioner

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BEFORE THE
OFFICE OF
ADMINISTRATIVE HEARINGS
FOR BALTIMORE COUNTY

Case No. 2018-0096-XA

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OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) as Petitions for Special Exception and Variance filed for property located at 10620 Reisterstown Road. The Petitions were filed on behalf of CEC Tollgate LLC, legal owner of the subject property. The Special Exception petition seeks to approve the development and use of the subject property as a full-service car wash. The Petition for Variance seeks to permit the entrance and/or exit of a car wash to face an adjacent residentially-zoned property in lieu of the otherwise applicable general design standard for a car wash operation. A site plan was marked as Petitioner’s Exhibit 1.

Appearing at the hearing in support of the petitions were professional engineers Joe Caloggero and Rick Richardson, Paul Riley, Todd Tilson, Kyle Decker and Len Weinberg. Lawrence E. Schmidt, Esq. represented Petitioner. Two interested citizens raised concerns with the project. The Petition was advertised and posted as required by the B.C.Z.R. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP), the Bureau of Development Plans Review (DPR), State Highway Administration (SHA) and the Department of Environmental Protection and Sustainability (DEPS). None of the agencies opposed the requests.

The subject property is approximately 2.70 acres in size and is split-zoned BM-AS & DR 3.5. There is only a small sliver of DR property at the rear of the site, which adjoins the Tollgate community. All proposed improvements would be located in the BM zone, which permits a car wash by special exception. The property was previously split-zoned DR 3.5 and RO, but was rezoned to BM in 2016 (Issue No. 4-014; *see* Ex. No. 4). Counsel indicated that the County Council and County staff understood the rezoning request (which was opposed by the community) was made to allow a car wash at the site.

SPECIAL EXCEPTION

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 *Attar v. DMS Tollgate, LLC*, 451 Md. 272 (2017), where the court of appeals discussed the nature of the evidentiary presumption in special exception cases. The court again emphasized 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.

Here, Mr. Richardson testified (via proffer) the requirements of B.C.Z.R. §502.1 were satisfied. Mr. Caloggero opined sufficient parking exists on site and he did not believe the use would cause congestion in area roadways. The citizens at the hearing voiced concerns about noise and traffic, and it seems fairly obvious that both would increase if a car wash is constructed on this vacant site.

But as recognized by Maryland's highest court, most if not all special exception uses have such adverse impacts. *Montgomery County v. Butler*, 417 Md. 271, 297 (2010) ("Most [uses for which a special exception is required] are regarded as potentially troublesome because of noise,

traffic, congestion, or other associated problems”). As the court in *Attar* emphasized, after a petitioner has established a *prima facie* case, the opponent must rebut the presumption of validity of the special exception. I do not believe the evidence presented by the citizens satisfies this standard.

George Harman spoke at length about the concern with noise from the air dryers which will be used at the facility, and he and Mr. Schmidt submitted additional e-mails on this issue following the public hearing. Mr. Harman previously served as the manager of the State’s noise program, and the concerns he raised are valid; even so, they are not sufficient to overcome the presumption in favor of this special exception use. The County Council is presumed to have been aware that car wash operations generate a certain amount of noise, and no evidence was presented to show the impact at this site would be above and beyond that which would be experienced at other BM zones in the County. Although the community opposed the zoning change, the Council rezoned the site to allow this use. In addition, Baltimore County does not have a commercial noise ordinance, and the lack of any concrete standards makes it even harder to evaluate this issue.

VARIANCE

A variance request involves a two-step process, summarized as follows:

1. It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
2. If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995).

Petitioner has met this test. There is a significant (approximately 35 ft.) grade change across the site, which renders the property unique. If the B.C.Z.R. were strictly interpreted Petitioner would suffer a practical difficulty since it would be unable to construct the proposed car wash facility.

Finally, I find that the variance can be granted in harmony with the spirit and intent of the B.C.Z.R., and in such manner as to grant relief without injury to the public health, safety, and general welfare. Several conditions designed to minimize the detrimental impacts upon the surrounding community will be included in the order below.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this 30th day of **November, 2017**, that the Petition for Special Exception to approve the development and use of the subject property as a full-service car wash, as shown and configured on the site plan admitted as Petitioner's Ex. No. 1, be and is hereby GRANTED; and

IT IS FURTHER ORDERED that the Petition for Variance to permit the entrance and/or exit of a car wash to face an adjacent residentially-zoned property in lieu of the otherwise applicable general design standard for a car wash operation, be and is hereby GRANTED.

The relief granted herein shall be subject to and conditioned upon the following:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at its own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioner would be required to return the subject property to its original condition.
2. Petitioner must comply with the ZAC comments of the DOP, DEPS, and DPR, copies of which are attached.
3. Dumpster(s) on the site shall not be emptied between the hours of 10:00 p.m. and 7:00 a.m.

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

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

JEB/sln