

IN RE: PETITIONS FOR SPECIAL HEARING *		BEFORE THE
AND SPECIAL EXCEPTION		OFFICE OF
(400 W. Padonia Road)	*	ADMINISTRATIVE HEARINGS
8 th Election District		FOR BALTIMORE COUNTY
3 rd Council District	*	Case No. 2018-0316-SPHX
Timonium SAB, LLC		
<i>Legal Owner</i>	*	
Sheetz, Inc.		
<i>Lessee</i>	*	
Petitioners	*	

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of Petitions for Special Hearing and Special Exception filed on behalf of Timonium SAB, LLC, legal owner and Sheetz, Inc., lessee (“Petitioners”). The Special Hearing was filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“BCZR”) as follows: (1) 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; and (2) 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 . A Petition for Special Exception was filed to approve a fuel service station.

Michael LaCesa and professional engineers Bob Bathhurst and Rebecca Myrick attended the public hearing in support of the requests. Jason T. Vettori, Esq. represented the Petitioners. Several citizens attended the hearing to express concerns with traffic conditions near the site, which they described as extremely congested. Michael McCann, Esq. appeared on behalf of DGG Market, Inc. and Caroline Hecker, Esquire appeared on behalf of 7-11. Both of these entities opposed the

requests. The Petition was advertised as required by the BCZR. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (“DOP”) and the Bureau of Development Plans Review (“DPR”). Neither agency opposed the requests.

The subject property is approximately 64,507 sq. ft. (1.48 AC.) in size and is zoned ML-IM. The site is improved with a commercial building which was the former location of a Bob Evans restaurant. Petitioners propose to raze that structure and construct a Sheetz fuel service station with a convenience store and restaurant.

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.

Mr. Bathurst, a professional engineer accepted as an expert, opined the plan and project satisfied all requirements for special exception relief set forth in BCZR Section 502.1 and the Maryland case law interpreting that provision. Ms. Myrick, a professional engineer/traffic engineer accepted as an expert, opined the use would not cause congestion in nearby roadways or cause a deterioration in the level-of-service of any signalized intersections in the vicinity.

Although several members of the community provided testimony concerning the congested traffic conditions in the area (a point also raised by the DOP in its ZAC comment), I do not believe that is sufficient to overcome the presumption in favor of the special exception use. 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").

The 2018 Basic Services Map (Pet. Ex. 18) reflects the intersection of York and Padonia Roads is rated at "D" level-of-service (LOS). But the subject property is not located within a deficient traffic shed, as shown on Petitioner's Ex. 19. While anecdotal evidence might well suggest traffic at the site is congested, the County Council (which adopts Basic Services Maps on a yearly basis) determined the site was not within a deficient traffic shed (i.e., with a LOS of D, E or F). In addition, Ms. Myrick stressed that the points of ingress/egress for the Sheetz would be "right in/right out" only, with no left turns permitted into or out of the site. As such I will grant the petition for special exception.

SPECIAL HEARING

The first special hearing request seeks confirmation the proposed ancillary uses are properly identified as a convenience store and carry-out restaurant, both of which are permitted by right in conjunction with a fuel service station. BCZR §405.4.D. While there was not much discussion concerning the convenience store aspect of the project, the parties disagreed on whether the proposed restaurant was in fact a carry-out restaurant as that term is defined in BCZR §101.1.

The zoning regulations recognize four varieties of restaurants: fast-food, carry-out, standard and drive in. *Id.* Petitioners contend the Sheetz will be a carry-out restaurant, which is defined as an "establishment whose principal business is to sell ready-to-consume food and beverages to customers who order their food and beverages over the counter...and whose principal characteristic is that food and beverages are consumed off the premises." BCZR § 101.1. Mr. LaCesa

testified patrons in fact order their food at a counter or kiosk, so I believe this aspect of the definition is satisfied. The difficulty concerns the latter portion of the definition regarding food being “consumed off the premises.”

Mr. LaCesa testified most customers do in fact carry-out their food and beverages for consumption off-site. But he indicated the proposed Sheetz (like almost all of their other 581 locations) will have seating for thirty (30) patrons. In a memorandum contained in the case file the Office of Zoning Review stated that “carryout restaurants are only entitled to have three tables and twelve chairs or they are considered [standard] restaurants.” This is likely why the developers of the Royal Farm Store at 11119 McCormick Road showed on their site plan just three tables and seating for “12+/- people” in connection with the carryout restaurant proposed. *See* Pet. Ex. 15. While this is apparently not a written or codified policy or regulation, Maryland cases recognize that an agency’s interpretation of a statute it administers is entitled to “great deference.” *BGE v. Public Service Comm’n.*, 305 Md. 145, 161 (1986).

The BCZR does not provide a clear answer to this inquiry; in fact, the definitions of “restaurant” are (like many things in the Regulations) somewhat antiquated and the operation proposed by Sheetz does not fit neatly in any of the categories. Whether or not the twelve seat limitation adopted by the zoning office is the exact line of demarcation, 2 ½ times as much seating is proposed here. In these circumstances I believe the operation cannot be accurately described as a carry-out restaurant. But at the same time, the operation does not fit precisely within the definition of a “standard restaurant” either, since the food will not be “served to persons seated at tables on the premises of the establishment.” BCZR §101.1. The reality is the Sheetz (which does not yet have a location in Baltimore County) is an amalgam that shares characteristics of both a standard and carry-out restaurant. “Carry-out, fast food and standard restaurants” are all permitted by right in the ML-

IM zone. BCZR §253.1.C.21.

In such circumstances (i.e., when the BCZR does not specify the number of parking spaces required for a particular use) the ALJ is permitted to determine the appropriate number of spaces for the use. BCZR §409.6.A. In this regard, Mr. LaCesa testified the majority of customer consume their food off-premises, although that was the extent of the evidence on this issue. In these circumstances, and given that the Sheetz is a hybrid of both types of restaurants, I believe the required parking should be determined by averaging the total required for a standard and carry-out restaurant. The proposed Sheetz restaurant is 2,023 sq. ft. (indoors), and a standard restaurant (16 spaces per 1,000 SF) would require 33 spaces, while a carry-out restaurant (5 spaces per 1,000 SF) would require 11. The plan also shows a 385 sq. ft. outdoor seating area for the restaurant, which would require 7 spaces for a standard restaurant and 2 spaces for a carry-out. Thus, a standard restaurant would require 40 spaces while a carry-out would require 13. The average of those totals is 27, and the site plan shows 35 spaces are provided for the restaurant. As such I believe more than a sufficient number of spaces are provided for the project.

THEREFORE, IT IS ORDERED this 2nd day of **October 2018**, by this Administrative Law Judge, that the Petition for Special Hearing to determine: (1) the ancillary uses to the fuel service station proposed herein are a convenience store and carry-out/standard restaurant, both of which are permitted by right pursuant to BCZR Sections 405.4.D & 253.1.C.21.; and (2) a minimum of 27 off-street parking spaces are required for the restaurant component of the Sheetz shown on the site plan, be and is hereby GRANTED.

IT IS FURTHER ORDERED that the Petition for Special Exception to approve a fuel service station, be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioners are hereby made aware that proceeding at this time is at their 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, Petitioners would be required to return the subject property to its original condition.
2. Petitioners shall have five (5) years from the date hereof in which to utilize the special exception.
3. Prior to issuance of permit(s) Petitioners must comply with the ZAC comments submitted by the DOP and DPR, copies of which are attached hereto.

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