

IN THE MATTER OF	*	BEFORE THE
PMIG 1027, LLC	*	HOWARD COUNTY
Petitioner	*	BOARD OF APPEALS
	*	BA-18-003 N&V

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### **DECISION AND ORDER**

The Howard County Board of Appeals convened on December 12, 2019 to consider the petitions of PMIG 1027, LLC (Petitioner) for nonconforming use confirmation and enlargement of a motor vehicle fueling facility under Howard County Zoning Regulation Section 129.0. The Petitioner also seeks a variance from the setback provisions of Section 119.0.D.2 to the existing motor vehicle fueling facility located at 9320 Baltimore National Pike, Ellicott City (the “Property”).

Petitioner proposes changes to the Property that would include removing the existing car wash component and kiosk from which convenience goods are sold, replacing both structures with a convenience store in connection with its motor vehicle fueling facility operations, increasing the number of multi-product dispensers from four to six and creating 20 surface parking spaces.

The Property is in the B-2-TNC (Business: General–Traditional Neighborhood Center) Overlay Zoning District on a corner lot located at Baltimore National Pike and North Chatham Road. The requested variance is from the side setback requirement from the adjacent property to the north that is located in the R-A-15-TNC District.

Board members James Howard, Neveen Kurtom, John Lederer and William Santos listened to the recording of the May 21, 2019 hearing held before the Howard County Hearing

Examiner, reviewed the application, record submissions and the evidence submitted at that hearing. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.<sup>1</sup>

The Board Members indicated that they had viewed the property as required by the zoning regulations and the Hearing Examiner indicated during the hearing on the record that she also had visited the site. The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code.

Petitioner was represented by Daniel Lynch, Esq. with the law firm of McNamee Hosea. At the hearing, Mr. Lynch presented the case on behalf of the Petitioner and called Todd Magiera, the civil engineer who prepared the site plan for the Property, to testify as to certain facts and findings. Lisa Soto, a member of the community, attended the hearing and submitted questions during the hearing on May 21, 2019.

The Petitioner submitted into evidence the following exhibits:

1. Non-Residential District Variance Petition filed December 17, 2018.
2. Application for Non-Conforming Use confirmation filed January 18, 2018
3. Non-conforming Use Plan dated January 16, 2018
4. Non-conforming Use Plan dated June 26, 2019
5. Site Plan dated 04/27/2018 with attached elevations
6. Aerial photographs of site from April 2017 and March, 2019
7. Certification of Advertisements
8. Technical Staff Report dated May 7, 2019
9. Revised Non-Residential District Variance Petition received June 21, 2019
10. Revised Sheet 3 of Site Plan revisions dated May 21, 2019
11. Council Bill No. 46-2016(ZRA-159)

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<sup>1</sup> The Hearing Examiner concluded the hearing, recited her findings and oral approval but left the service of the County prior to issuance of the written Decision and Order.

## **FINDINGS OF FACT**

Based upon the evidence submitted into the record and presented at the hearing, the Board makes the following Findings of Fact:

1. Property Identification. The Property lies in the District 5 and is identified on Tax Map 24, Grid 4, Parcel 996, Lot 1 and the address is 9320 Baltimore National Pike, Maryland (the "Property").
2. Property Description. The Property is approximately 39,866 square feet in size. It is in the B-2-TNC (Business: General – Traditional Neighborhood Center Overlay District) zoning district. The Property is improved with a gasoline station with a 208 square foot sales kiosk, a 1,135 square foot brick car wash building, an approximately 2,380 square foot canopy, and four multi-product fuel dispensers. The property is a corner lot bounded by Baltimore National Pike and North Chatham Road; it is approximately 175 feet deep and relatively shallow compared to similar corner lots in the vicinity. The topography is relatively flat.
3. Vicinal Properties. Vicinal properties are zoned: B-2-TNC to the east improved with bank, shopping center and retail uses, B-2-TNC on the south improved with restaurants, retail and services uses, B-2-TNC on the west improved with retail, office and commercial uses, and R-A-15-TNC to the north improved with apartments.
4. Petition Requests. The combined petitions are for a variance from Section 119.0.D.2 of the zoning regulations to reduce by 20 feet the required 30-foot use and structure setback in the B-2 Zoning District and to confirm and enlarge a non-conforming use according to Zoning Regulation sections 129.0.D&E. The variance request is to comply with onsite parking requirements and avoid impinging upon the minimum drive aisle requirements.



5. Agency Comments. The Department of Planning and Zoning recommends that the request for nonconforming use confirmation and enlargement be granted and that the variance to reduce the 30-foot setback from a residential zoning district by 20 feet be granted. The Department of Planning and Zoning found that the property is substandard and that the fact that it is a corner lot with increased setbacks has a greater impact on the site. The vicinal properties have predominantly intense commercial/retail/office uses. The apartment building to the north is approximately 120 feet from the property lot line and will be screened by a buffer and a six-foot masonry wall. The use of the Property is not being changed in any substantial way and will not substantially impair the use of adjacent properties or be detrimental to the public welfare. The practical difficulties resulting from the location of the property at an intersection and the size and depth of the Property were not created by the owner.

6. Testimony and Evidence. Petitioner indicates that the property has had a motor vehicle fueling facility operating on it since 1974. The Property became non-conforming on October 5, 2016, the date on which Bill No. 46-2016 (ZRA -159) took effect and established a 40,000 square foot minimum lot size. The Property is 39,866 square feet. Petitioner provided fuel delivery tickets dated from 9/28/16 to 12/12/17 and an affidavit of the operator verifying operations in existence at the time of CB 46-2016 as evidence that the uses existed at the time the law changed.

Photos submitted show a fully paved site with the above described existing uses. Petitioner's engineer, Todd Magiera, testified that he prepared the site plan; that it complies with bulk requirements except for the setback. Mr. Magiera testified that the existing site is paved with impervious area of 28,799 square feet and that the proposed use will result in 28,791 square feet of impervious area, which will be a slight reduction. He further testified that the site currently does not contain or treat stormwater and that stormwater sheets off the property. Mr. Magiera

testified that the proposed changes include a new plan in which stormwater will be collected into inlets conveyed and discharged into a bioretention system designed to Maryland standards for environmental site design and will be connected to an existing stormwater system. Mr. Magiera testified that the Property is small relative to the Baltimore National Pike commercial corridor, that he studied the corridor and found only one property similar in size and that the Property is smaller and shallow in comparison to other corner lots. Mr. Magiera testified that the Property is unusually small and shallow. For these reasons and because the lot is a corner lot, the setbacks have a greater impact due to the size, configuration and neighboring properties. Mr. Magiera found that while there are properties of similar size, they are interior lots, not corner lots and therefore have different setbacks. The shallowness of the Property, the fact that it is a corner lot with larger setbacks and that it abuts a R-A-15-TNC property requiring a greater setback combine such that these requirements have a greater impact on the subject Property. Petitioner's justification indicates that moving the parking spaces to accommodate the 30' setback from the residential district would interfere with the need to accommodate a safe circulation pattern for vehicles and fuel delivery. Applicant seeks to redevelop the Subject property with a modern convenience store to stay competitive with the market.

### **CONCLUSIONS OF LAW**

#### **A. Variance Standards Section (130.0.B.2.a)**

A variance may be granted if the Petitioner demonstrates compliance with the four standards set forth in HCZR 130.0.B.2.a., which gauge the impact of the requested relief from certain bulk regulations, dimensional standards in the applicable zoning district, such as setbacks, lot coverage and building height.

Based upon the foregoing Findings of Fact, and for the reasons stated below, the Board finds the requested variance complies with 130.0.B.2.a(1) through (4), and therefore may be granted, as conditioned.

**(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical conditions, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.**

Compliance with this first criterion is a two-part test. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A "practical difficulty" is shown when the strict letter of the zoning regulation would "unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220.

As noted by the Department of Planning and Zoning in its Technical Report, "[t]he Property is substandard to the 40,000-square foot requirement in Section 131.0.O.2 and is located at the intersection of Baltimore National Pike and Chatham Road making it a corner lot and subject to multiple setbacks. The property is approximately 175 feet deep, making it relatively shallow compared to similar corner lots in the vicinity. Section 133.0 of the zoning regulations requires 20 parking spaces, further restricting the developable site area. The size and shallowness of the lot, combined with its location adjacent to two public rights-of-way, present unique physical conditions and practical difficulties in complying with the bulk regulations of the B-2 zoning district." The testimony and study of the Petitioner's engineer is in accord with the Technical Report and the engineer further described the impacts on functionality of drive aisles and fuel



deliveries if the parking areas were to be moved to adhere to the setback requirement. The Board finds the lot is a corner lot which is comparatively smaller and more narrow than similar corner lots in the vicinity and that the combined setbacks therefore create a greater hardship for the modernization of the existing legal use of the Property causing the Petitioner practical difficulty in complying with the setback requirements, in accordance with Section 130.0.B.2.a.(1).

**(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.**

The Property is currently being used as a motor vehicle fueling facility with four multi-product fueling stations, a kiosk from which convenience goods are sold and a car wash. The proposed modernization is substantially the same use as currently exists with a convenience store, a permitted use in the zone, an additional two (six total) multi-product fueling stations, and elimination of the car wash. The site is located on the Baltimore National Pike, a main thoroughfare. The vicinal properties to the south, east, and west are predominantly intense commercial/retail/office uses as noted in the Staff Technical Report and apparent by the site visit and zoning map. The apartment building to the north is more than 120 feet from the Property's north lot line and will be screened by a buffer and six-foot wall.

One resident participated in the public hearing. The resident expressed concern that the wall may end up with graffiti upon it which, she indicated that if it were to occur could be detrimental. Accordingly, as noted by the Hearing Examiner during the hearing, a condition of the grant of a variance is that the wall be properly maintained to be in good condition and free of graffiti or other defacement of the wall. Additionally, the community member expressed concern that the site is currently being used for the rental of trucks, which the owner denied. The Hearing Examiner indicated that grant of the variance would be conditioned upon the Property not being

used for the parking of rental trucks. The Board of Appeals concurs and, with the parking being closer to the residentially zoned property under the requested variance, as a condition of the grant of the variance, parking of commercial trucks whether for sale, rental or otherwise is prohibited on the Property.

The Petitioner's engineer testified about the lack of stormwater management for quantity or quality of stormwater under existing conditions on the Property and that when it rains the water "sheets" off the Property. He then described the project plans for on-site environmental site design for stormwater management and the capture of stormwater and conveyance to an existing storm drain system as part of the plans for modernization of the motor vehicle fueling facility. These plans are an improvement to existing conditions and a betterment for the public welfare. Likewise, testimony at the hearing, and as reflected on the site plan, demonstrate that fenestration will be included to enhance the visual appearance of the new building to be constructed.

**(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.**

The practical difficulties in complying strictly with the setback regulations arises from the location of the Property at an intersection, and the depth/size of the lot which were not created by the owner and do not constitute a self-created hardship. It is also noteworthy that the current commercial standard for modern fueling stations is not a standard created by the owner.

**(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.**

The Board of Appeals concurs with the Department of Planning and Zoning noting that the Property is substandard to the recently adopted 40,000-square foot requirement in Section 131.0.O.2, that its location at the intersection of Baltimore National Pike and North Chatham Road



make it a corner lot with multiple setbacks and the proposed 20-foot encroachment into the 30-foot setback is needed to comply with the parking requirement without adversely impacting travel aisles and fuel delivery operations. The Board of Appeals finds that the request is the minimum necessary to provide relief within the intent and purpose of the Zoning Regulations.

**B. Confirmation of Nonconforming Use (Section 129.D)**

In addition to the variance request, Petitioner requests confirmation that the current use of the Property is a legal non-conforming use under Zoning Regulation Section 129.D. ZRA-159 was adopted through CB 46-2016 and took effect on October 5, 2016. ZRA-159 established 40,000 square feet as the minimal lot size for a motor fueling facility. The Property is approximately 39,866 square feet. Petitioner provided the required plan that illustrated the extent of the motor vehicle fueling facility, consisting of a 208 square foot kiosk, a 1,135 square foot car wash building, a 2,380 square foot canopy and four multi-product fuel dispensers. Historic aerial photos were produced as well as fuel delivery tickets demonstrating that the facility was in existence at the time of adoption of ZRA-159. Accordingly, the current use of the Property is a legal non-conforming use.

**C. Extension, Enlargement or Alteration of Nonconforming Uses (Section 129.0.E)**

**(1) That any changes or additions to the activities taking place in connection with the nonconforming use will not change the use in any substantial way.**

The proposed building enlargement to replace the 208-foot square foot fuel sales kiosk to a 2,666-square foot convenience store and increase the number of fuel dispensers from four to six and the removal of the existing accessory car wash will not change the use in any substantial way. The convenience store addition is a minor expansion of the current use and is a common accessory use to a motor vehicle fueling facility.

(2) **That an enlargement may not exceed 100% of the gross floor area of structures or 100% of the gross acreage in the case of nonconforming land, above that which legally existed at the time the use first became nonconforming.**

The proposed enlargement will not exceed 100% of the gross floor area of structures which existed at the time the use first became nonconforming.

(3) **That the boundaries of a nonconforming use may be enlarged only to provide additional parking area.**

The boundaries are not proposed to be enlarged, therefore, this criterion does not apply.

(4) **That an enlargement would not cause a violation of the bulk regulations for the zoning district in which the property is located.**

The enlargement complies with all bulk regulations except for parking on the north side portion of the property for which the Petitioner is requesting a variance as discussed above.

(5) **That the extension, enlargement or structural alteration would not cause an adverse effect on vicinal properties.**

The adjoining properties to the south, east and west are similarly zoned B-2-TNC and improved with retail, restaurants and office/commercial development. The Petitioner proposes a Type "C" buffer and six-foot masonry wall to screen the proposed use from the apartments to the north. The proposed building addition and increase in pump dispensers from four to six will not cause an adverse effect on vicinal properties.

#### **ORDER**

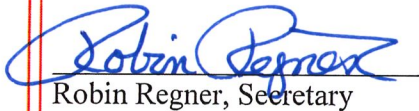
Based upon the foregoing, this 31<sup>ST</sup> day of December 2019, the Howard County Board of Appeals **ORDERS:**

That the Petitions of PMIG 1027, LLC for non-conforming use confirmation and enlargement of a motor vehicle fueling facility and variance to reduce the 30-foot setback from a residential zoning district to 10-feet is **GRANTED**;

Provided however, that:

1. The Property may not be used for the parking, storage or renting of commercial trucks.
2. The six-foot wall to be constructed in connection with screening is to be properly maintained by the owner and/or operator and is to be kept free of graffiti and other defacement.
3. Any red-line site development plan revision shall contain a note referencing what this decision and order approved and the conditions stated above.
4. Petitioner shall obtain all required permits.
5. Petitioner shall comply with all Federal, State, and County laws and regulations.

**ATTEST:**

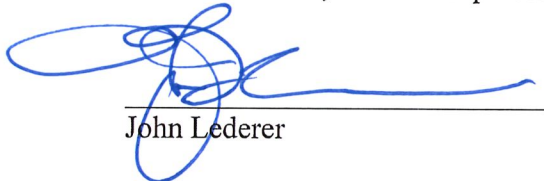
  
Robin Regner, Secretary

**HOWARD COUNTY BOARD OF APPEALS**

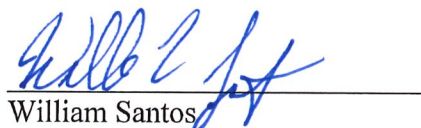
  
James Howard, Chairperson

James Howard  
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ABSENT AT TIME OF SIGNING  
Neveen Kurtom, Vice-Chairperson

  
John Lederer


\_\_\_\_ Did Not Participate \_\_\_\_  
Steven Hunt

  
William Santos

Reviewed by:

HOWARD COUNTY OFFICE OF LAW

Gary W. Kuc  
County Solicitor

  
Barry M. Sanders  
Assistant County Solicitor