

BRITISH AMERICAN BUILDING, LLC et al.	:	BEFORE THE
Appellants	:	HOWARD COUNTY
v.	:	BOARD OF APPEALS
HOWARD COUNTY PLANNING BOARD	:	HEARING EXAMINER
Appellee	:	BA Case No. 766-D

.....

DECISION AND ORDER

On October 16, 2020, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of British American Building, LLC, et al. (Appellants). Appellants are appealing the Howard County Planning Board's letter of decision of March 7, 2019 approving SDP-17-041 (Site Development Plan) for Royal Farms 186 and Canton Car Wash (Two Farms, Inc.) for the construction of a gasoline service station, car wash, convenience store, and carry out restaurant.

Ann Grillo, Esq. represented the Appellants. David Moore, Senior Assistant County Solicitor, represented the Appellee. Thomas Coale, Esq. represented the landowner Two Farms, Inc.. Jervis Dorton, Chris Alleva, and James Mazzullo testified on behalf of the Appellants.

BACKGROUND

Two Farms, Inc. filed a request for the Howard County Planning Board to approve SDP-17-041, consisting of a gasoline station, convenience store, car wash, restaurant with carry-out, and associated site improvements including two one-story commercial

buildings (convenience store and car wash), gas pumps, detailing shelter, pay shelter, attendant's booth, parking facilities, and landscaping and stormwater management facilities. The subject property is 3.81 acres in size, in the New Town-Employment Center-Industrial (NT) Zoning District, also identified as 9585 Snowden River Parkway, Columbia, Maryland. It is located in the southeast corner of Snowden River Parkway and Minstrel Way as shown on Tax Map 42, Grid 9, Parcel 375, EGU Subdivision, Section 2, Area 2, Lot 22, in the 6th Election District. The property is accessed from Minstrel Way, a public local road, and is mostly paved and does not contain forests or environmental resources.

On May 3, 2018, after one year of plan review by the Subdivision Review Agencies (SRC), the Department of Planning and Zoning (DPZ) issued its Technical Staff Report, finding compliance with County and State requirements, recommending approval, subject to any Planning Board conditions of approval. Of particular note, DPZ founds as follows:

J. Final Development Plan Analysis: SDP-17-041 complies with all FDP-55 requirements:

* * * * *

2. Permitted Land Uses (Criterion 7): All uses in the M-1 zoning district are permitted, which includes car wash facilities. Uses that are ancillary to, or compatible with permitted industrial uses are also permitted including, but not limited to: restaurants, lunchrooms and similar establishments serving food and/or beverages (item a) and gasoline stations (item d). Therefore, the convenience store and carryout uses, which are

ancillary to or compatible with both the gasoline service station and restaurant, are permitted and comply with Criterion 7.

On March 7, 2019, after an approximately 2-hour public hearing, the Howard County Planning Board voted to issue its decision letter approving SDP-17-041 with 2 conditions of approval regarding landscaping and pedestrian connectivity. On April 5, 2019 Appellants British American Building, LLC, 9620 Gerwig Lane, LLC, and Efficient Properties, LLC timely filed an Administrative Appeal Petition to the Howard County Hearing Authority from the issuance of the Planning Board's decision letter.

On June 19, 2019 Two Farms, Inc., through its counsel, filed a Motion to Dismiss for Lack of Standing. The Zoning Hearing Examiner held a work session on June 26, 2019 during which alleged procedural errors on behalf of both Appellants and Two Farms, Inc. were discussed. See, June 25, 2019 letter from Hearing Examiner LeFaivre. Appellants participated pro se. Your Hearing Examiner reviewed the audio recording of that work session. The Motion to Dismiss was not argued nor was it ruled on during the work session.

For the remainder of the year after the June 26, 2019 work session there was no hearing examiner available to proceed with the appeal. On March 5, 2020 Ann Grillo, Esq. entered her appearance on behalf of the three Appellants. Two Farms, Inc. filed a Motion to Dismiss for Lack of Standing on August 3, 2020 and Appellants filed their Opposition thereto on August 17, 2020.

MOTION TO DISMISS FOR LACK OF STANDING

On September 21, 2020 oral argument was held on the Motion to Dismiss and Opposition thereto. Ms. Grillo, Esq. represented the three Appellants, each of whom testified as to their requisite standing. Chris Alleva also testified in opposition to the Motion to Dismiss. Mr. Coale, Esq. represented Two Farms, Inc., and Mickey Cornelius and Chris Rosata testified in support of the Motion.

Appellants presented the following Exhibits:

Exhibit 1: GIS property location

Exhibit 2: Alleva curriculum vitae

Exhibit 3: Planning Board decision letter and DPZ Technical Staff Report

Exhibit 4: 12/13/18 email to Mr. Oh, Esq. from Valdis Lazdins regarding ZRA

159

Two Farms Inc. presented the following Exhibits:

Exhibit 1: Tax Map providing location of Appellants properties relation to the subject property.

Exhibit 2: AMHA, LLC, et al. v. Howard County Board of Appeals, not reported in A.3d (2015)

The right to appeal an administrative decision is statutory. Howard County Code Section 16.900(j)(2)(iii) provides the statutory authorization for an appeal from the

decision of the Planning Board: “Any person *especially aggrieved* by any decision of the Planning Board and a party to the proceedings before it may, within 30 days thereof, appeal said decision to the Board of Appeals in accordance with section 501 of the Howard County Charter.” (emphasis added) It is uncontroverted that British American Building, LLC, 9620 Gerwig Lane, LLC, and Efficient Properties, LLC were parties to the Planning Board’s consideration of SDP-17-041 and that an appeal from the Planning Board’s decision letter was timely filed.

Special Aggrievement

Following the standards in Bryniarski v. Montgomery County, 247 Md. 137, 230 A.2d 289 (1967), two conditions precedent must be met before a person has standing: (1) he must have been a party to the proceeding before the agency, and (2) he must be aggrieved by the agency decision. A person aggrieved is one whose personal or property rights are adversely affected by the agency decision in a way different from that suffered by the public generally.

Adjoining, confronting or nearby property owners within “sight and sound” are deemed to be specifically damaged and therefore aggrieved. Committee for Responsible Development on 25th Street, et al. v. Mayor and City Council of Baltimore, et al., 137 Md. App.60, 767 A. 2d 906 (2001) A non-property owner is not “prima facia” aggrieved and non-property owners must establish special aggrievement as part of a strict burden of proof. British American Building, LLC owns the property at 9577 Gerwig SE Lane (mailing address 9577 Berger Road), 9620 Gerwig Lane, LLC owns the property at 9620 Gerwig

Lane, and Botzler-Emory Associates, operating as Efficient Properties, LLC, owns the property at 9630 Gerwig Lane. The relationship between James Mazullo and Botzler-Emory Associates is unclear. Both “prima facia” aggrievement and special aggrievement simply give rise to rebuttable presumptions.

In qualifying under the Bryniarski test of prima facia aggrievement, if the contesting property owner is not adjoining or confronting, the qualification of “nearby” depends upon a number of factors including: (1) geographic proximity to the subject property; (2) visibility by clear sight to the subject property; and (3) intervening presence of an obstacle notwithstanding visibility to the subject property. The ability to view the subject property must be measured from the objector’s property and not from the objector’s place of employment or the fact that the objector regularly passes by the subject property. In addition, claims that there will be an increase in traffic flow, impact/change in neighborhood character, or depreciation in property value must be demonstrated to be special rather than merely general detrimental effects. Benn Ray v. Mayor & City Council of Baltimore, 203 Md. App.15, 36 A.2d 521 (2012) Distances of 200-1,000 feet between properties have been deemed to be too far away to support “prima facia” aggrievement but may be close enough to be “almost prima facia aggrieved”. Distances greater than 1,000 feet have been found to be too far away to support a claim of special aggrievement. Ray v. Mayor & City Council of Baltimore, 430 Md. 74, 59 A.3d 545 (2013)

Howard County Code Section 16.200(b)(1) defines “*Adjoining* means land which is touching or would be touching in the absence of an intervening utility or road right-of-way,

BOA Case No. 776-D
British American Building, LLC et al.

other than a principal arterial highway.” Efficient Properties, LLC and 9620 Gerwig Lane, LLC adjoin the subject property with an intervening utility right of way. These properties are located, respectively, 250 feet and 262 feet from the subject property. Both of these appellants have standing under the Bryniarski test sufficient to meet prima facie aggrievement and proceed with their appeal.

British American Building, LLC’s property at 9577 Gerwig SE Lane is approximately 684 feet from the subject property, does not have a clear line of sight to the subject property and has intervening buildings between this property and the subject property. British American Building’s claims of increased traffic, change in the character of the neighborhood, and depreciation in property value are insufficient to convey standing under either the Bryniarski or Benn Ray tests. British American has been found to lack standing in two previous applications involving the subject property, BOA Case Nos. 692-D and 702-D. British American has similarly failed to meet its burden of proof regarding special aggrievement in this appeal. British American does not have standing to proceed with this appeal.

The Motion to Dismiss is granted as to British American Building, LLC and is denied as to Efficient Properties, LLC and 9620 Gerwig Lane, LLC.

APPEAL

On October 16, 2020, a merits hearing was held on Appellants appeal. Ms. Grillo, Esq. represented Appellants Efficient Properties, LLC and 9620 Gerwig Lane, LLC. Jervis Dorton, Chris Alleva and James Mazullo testified on behalf of Appellants. Mr. Coale, Esq. represented Two Farms Inc.. Mr. David Moore, Senior Assistant County Solicitor, represented the Appellee,

Howard County Planning Board. During the course of the hearing, Mr. Moore objected to Appellants raising of issues not preserved before the Planning Board. Colao v. Maryland-National Capitol Park & Planning Comm'n, 167 Md. App. 194, 892 A. 2d 579 (2005) Your Hearing Examiner reviewed the video recording of the March 7, 2019 Planning Board hearing on SDP-17-041 and no issues other than those preserved at the hearing were considered in the decision on this appeal.

THE STANDARD OF REVIEW

Pursuant to Planning Board Rule of Procedure § 1.106.G, appeals to the Board of Appeals of decisions made pursuant to the Planning Board's administrative decision-making authority shall be heard de novo by the Board of Appeals in accordance with the Board of Appeal's Rules of Procedures. Per Howard County Code § 16.302(a) (jurisdiction of hearing examiner), when a matter is authorized to be heard and decided by the Board of Appeals, the matter will first be heard and decided by a Hearing Examiner. Hearing Examiner Rule of Procedure 10.2(c) assigns the burden of proof in an appeal from an administrative agency decision of showing by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

The role of the Hearing Examiner is akin to a first tier judicial reviewer (*i.e.*, the first full evidentiary hearing was before the Planning Board whose decision is appealed), whose functions are similar to a reviewing court, and its review powers are more limited. Hikmat v. Howard County, 148 Md. App. 502, 813 A.2d 306 (2002) Review of the Board's action is narrow and confined to whether the Board's determination was supported by such evidence as a reasonable

mind might accept to support a conclusion, and whether the decision was premised upon an erroneous conclusion of law. *Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 994 A.2d 842 (2010) In making such a determination, the Hearing Examiner may not substitute its judgement for that of the Board unless the Board's conclusions were not supported by substantial evidence or were premised upon an error of law. *People's Counsel for Baltimore County v. Elm St. Dev.*, 172 Md. App. 690, 917 A.2d 166 (2001) In the instant appeal, all parties agree that substantial evidence supports the Planning Board's decision; the issue is whether the decision was based upon an error of law. When considering an error of law, courts give "considerable weight" to an administrative agency's interpretation and application of the statute which the agency administers. *Elm St.*

CONCLUSIONS OF LAW

Appeal Count 1- The Decision and Order dated March 7, 2019 as rendered is in violation of Howard County Code Sec. 19-900(j)(2)(i). This appears to be an attempt to invalidate the Planning Board's Rules of Procedure, which is beyond the scope of this appeal, and no objections as to these alleged violations were raised during the Planning Board hearing and were therefore not preserved.

Appeal Count 2- The Planning Board defied the persuasive authority that bears directly on this case under the Hearing Examiners Decision and Order in BA 753-D and BA 754-D. This argument is beyond the scope of this appeal of BA 776-D and your Hearing Examiner does not have jurisdiction over those previous decisions during the instant appeal.

Appeal Count 3- Failure to notice village boards. Appellants have withdrawn this Count.

Appeal Count 4- The grandfathering clause in Bill No. 46-2016 is an unconstitutional “special law”. This argument is beyond the scope of the instant appeal and your Hearing Examiner does not have jurisdiction to strike County law during the instant appeal. In an advisory note, the referenced grandfather clause pertaining to HCZR 125.0.A.11 which states that it “shall not apply to property for which any Conditional Use application for a gasoline service station was filed or for which a site development plan for a gasoline service station was submitted prior to June 27, 2016” contemplates a pending application and not a future application in perpetuity.

Appeal Count 5- The grandfathering clause in Bill No. 46-2016 amounts to spot zoning and violates the uniformity requirement for zoning laws. Again, this appeal of BA 766-D is not the appropriate forum to challenge County law, is beyond the scope of the instant appeal, and is beyond the jurisdiction of your Hearing Examiner.

Appeal Count 6- The failure by the Planning Board to apply the conditional use criteria in HCZR Section 131 to this project renders the delegation of zoning authority by the County Council to the Planning Board unlawful. Review of the Planning Board’s decision in BA 776-D is limited and review of County Council prior actions, including review of their authority to act, is beyond the scope of the instant appeal.

Appeal Count 7- The Planning Board must apply the conditional use criteria to this project based upon the Howard County Policy Concerning Final Development Plan Phase Criteria Adopted by Planning Board:1-17-79. See discussion *supra*.

Appeal Count 8- Planning Board must comply with the adopted Master FDP Criteria. This was not argued before the Planning Board and is beyond the scope of the instant appeal.

Appeal Count 9- The proposed retail use is not authorized by FDP 55. This is the crux of the instant appeal. Appellants misguidedly also argued the applicability FDP 52(a)-(c) which is not applicable to the subject property and therefore was not considered.

Final Development Plan Phase Fifty-Five was approved by the Howard County Planning Board on May 21, 1969 and subsequently recorded in the Land Records of Howard County. The area within this Final Development Plan (FDP) is applicable to Section 2, Area 2, of the E.G.U. Subdivision which includes the subject property. This FDP states, in pertinent part, as follows:

7. PERMITTED USES-SECTION 17-.031 D:

EMPLOYMENT CENTER LAND USE-INDUSTRIAL LAND USE AREAS

All uses permitted in industrial districts or industrial land use zones are permitted including, but not limited to, all uses permitted in M-1 and M-R districts except, however, that uses only permitted in the M-2 and T-2 Districts are prohibited. Commercial uses ancillary to, or compatible with, permitted industrial uses are permitted including, but not limited to, all of the following:

- a. Restaurants and lunchrooms, and similar establishments serving food and/or beverages.
- b. Personal service shops and retail stores which primarily sell or service merchandise manufactured on the premises.
- c. Banks.
- d. Gasoline Service Stations.

- e. Wholesale Distributors.
- f. Savings and Loan Association.
- g. Business and professional Offices.
- h. Parking Lots or Garages.
- i. Building Supplies and Lumberyards.
- j. Storage of prepared dairy products and other food products to be distributed on truck vending routes.
- k. Such other ancillary uses as may be approved by the Howard County Planning Board.

As found by the DPZ Technical Staff Report, SDP-17-041 complies with all FDP requirements (see Appeal Count 8) including Setback (Criterion 6), Permitted Land Uses (Criterion 7), Height (Criterion 8), Parking (Criterion 9), and Lot Coverage (Criterion 12). SDP-17-041 approved a gasoline station, convenience store, car wash, and associated site improvements. A gasoline station is permitted pursuant to Criterion 7 (d). A convenience store which sells carryout and food and/or beverages is permitted pursuant to Criterion 7 (a) and has been recognized as ancillary to gasoline stations by the courts. *Eastern Servs. Ctrs., Inc. v. Cloverland Farms Dairy, Inc.*, 130 Md. App. 1, 744 A. 2d 63 (2000) The Planning Board also approved the convenience store as an ancillary use pursuant to Criterion 7(k). Car washes are permitted by right in the M-1 Zoning District. HCZR Sec. 122.0.B.11 The Planning Board's approval of SDP-17-041 is in accordance with FDP-55. As all the uses are permitted pursuant to FDP-55, the application of conditional use criteria is not required.

Appellants have failed to show by substantial evidence that the approval of SDP-17-041 by the Planning Board was clearly erroneous, arbitrary and capricious, or contrary to law.

ORDER

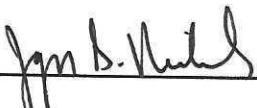
Based upon the foregoing, it is this 4th day of November 2020, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Appeal of the Planning Board's approval of SDP-17-041 for a gasoline station, car wash, convenience store with carryout, and associated site improvements at the southeast intersection of Snowden River Parkway and Minstrel Way, 9585 Snowden River Parkway, in the EGU Subdivision, Section 2, Area 2, Lot 22, be and is hereby **DENIED**; and that the Planning Board approval of SDP 17-041 remains in full force and effect, and it is further, **ORDERED**:

That the Motion to Dismiss for Lack of Standing is **GRANTED**, in part, as to Appellant British American Building, LLC, and **DENIED**, in part, as to Appellants Efficient Properties, LLC and 9620 Gerwig Lane, LLC.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER



Joyce B. Nichols

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in

**BOA Case No. 776-D
British American Building, LLC et al.**

accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.