

IN THE MATTER OF

**WOELPER ENTERPRISES, INC.,
and FRIENDLY INN, LLC**

Petitioner

* BEFORE THE
* HOWARD COUNTY
* BOARD OF APPEALS
* BA Case No. 09-017V

*

DECISION AND ORDER

The Howard County Board of Appeals convened on March 2, 2010 and April 29, 2010 to hear the amended petition of Woelper Enterprises, Inc., and Friendly Inn, LLC, (the "Petitioners"), for variances to reduce the 30-foot structure and use setback from a residential zoning district to 6-feet for the construction of a patio, in a B-2 (Business: Local) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

All members of the Board were present at the hearings and each Board member indicated on the record that they had each viewed the property as required by the Zoning Regulations. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The requisite notice and advertising of the hearing was provided as required by the Howard County Code.

The case was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the July 28, 2009 Department of Planning and Zoning Technical Staff Report recommendation of approval with conditions, the February 23, 2010 letter from the

Director of the Department of Planning and Zoning recommending conditional approval of the amended variance petition, the General Plan for Howard County, the General Plan of Highways, and the Petition and Plat submitted by the Petitioners were incorporated into the record by reference. This case comes before the Board on a *de novo* appeal filed by Susan Boyd from the September 10, 2009 Decision and Order of the Howard County Hearing Examiner.

The Petitioners were represented by Andrew H. Robinson, Esquire. The following persons testified on behalf of the Petitioners: Jason Cooke, Robert Vogel, Mary Cochran, Steven Iampieri, and Leslie Rogers. The Protestants, Susan Boyd and Charles Christian, were represented by Andrea Le Winter, Esquire and Katherine Taylor, Esquire. The following individuals testified in opposition to the Petition: Susan Boyd, Charles Christian, Patrick Smith, Martin Johnson, and Philip Fass.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the Board makes the following Findings of Fact:

1. The 1.87-acre property is located on the north side of Frederick Road (MD 144) about 240 feet west of Folly Quarter Road. It lies in the 3rd Election District and is identified on Tax Map 16, Grid 22, as Parcel 98, and is also known as 11074 Frederick Road (the "Property"). The Property has a parallelogram shape and is about 163 wide and 510 feet deep.

2. The Property is improved by the 2,091 square foot Friendly Inn (the "Inn"), formally known as the Folly Quarter Inn, a tavern/restaurant that predates the 1948 establishment of zoning in Howard County. According to the variance plan, the Inn is located in the southwesterly portion of the Property. Its front appears to lie within the public street

right-of-way and all but a small triangular section of the main building lies within the 30-foot structure and use setback. At its closest, the rear and side portion of the Inn is located about six feet from the western side lot line. To the rear and eastern side of the Inn is a seasonal, snowball stand accessory use approved by permit since 2007.

To the Inn's north and northeast is an open, unmarked, 250 +/- foot deep, partly gravel, packed earth parking area and lawn. A small, unused building sits about 130 feet from the front property line and about 20 feet from the east side lot line. Two unenclosed dumpsters are located behind the unused building.

3. In 1979, the Board of Appeals, in BA Case No. 928-C, confirmed the existence of a nonconforming restaurant and tavern on the Property. In 2004, the Property was rezoned from RC-DEO (Rural Conservation: Density Exchange Option) to B-1 (Business: Local) as Amendment No. 16.25 of the 2004 Comprehensive Zoning Plan. With the rezoning, the nonconforming uses became a fully permitted use.

4. All surrounding properties are similarly zoned RC-DEO. The Board of Appeals, in BA Case No. 98-15E, approved to the northeast and east of the Property a special exception for elderly housing for former Parcel 99, now part of Parcel 446, which was finally and recently developed as single family attached age-restricted adult housing.

The Board in BA Case No. 00-52E similarly approved the western adjoining portion of Parcel 440 (originally Parcel 204) for a much larger elderly housing project and the property was developed as an age-restricted housing project.

Across MD 144, to the Property's south, is Lot B of Parcel 214, a large open field subject to a preservation easement.

5. MD 144 in this area has two travel lanes and about 28 feet of paving within a proposed 80-foot right-of-way. The posted speed limit is 40 MPH. The estimated sight distance from the existing entrance is more than 1,000 feet to the east, but very limited to the west due to the building and vegetation. State Highway Administration data shows 8,771 average daily trips as of May 2006 on MD 144 east of Folly Quarter Road and the traffic volume on MD 144 west of Marriottsville Road was 7,633 average daily trips as of April 2007.

6. The Property is located in the Metropolitan District, specifically the Marriottsville Service Area for sewer, and within the existing and under-construction area for water. The Property is currently served by water and sewer facilities.

7. The Property is designated Rural Conservation in the 2000 General Plan's Policies Map 2000-2020. MD 144 in this location is depicted as a Minor Arterial on the General Plan's Transportation Map. It is also designated as a Scenic Road.

8. As originally submitted, the Petitioners sought a variance to reduce the 30-foot side structure and use setback from a residential district to six feet to construct an outdoor seating area for the snowball stand. By letter dated June 15, 2009 from Petitioners' counsel, Andrew Robinson, to Bob Lalush, DPZ, the Petitioners amended the petition to accommodate development plans for the eventual expansion of the outdoor dining area for food consumption, including the consumption of carryout food. At the outset of the August 3, 2009 proceeding, the Petitioners' counsel proposed to amend the petition further to include a covering and/or extended awning over the proposed patio area. While the Petitioners' amendment regarding the use of the outdoor seating area for food consumption, including the consumption of carryout food, in connection with the Petitioners' existing restaurant use on the Property was considered and approved, the Hearing Examiner denied the amendment to include a roof over the outdoor

dining area because the Petitioners were unable to provide sufficient detail with respect to the construction of roof.

On December 14, 2009, the Petitioners submitted another amended petition and plan with the Board of Appeals. The Board of Appeals Chairperson requested an updated technical staff report from DPZ which was filed with the Board on February 23, 2010. The latest amendments to the variance petition and plan submitted to the Board are as follows:

(a) The Petitioners request a variance from Section 118.D.2.b of the Zoning Regulations to reduce the required 30' structure and use setback to 6' from the side property line for the construction of a patio.

(b) The Petitioners no longer propose to use the outdoor seating area in connection with the existing snowball stand accessory use on the Property. As such, the Petitioners' use of the proposed outdoor seating area shall be limited to: (i) food and beverage consumption, including the consumption of carryout food, and table service in connection with the Petitioners' existing restaurant use on the Petitioners' Property; and (ii) the construction of a covering over a portion of the proposed patio area.

(c) As per the Decision and Order of the Hearing Examiner, the Petitioners shall install a three-foot high permanent fence or three-foot high permanent, spaced planters along the outdoor seating area perimeter, except where the outdoor seating area's perimeter adjoins a structural wall. This perimeter shall provide for one means of ingress/egress for ADA access only, as required by the Department of Licenses and Permits, and the Petitioners shall install a sign at this access point informing all other patrons to enter and leave the outdoor seating area through the existing restaurant.

(d) The Petitioners' outdoor seating area shall be covered by a certain permanent roof structure consisting of the following:

- (i) Height – 8-12' ceiling and another 5-7' to top of pitched roof;
- (ii) Frame Material – wood or steel post and beam construction;
- (iii) Roof Material – Metal seam or plywood and shingles; and
- (iv) Area Covered – 1,228 square feet.

(e) Lighting will be installed as required by applicable State and local building codes and will at all times comply with the Zoning Regulations.

(f) The Petitioners shall not provide piped-in and/or live outdoor music within the variance area.

10. Robert Vogel, the Petitioners' site engineer, testified that the Property is unusually long and narrow for B-1 zoned properties and measures a mere one hundred fifty feet in width at its frontage with Frederick Road. In addition, Mr. Vogel testified that the Property was completely surrounded by residentially zoned properties, and, as a result, was subject to significant setback restrictions from all lot lines. As set forth on the Petitioners' Exhibit #8 "Area Out of Building Restriction Line" – the applicable side use and structure setback lines reduce the building envelope by forty-five percent and leave a developable width of approximately one hundred feet. Mr. Vogel testified that a standard double aisle parking layout for B-1 uses on the Property would reduce the width of the developable area down further to a mere thirty feet. Mr. Vogel stated that the proposed patio location is truly the only logical area to construct the Petitioner's proposed patio due to the Property unique conditions and safety concerns relating to proximity of the existing structure to Frederick Road. In Mr. Vogel's opinion, the Property's narrow width presented a unique physical condition on the site.

11. Jason Cooke, a majority owner of the Friendly Inn, LLC, testified that the existing structure was constructed over 70 years ago. Mr. Cooke stated that the Petitioners are proposing to improve the site by the addition of a covered patio area to the rear of the building. Mr. Cooke stated that the ability to offer an outdoor dining area is vital to the continued operation of the existing use on the Property and would allow the use to compete with neighboring uses in the area. To ensure that this patio area runs parallel to the existing uses of the Friendly Inn and maintains the orderly development of the Property, the Petitioners have requested a reduction in the 30' use setback to 6' along the western perimeter of the property to match the existing Friendly Inn building. The proposed patio area that would encroach would not encroach into this side setback any more than the existing non-complying building.

12. Steven Iampieri, the general manager of the Friendly Inn, testified and stated that the Inn currently employs 22 individuals. Mr. Iampieri stated that the outdoor seating area will provide growth to the business.

13. Mary Cochran testified in support of the amended petition and stated that she enjoys going to the Friendly Inn and she feels that a patio would be beneficial to the Inn.

14. Leslie Rogers, a patron of the Friendly Inn, testified in support of the amended petition and stated that she believes that the outdoor patio would only serve to enhance the quaint environment of the Inn.

15. Susan Boyd, a nearby neighbor, testified in opposition to the amended petition and stated that she is opposed to an outdoor dining area with no barriers. Ms. Boyd stated that the character of the neighborhood will be changed due to noise and light intrusion generated by the outdoor patio's use.

16. Charles Christian, another nearby neighbor, testified and stated that he was opposed to the amended petition because he moved into the neighborhood in November of 2008, with the expectation that there would be no changes made to the existing Friendly Inn. Mr. Christian also expressed his concern that the proposed patio will generate excessive noise.

17. Patrick Smith, a real estate agent who lives in the nearby Ellicott Meadows development, testified and stated that it will be difficult to sell remaining undeveloped lots in Ellicott Meadows because of the proposed patio.

18. Martin Johnson, a former liquor inspector for Howard County, testified and stated that an outdoor patio use may generate a significant increase in noise complaints.

19. Philip Fass, a nearby resident, testified in opposition to the petition and stated that he has a clear view of the Friendly Inn from his residence. Mr. Fass stated that on one occasion he witnessed an individual publicly urinate on the Property.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides that a variance may be granted only if all of the following determinations are made:

- (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 condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.
- (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.

(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.

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

Based upon the foregoing Findings of Fact, the Board concludes as follows:

1. The Board concludes that the narrow width of the Property is a unique physical condition of the Property and the location of the non-complying structure within the side setback is an existing feature peculiar to the particular lot that cause the Petitioners practical difficulty in complying with the side setback requirement, in accordance with Section 130.B.2.a(1).

2. The granting of the variance will enable the Petitioners to construct an outdoor patio serving a long-established use. The outdoor covered patio would not be any closer to the residential district than the existing non-complying building. The patio use with restaurant/tavern seating is a relatively low to moderate use in terms of intensity. The patio area will be well separated from dwellings in the development to the west by distance, proposed landscaping and a storm-water management facility. The patio area will be screened from dwellings to the east by distance and part of the existing building. The patio area location will exceed the required side setback from the eastern property line. The Petitioners propose to install a three-foot high permanent fence or three-foot high permanent spaced planters along the

outdoor seating area perimeter and plant Leyland Cypress trees to better screen the use from adjoining residences. As a further condition of approval, the Board is requiring that the Petitioners plant additional Leyland Cypress trees along the northernmost portion of the outside patio. As such, the Board finds that the variance, if granted, will not alter the essential character of the neighborhood in which the lot is located, nor substantially impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, in compliance with Section 130.B.2.a.(2).

3. The practical difficulty in complying strictly with the setback regulation arises from the shape of the lot and the location of the non-complying structure within the existing side setback. The Petitioners did not create the practical difficulties or hardships, and so comports with Section 130.B.2.a.(3).

4. The Board concludes that the proposed outdoor covered patio is a reasonable size. The proposed patio area will not encroach into the side setback line any more than the existing structure of the Friendly Inn does currently. As such, the Board concludes that the variance is the minimum variance necessary to afford relief, in accordance with Section 130.B.2.a.(4).

ORDER

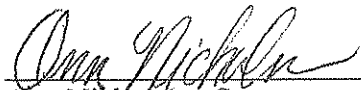
Based upon the foregoing, it is this 8th day of June, 2010, by the Howard County Board of Appeals, **ORDERED:**

That the amended petition of Woelper Enterprises, Inc., and Friendly Inn, LLC, Petitioners, for variance to reduce the 30-foot structure and use setback from a residential zoning district to 6-feet for an outdoor covered patio in a B-1 (Business: Local) Zoning District is hereby **GRANTED**, subject to the following conditions:

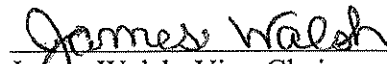
1. The variances shall apply only to the amended petition/plan and uses submitted to the Board on March 2, 2010, as Petitioner's Exhibit Nos. 1 & 2, and not to any other activities, uses, or structures on the Property.
2. The Petitioners shall plant additional Leyland Cypress trees along the northern border of the outdoor patio
3. The Petitioners shall not provide piped-in and/or live outdoor music within the variance area.
4. All outdoor lighting shall comply with the Zoning Regulations.
5. The Petitioners shall obtain all necessary permits.
6. The Petitioners shall comply with all applicable Federal, State, and County laws and regulations.

ATTEST:

HOWARD COUNTY BOARD OF APPEALS



Ann Nicholson, Secretary

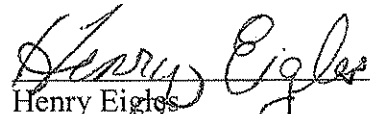

Albert Hayes, Chairperson


James Walsh, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR


Maurice Simpkins


Barry M. Sanders
Assistant County Solicitor


Henry Eagles

Did Not Participate
*John Lederer

*Board Member Kevin Doyle's term serving on the Board of Appeals expired on May1, 2010, prior to the issuance of this Decision and Order. His replacement, John Lederer, did not participate in this decision.