

IN THE MATTER OF	:	BEFORE THE
<b>PARKER FUEL COMPANY</b>	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 09-021C

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### **DECISION AND ORDER**

On July 27, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of Parker Fuel Company for the underground bulk storage of fuel oil in two 20,000 tanks, an office for taking orders and single axle delivery trucks in B-2 (Business: General) and R-A-15 (Residential: Apartments) Zoning Districts, pursuant to Section 131.N.24 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Thomas M. Meachum, Esquire, represented the Petitioner. At the outset of the hearing, Mr. Meachum stated the Petitioner would present no additional evidence or testimony at the hearing.

The Petitioner, through counsel, introduced into evidence the following exhibits concerning the storage of fuel oil, bottle gas, gasoline, liquefied petroleum.

1. 1948 Zoning Regulations. Paragraph 4A, concerning additional uses in the Commercial A District
2. 1952 Zoning Regulations. B-2 Districts, Section 7.A.6 & 11 (permitted uses)

3. 1961 Zoning Regulations. B-2 Districts, Section 19.24 (requiring Board of Appeals approval)
4. 1977 Zoning Regulations. Special Exceptions, Section \*.8
5. 1999 Zoning Regulations. Special Exceptions Section \*.11.b
6. 2000 Zoning Regulations Revision Notes. Conditional Uses. New Section \*.11.b
7. Amendment to Council Bill 11-2001 limiting the amount of propane gas and liquefied petroleum in the B-2 District. (PAGE 62) and Petition to Amend the Howard County Zoning Regulations dated 1.29.01 ZRA-30, Page 1
8. DPZ Proposal to Amend Howard County Zoning Regulations Section 131.\*.11
9. Current Regulations. Section 131.N.23

#### **FINDINGS OF FACT**

Based upon the preponderance of evidence, I find the following facts:

1. The subject property is located in the 2<sup>nd</sup> Election District on the south side of Baltimore National Pike, west of Chatham Road and is also known as 9139 Baltimore National Pike (US 40) (the "Site"). It is referenced on Tax Map 24, Block 4, as Parcel 933 A, C, & D.
2. The irregularly shaped, 3,025-square foot interior Parcel D lies beyond the west side of Chatham Road and about 300 feet from US 40. It is split-zoned B-2 to the north and R-A-15 to the south. The developed area is concentrated in the B-2 portion of the Site. In this portion are two above ground fuel storage tanks sited near the northern boundary line. To the tanks' southwest is a one-story, metal garage/shelter building within a corner enclosure secured by a gated fence. Within this corner are two accessory buildings and general outdoor storage. The remainder of the Site is used predominately for parking and vehicle circulation. The entrance to

the Site from North Chatham Road is shared with the fast food restaurant development on the abutting Parcel A to the north. The R-A-15 zoned southern portion of the Site is unimproved and is generally wooded.

3. Located between Parcel D and the west side of North Chatham Road is Parcel C, an irregularly shaped, 13,025 square foot parcel and the site of 25 paved parking spaces.

4. Parcel A abuts US 40 and lies to the north of Parcel D. It is improved with a one-story, 3,199-square foot office building housing, in part, the Parker Fuel office. An access easement to Parcels A and C runs along Parcel A's east lot line.

5. Vicinal properties. The B-2 zoned parcel to the north, across US 40, is improved by a gasoline service station. To its west is a small B-2 zoned shopping center. To the east, across North Chatham Road the properties are also zoned B-2. Parcel 650 is improved by a one-story retail building. To its south is a one-story motor vehicle repair business. To the Site's immediate south is the remainder of the R-A-15 zoned bulk of Parcel D. The B-2 zoned Parcel 115 to the west is used as a large outdoor storage yard. To the storage yard's north are several office buildings fronting on US 40.

6. Roads. US 40 has three eastbound and three westbound travel lanes, and left-hand turn lanes at the North Chatham Road intersection within a 150-foot wide right-of-way. The posted speed limit is 45 miles per hour. North Chatham Road from Frederick Road to a point generally to the southeast of the Site is one way northbound. Adjacent to the Site is a southbound lane leading to a loop-turnaround, a northbound lane for left-hand and straight travel, and a right-turn only lane. The pavement width is generally 20 feet within a 30-foot wide right-of-way, but the width varies adjacent to the Site. The posted speed limit is 25 miles per hour. Visibility from

the existing North Chatham Road driveway entrance appears to be acceptable, with estimated sight distance of more than 250 feet to the north to the US 40 intersection, and over 500 feet to the south. According to data from the State Highway Administration, the traffic volume on US 40 west of US 29 was 47,692 AADT (annual average daily trips) as of 2007. There is no recent traffic volume data available for North Chatham Road between Frederick Road and US 40.

1. Water and Sewer Service. The Property is served by public water and septic facilities.
2. General Plan. The 2000 General Plan Policies Map 2000-2020 designates the Property as "Residential Areas and Redevelopment Corridors." The 2000 General Plan Transportation Map 2000-2020 depicts US 40 as an Intermediate Arterial/HOV Transit Corridor and North Chatham Road south of US 40 as a local road.

3. The Proposed Conditional Use. The Petitioner proposes to remove the two 20,000 above ground tanks and replace them with two 20,000 underground heating fuel oil tanks. The two underground tanks would be sited 10.5 feet north of the Site's south/rear B-2 zoning line (65 feet from Parcel D's south/rear property line. A 30' by 40', 21-foot high, metal fuel oil canopy would cover the delivery truck filling area next to the tanks. The paving, asphalt gravel, block wall surrounding the existing tanks, and other miscellaneous site features near the existing tanks would be removed. An irregularly shaped grassed area would replace the paved area surrounding the existing tanks. Portions of the existing woods along the south boundary line of the B-2 zoning district and along the east side of parcel D adjacent to Parcel C would be removed.

4. The Conditional Use would operate from 6:00 a.m. through 5:00 p.m. Monday through Friday and 6:00 a.m. to 2:00 p.m. on Saturday with a maximum of 26 employees. Seven of the employees would be office employees and three would be part-time. Nine single-axle fuel

delivery trucks/tractor trailers would come to the Site to deliver fuel for storage. Apparently, the one-story commercial building used by Parker Fuel (on Parcel A) would be utilized as office space in conjunction with the Conditional Use. Access would continue to be via the existing driveway from North Chatham Road.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, I conclude as follows:

#### **I. General Criteria for Conditional Uses (Section 131.B)**

#### **I. General Criteria for Conditional Uses (Section 131.B)**

**1. Harmony with the General Plan.** Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

**a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**

**b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

General Plan Policies. The General Plan designates the area as a Residential Area/Redevelopment Corridor. Because the proposal is a modernization of an existing commercial use, it will be harmonious with area commercial uses, which define the immediate area.

The Nature and Intensity of the Use. The proposed underground tanks will not change the nature or intensity of the use.

The size of the site in relation to the use. The proposed canopy next to the underground tanks use would only moderately increase the area of the Site. The Site is an appropriate size in relation to the use.

The location of the site with respect to streets giving access to the site. The Site has frontage on an intermediate arterial road in an area characterized by commercial uses and substantial traffic.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed expansion of the conditional use would continue to be combined with a permitted use on another site, the fuel company office, so this section is inapplicable. As the petition notes, the R-A-15 setback requirements do not apply because a portion of the R-A-15 zoned part of Parcel 933 is a part of the project.

**2. Adverse Effect.** Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in a B-2 District. The proper question is whether there are facts and circumstances showing that the

particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, I conclude the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with the bulk storage of fuel oil in a B-2 district.

**a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.**

The petition states that proposed use will not generate anything out of the ordinary for a B-2 zoning use. There is no evidence that the bulk storage or single axle trucks will be driving on and off-site use will cause fumes, odors, glare, vibrations, or hazards. I therefore conclude that any inherent operational adverse effects resulting from the proposed conditional use will not be greater at the subject site than elsewhere in the zone or applicable other zones.

**b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.**

The proposed structures and uses meet all setback requirements and height restrictions. The existing and any proposed landscaping meet minimum requirements. I therefore conclude

the location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

**c. Parking and Loading.** Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

No modification to the existing parking is proposed. Under Section 133.D.4, the office use Section 133.D.4, requires five parking spaces for every 1,000 square feet of retail space. Based on the 3,199-square foot office building on Parcel A, 16 parking spaces are required and 25 are provided. The existing driveway/easement will continue to minimize adverse impacts on adjacent properties.

**d. Access.** The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The existing driveway appears to provide continued safe access, with adequate sight distance.

**II. Specific Criteria for the Bulk Storage of Gasoline, Fuel Oil and Liquefied Petroleum (Section 131.N.24)**

**a.** Maximum storage above ground shall not exceed 10,000 gallons or its equivalent in pounds or cubic feet, for each 20,000 square feet of lot area. Except that total storage of liquefied petroleum in the B-2 district shall not exceed 2,000 gallons and no single container may contain more than 1,000 gallons of liquefied petroleum, total storage shall not exceed 20,000 gallons in the B-2 and M-1 districts.



My decision in this case turns on the construction of the 20,000 gallon total storage limit in the B-2 and M-1 districts. The TSR reads the restriction as an absolute limit, applying to all types of storage, including, in this case, underground storage, and for this reason recommends the petition be approved for one 20,000 gallon underground tank. Disagreeing with the TSR, the Petitioner's counsel introduced in evidence the lengthy legislative history of the conditional use category, which he claimed clarifies that the 20,000-gallon restriction applies only to above ground storage.

The cardinal rule of statutory construction is to ascertain and carry out the real intention of the legislature. The primary source from which we glean this intention is the language itself. We first accord the words their ordinary and natural signification. We must also consider the context in which the provision appears and interpret it in the context of the entire statutory scheme. If the words of a provision are ambiguous, i.e., "reasonably capable of more than one meaning" – that is, their meaning is intrinsically unclear or their application to a particular object or circumstance is uncertain – then resort may be made to surrounding circumstances such as legislative history and prior case law. The effort is to discern the meaning and effect of the language in light of the objectives and purposes of the provision enacted. Such an interpretation must be reasonable and consonant with logic and common sense. *The Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514 (2003).

Heeding these rules of statutory construction, I believe the "total storage" restriction in the second sentence is to be construed within the broader context and purpose of Section 131.N.24.a, the evident purpose of which is to impose maximum above ground bulk storage limits on various fuels. Thus, the above ground storage of gasoline, fuel oil, and liquefied

petroleum is limited to a maximum of 10,000 gallons, or its equivalent in pounds or cubic feet, for each 20,000 square foot of lot area. However, in the B-2 and M-1 districts, the above ground bulk storage of gasoline, fuel oil, and liquefied petroleum is subject to an absolute limit, 20,000 gallons. Additionally, the above ground bulk storage of liquefied petroleum in the B-2 districts is limited to 2,000 gallons, with the qualifier that no single container of liquefied petroleum may contain more than 1,000 gallons of liquefied petroleum.

Giving weight to this construction is the legislative history of the conditional use category, as set forth in Petitioner's Exhibits 1 through 9. When Howard County first adopted zoning regulations in 1948, the then Zoning Commissioner was permitted to approve certain "special uses" in the then Commercial A District, including "fuel oil storage tanks for wholesale or retail distribution, not exceeding 50,000 gallons." By 1954, the storage of gasoline or fuel oil for retail distribution had become a permitted use in the B-2 Districts, but no more than 25,000 gallons could be stored on any lot. The sale of bottle gas or liquefied petroleum for retail distribution had likewise become a permitted use in the B-2 Districts, subject to a 25,000-gallon limit.

These bulk storage permitted uses had become a unified special exception use category (at least in the B-2 zone) by 1961, when the zoning regulations authorized the Board of Appeals to approve, in the B-2 districts, the storage of gasoline, fuel oil and liquefied petroleum, subject to the express condition that the "maximum storage above ground" not exceed 30,000 gallons for each 20,000 square foot of lot area. Under the 1977 regulations, the Board of Appeals could grant a special exception for the bulk storage of gasoline, fuel oil and liquefied petroleum in the

B-2 and M-2 districts, but only to a maximum above ground storage limit of 10,000 gallons for each 20,000 square foot of lot area. In 1999, bottled gas was added to the bulk storage fuels list.

In 2001, Howard County substantially revised Section 131, concerning special exceptions, which henceforth would be termed "conditional uses." Then Subsection 11 was proposed to be renamed to its current category, "Gasoline, Fuel Oil and Liquefied Petroleum, Bulk Storage." As initially proposed, Subsection 11 was proposed to be amended by a 20,000 total storage limit in the B-2 and M-1 Districts.

b. Maximum storage above ground shall not exceed 10,000 gallons or its equivalent in pounds or cubic feet, for each 20,000 square feet or lot area. **In the B-2 and M-1 Districts, total storage shall not exceed 20,000 gallons.**

According to the commentary on the proposed amendment, the additional limitation to be imposed in the B-2 and M-2 districts was generally intended to control the visual impact and compatibility of the use category with neighboring uses and, specifically, to limit the overall size of the use category because a large facility would not be appropriate.

Amendment No. 51, added to the 20,000 gallon total storage limit language, a restriction limiting the total bulk storage amount of propane gas and other liquefied petroleum in the B-2 district. "Except that total storage of liquefied petroleum in the B-2 District shall not exceed 2,000 gallons and no single container may contain more than 1,000 gallons of liquefied petroleum, total storage could not exceed 20,000 gallons in the B-2 and M-1 districts."

The evident purpose of the 2001 revisions to what is now Section 131.B.24.b was (in pertinent part) to impose two restrictions on above ground bulk storage in the B-2 districts, 1) a 20,000 gallon maximum above ground bulk storage limit for gasoline, fuel oil, and bottled gas,

and 2) a 2,000 gallon limit for the storage of liquefied petroleum, with the additional restriction that no single container shall contain more than 1,000 gallons.

The legislative history also makes manifest that while the Howard County Legislature has historically wrestled with the quantities and types of bulk storage permitted by right or by conditional use in the B-2 districts, the debate concerned only above ground storage. In my view, neither the plain language of the B-2 district restrictions nor the legislative history of the conditional use evidence a legislative intent that the 20,000 gallon total bulk storage restriction applies to anything but above ground storage.

Reviewing the Petitioner's proposal to remove and replace the two existing, 20,000 gallon, above ground heating oil fuel tanks with two under ground 20,000 gallon tanks, I therefore conclude the petition complies with Section 131.N.24a.

**b. If a storage area is closed or not operated for a continuous period of twelve months, the storage facilities shall be dismantled and removed from the site.**

This requirement being more in the nature of a condition of approval rather than an approval standard, no legal conclusion is required.

**c. Solid walls such as masonry or wood and masonry may be required by the Hearing Authority when the site borders a residential district. When solid walls are required, landscape planting is required between the outside of the wall and the property line.**

Relying on Sections 128.A.10 and 11, which concern structure and use setbacks and contiguous parcels treated as a single parcel for development and internal zoning setbacks for a multi-zoned site, the TSR similarly concludes that no wood or masonry walls or landscape

planting is required between the different zoning districts. I therefore conclude Section 131.N.24.c is inapplicable.

**ORDER**

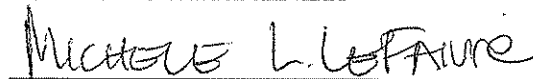
Based upon the foregoing, it is this 3<sup>rd</sup> day of August 2009, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the conditional use petition of Parker Fuel Company for the underground bulk storage of fuel oil in two 20,000 tanks, an office for taking orders and single axle delivery trucks in B-2 (Business: General)/R-A-15 (Residential: Apartments) Zoning Districts, is hereby **GRANTED;**

**Provided, however, that:**

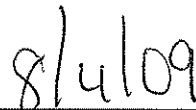
1. The conditional use will apply only to the uses and structures as described in the petition and Conditional Use Plan submitted, and not to any other activities, uses, structures, or additions on the Property.
2. If the storage area is closed or not operated for a continuous period of twelve months, the storage facilities shall be dismantled and removed from the site.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed



**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 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.