

IN THE MATTER OF	:	BEFORE THE
SWEET PEA FOODS, INC., T/A	:	HOWARD COUNTY
MCDONALD'S	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 10-002S

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DECISION AND ORDER

On January 24 and February 14, 2011, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Sweet Pea Foods, Inc., t/a McDonald's, to erect two signs in a B-2 (Business: General) Zoning District, in accordance with Section 3.513 of the Howard County Sign Code (the "Sign Code"). For Sign A, the Petitioner requests a variance to erect a 9'11" (H) x 10' (W), 99.2 aggregate square foot pole sign 40 feet from grade to the top of the sign in total height, with a 14-foot setback from the US 1 right-of-way (ROW) rather than the 99'2" foot-setback required in relation to the aggregate sign area and the 80-foot setback required in relation to the sign height. For Sign B, which would be attached beneath Sign A, the Petitioner requests a variance to erect a 3' (H) x 8' (W), 24 aggregate square foot changeable text sign 13 feet high from grade to the top of the sign.

The Petitioner certified to compliance with the notice, advertising, and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esq., represented the Petitioner. John Eidberger testified in support of the petition. Michele Miller testified in opposition to the petition as the representative of the Greater Elkridge Community Association (GECA).

The Petitioner introduced into evidence Exhibits 1-12, twelve copies of photographs along US 1 taken on December 22, 2010. Opponent Michele Miller introduced into evidence Opponent's Exhibit 1, four copies of photographs of the McDonald's building taken at various times and dates.

FINDINGS OF FACT

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

1. Property Identification. The subject property is located in the 3rd Election District. It is referenced as Tax Map 38, Parcel 127 and is also known as 6225 Washington Boulevard (the Site). The B-2 zoned, generally square Site is about 2.16 acres in size.
2. Property and Area Description. The existing McDonald's structure is sited horizontal to US 1 (Washington Boulevard) and is set back from the ultimate ROW. US 1 in the area of the site falls gradually in elevation from a high point south of the Exec Motel (Petitioner's Exhibit 2). The Site appears to have been graded. (Petitioner's Exhibit 5.) Consequently, the Burger King Restaurant sharing the common southwesterly lot line with McDonald's sits at a higher elevation, about four feet according to the Department of Inspections, Licenses and Permits technical staff report (TSR). The Burger King structure also sits closer to US 1 and partially blocks the view of the McDonald's structure.

There is an existing McDonald's sign in the Site's southwestern corner. Although it is visible to southbound motorists, northbound motorists cannot view it until close to the McDonald's site owing to a large evergreen tree on the Burger King lot (the Burger King tree). This tree does not obstruct the view of the Burger King sign located closer to the ROW.

This section of the east side of US 1 is populated by a continuous line of utility poles. There are multiple clusters of landscaping trees on the properties north and south of the Site in the same general area as the utility poles.

3. Vicinal Properties. The B-2 zoned Property to the northeast is improved by a one-story commercial structure housing Fuentes Brothers Auto Sales. To the east, the R-12 (Residential: Single Family) zoned property (5934 Bonne View Lane) is improved by a single-family dwelling. The adjoining property to the southwest is the site of a Burger King restaurant. Across US 1 to the west is the site of Elkridge Crossing, a garage townhome and condominium subdivision.

4. Roads. US 1 is an interstate highway with a 45 MPH speed limit in the area of the Site.

5. The Requested Sign Variances. Sign A is 9'11" (H) x 10' (W), 99.2 aggregate square foot pole sign 40 feet from grade to the top of the sign in total height, rather than the 99'2" foot-setback required in relation to the aggregate sign area and the 80-foot setback required in relation to the sign height. It would be sited 14 feet from the US 1 ROW, as measured from the leading edge of the sign frame. According to the sign variance plan, the sign frame would be topped by a 6'3" (H) McDonald's golden arch. The 3'8" high red sign frame

would contain the word "McDonald's" in white lettering. Sign B, which would be attached beneath Sign A, is a 3' (H) x 8' (W), 24 aggregate square foot, changeable text yellow sign 13 feet high from grade to the top of the sign. There are tracks for three lines of six-inch high changeable copy.

6. John Eidberger testified to being a construction manager for McDonald's and regularly reviewing sites for sign, driveways and other matters. He stated the McDonald's building was reconstructed in 2009 after a fire. He inspected the property and reviewed the signage for the restaurant. He also explained McDonald's restaurants depend on impulse customers.

7. Referring to Picture A in the Department of Inspections, Licensing and Permits (DILP) technical staff report (TSR), Mr. Eidberger testified it shows the current McDonald's sign and the location of the utility poles at the ROW. He estimated the pole lighting in the picture to be about 50 feet in height.

8. Describing Sign B, Mr. Eidberger testified it would advertize meal specials. It would not be visible from northbound traffic. It would be visible to southbound traffic.

9. In response to questioning, Mr. Eidberger testified that the 40-foot height for Sign A is necessitated by obstructions along US 1, including the utility poles and trees depicted in the Petitioner's exhibits and the state highway sign to the north of the site. He opined that a sign 40 feet above the trees and the Burger King building would be partially visible to northbound traffic. It would give the restaurant a chance to compete with the Burger King, whose sign is more visible.

10. Michele Miller testified the houses behind McDonald's would be able to see the proposed sign. Referencing the four photographs in Opponent's Exhibit 1, she testified they document the level of business at the McDonald's at this location. The photographs were taken in the early morning and evening, when the restaurant is well illuminated. The bottom photograph on Page 3 shows the visibility of the existing sign and the restaurant to southbound traffic. In her opinion, the proposed sign does not comport with the Route 1 Manual, especially its requirements and recommendations for freestanding signs along the Route 1 corridor. She opined the proposed signage should be denied because it does not comply with the manual. She also testified to being concerned about the sign's height setting an inappropriate precedent along US 1. It was her further opinion that this section of US 1 did not function as an interstate highway; rather, it is used by persons who travel it on a daily basis. She further contended that people who frequent the restaurant do so with forethought, not impulsively.

11. The TSR finds trees and utility poles along US 1 and the Burger King tree block northbound motorists' view of the proposed 40-foot sign at the proposed location until they are about 100 feet from the McDonald's entrance. The TSR consequently concludes the sign at the proposed 40-foot height is not the minimum that would afford relief, because the sign would not be high enough to be visible.

12. It further concludes that a ground mounted McDonald's sign located at a suggested 0' (zero) foot setback from the US ROW would be more visible than the proposed 40-foot high sign.

13. Responding to the TSR's conclusions about a ground mounted sign, Mr. Eidberger opined that a zero setback monument sign would be not be visible to northbound traffic until motorists were in front of the Burger King property. The monument could not be seen by southbound traffic because of the grade. Referring to the sixth photograph in Petitioner's Exhibit 1, he explained the McDonald's driveway matches the grade of the US 1 roadbed. Consequently, vehicles waiting to pull out would block the view of a monument sign.

14. In Mr. Eidberger's opinion, the proposed sign is exempted from the application of the manual's requirements and recommendations because the reconstruction of the post-fire McDonald's building was a rebuild requiring only a building permit and not a site development plan (SDP).

15. Petitioner's counsel Thomas Meachum argued in closing that the proposed sign could not set a precedent because a sign variance is a site-specific form of relief.

CONCLUSIONS OF LAW

I. Applicability of the Route 1 Manual¹

A preliminary issue in this case is the applicability of the Route 1 Manual to the proposed sign variance petition. Ms. Miller, testifying on behalf of the Greater Elkridge Community Association, contends the manual should dictate the signage for the property.

The Petitioner, through Mr. Eidberger's testimony and Mr. Meachum's arguments at closing, contends the manual is inapplicable to the sign variance petition because it is an

¹ The Hearing Examiner continued the hearing to allow the parties the opportunity to address the proposed signage in relation to the Route 1 Manual. The TSR does not reference the Manual.

exemption within the meaning of the Manual. The Petitioner points us to Chapter 6, which exempts certain activities from the application of the manual's requirements and recommendations. The Exemptions language on Page 55 reads as follows.

It is not the intent of these new regulations and this Manual to impose an undue hardship on the owners of existing structures and uses who propose minor improvements. Thus, the following minor alterations or enlargements are exempt from complying with the Manual:

1. Expansion of a building by less than 10% of the floor area of the building, as existing on the effective date of this legislation, up to a maximum of 5,000 square feet of floor area.
2. Building repairs, repaving or restriping of parking areas, and other maintenance or repair that does not enlarge a building or a use.
3. Removal of parking areas, driveways or other paved areas.
4. A change in the use of an existing building (to a use permitted in the district), if the Department of Planning and Zoning determines, in accordance with the Subdivision and Land Development Regulations, that no changes to site improvements are required.
5. Other minor alterations to a developed site that do not require a site development plan or a revision to an approved site development plan. This includes alterations approved through a waiver of the site development plan requirement or a red-line revision to an existing site development plan.

The Petitioner reads this language as exempting the proposed sign from the Manual's recommendations because the rebuilding of the McDonald's restaurant was performed pursuant to a building permit with no revision to the approved McDonald's SDP.

The Petitioner's claim to the proposed signs' exemption based on the reconstruction of the restaurant through a building permit is premised on false logic—that the exemption available for the rebuilding of the restaurant sweeps in the proposed signage. To reconstruct

the destroyed restaurant, the Petitioner applied for a building permit, which the Department of Inspections, Licensing and Permits (DILP) granted. This building permit, however, has no bearing on any commercial signage on the site because DILP regulates commercial signage through the Sign Code and a separate permit process. Were the Petitioner's argument about the inapplicability of the proposed sign carried to its logical conclusion, no commercial sign along US 1 would appear to be subject to the Manual because signs do not require a site development plan.

Since the proposed signage is not exempt from the Manual, we must now consider the Manual's signage recommendations in the context of the criteria for granting a variance from the Sign Code. We begin with the implementing policy of the Route 1 Manual.

The Howard County Council adopted the Route 1 Manual by Resolution No. 175-2033 in March 2004. The Department of Planning and Zoning subsequently revised the manual and the Council adopted the revised manual by Resolution No. 52-2009.² The Statement of Authority for the Manual references multiple documents, including the Howard County Sign Code. With respect to the Sign Code, the Manual states "[t]he Howard County Sign Code establishes the requirements for installing signs." July 2009 Route 1 Manual, Page 3.

A stated intent of the July 2009 Route 1 Manual, is, in pertinent part, "to enhance the image and functioning of the Route 1 corridor" through streetscape requirements and

² The 2009 amendments reflect changes to the Zoning Regulations, particularly the creation of three zoning districts exclusive to the Route 1 corridor, the 2008 completion of the Maryland State Highway Administration's Route 1 corridor study and its report, the US 1 Corridor Improvement Strategy, and the 2008 establishment of a Design Advisory Panel, which reviews development areas subject to Route 1 Manual requirements. The Exemptions language is unchanged from the 2004 manual.

recommendations that apply both to the corridor districts and properties in the B-1, B-2, M-1, and M-2 zoning districts adjacent to Route 1. The Route 1 Manual has seven purposes:

1. Improve the visual appearance of the corridor's streetscape.
2. Enhance the appearance and value of developments in the Route 1 corridor.
3. Establish the desired design character for new developments in the CE, TOD and CAC Districts.
4. Clarify how the Route 1 design requirements and recommendations affect the renovation and expansion of existing uses.
5. Achieve better land use and function by using land more intensively and efficiently.
6. Increase the safety of pedestrians and vehicular traffic, enhance pedestrian accommodations and connectivity, and improve pedestrian and vehicular access to shopping, services, housing and employment.
7. Promote the use of transit and alternative modes of transportation, such as bicycles.

July 2009 Route 1 Manual, Page 3.

The Manual is divided into four major sections: corridor zoning districts, streetscape design, site design, and building design. Of import to this case are the signage goals, requirements and recommendations set forth in Chapter 4, Site Design. These are as follows.

Goals: The Route 1 corridor, being an older commercial and industrial corridor, has many freestanding signs that have, over time, helped to create an overall chaotic appearance of the corridor. Citizens have stated that the existing signage along the Route 1 roadway contributes to the corridor's overall negative character. Providing a more consistent placement and orientation of signage should reduce this sense of visual clutter.

Requirements:

1. Comply with the requirements of the Howard County Sign Code, administered by the Department of Inspections, Licenses and Permits.

Recommendations:

1. Instead of freestanding signs, select building mounted or wall signs that are integrated into the building's architecture.

2. For wall signs, please see the chapter on Building Design and the section entitled Signs Attached to Buildings.
3. Use durable materials, subdued colors and professionally executed graphic design.
4. Select monument or low-profile, ground mounted type signs instead of freestanding pole mounted signs.
5. Without limiting sight distance, place freestanding signs closer to the property line to promote a street edge appearance.
6. Coordinate materials and colors for freestanding signs with materials and design elements/character from the principal buildings on the site. This helps bring the identity of the building to the street edge.
7. Eliminate any glare visible to motorists and pedestrians from the sign's lighting source. Freestanding signs may be internally or externally lit.

As noted above, the Howard County Sign Code is the authority for these requirements and recommendations. Turning to the Sign Code itself, we look to its purpose statement, as is set forth in Section 3.500.(a) and (b).

(a) The purpose of this subtitle is to regulate all exterior signs and interior window signs placed for exterior observance so as to protect property values, to protect the character of the various communities in the county, to protect health, safety and morals, and to promote the public welfare.

(b) The principal features are the restriction of advertising to the business or use of the premises on which the sign is located and the restriction of the total sign area permissible per site. Any sign placed on land or on a building for the purpose of identification or for advertising a use conducted thereon or therein shall be deemed accessory and incidental to such land, building or use. It is intended that the display of signs will be appropriate to the land, building or use to which they are appurtenant and be adequate, but not excessive, for the intended purpose of identification or advertisement. With respect to signs advertising business uses, it is specifically intended, among other things, to avoid excessive clutter among displays in their demand for public attention.

Thus, by its plain language, the primary purpose of the Sign Code is aesthetics—the location, size and appearance of signs and their effect on property values and the visual character of communities. A second purpose is the protection of property values, protection of

the character of the various communities in the county, protection of health, safety and morals, and the promotion of the public welfare. Because the Route 1 Manual's recommendations for signs are intended to be used to implement these purposes, the Hearing Examiner must apply and weigh its recommendations when evaluating the specific Sign Code criteria for granting sign variances. Only this methodology will ensure the "display of signs will be appropriate to the land, building or use to which they are appurtenant and be adequate, but not excessive, for the intended purpose of identification or advertisement."

Of consequence to this case are the Section 3.513.(b)(4) and (5) variance criteria, which require, respectively, an evaluation of the proposed sign's adverse effect on the appropriate use and development of adjacent properties, and whether the requested variance is the minimum necessary to afford relief, without substantial impairment of the Sign Code's intent, purpose and integrity. We turn now to the criteria for granting a sign variance, where we consider the Manual's signage recommendations with respect to the proposed signs.

II. Specific Sign Variance Criteria (Section 3.513(b))

Section 3.513(b) of the Sign Code permits the Board of Appeals to grant variances from the provisions of the Sign Code where certain determinations are made. Based upon the foregoing Findings of Facts, the Board of Appeals Hearing Examiner concludes as follows.

Sign A: The 40-Foot High McDonald's Sign

- 1. That there are unique physical conditions or exceptional topographical conditions peculiar to the property on which the proposed sign is to be located, including the location of existing buildings and other structures, irregularity,**

narrowness or shallowness of the lot, irregularity of the road right-of-way, location on a highway that has a dependency on nonlocal use, which conditions lead to practical difficulty and unnecessary hardship in complying strictly with the provisions of this subtitle.

The Site has frontage along US 1, which has a dependency on nonlocal use. This condition leads to practical difficulty and unnecessary hardship in complying strictly with the setback requirements of the Sign Code, in accordance with Section 3.513.(b)(1).

2. Or, that there are obstructions, such as excessive grade, building interference, structures or landscaping on abutting property or properties which seriously interfere with the visibility of a proposed sign, resulting in practical difficulties and unnecessary hardship in complying strictly with the provisions of this subtitle.

The McDonald's building is set back farther from US 1, causing the Burger King restaurant to obstruct motorist's view of the sign if it were located 80 or 99 feet from the ROW. The Site is also lower in elevation than adjoining properties, which would also reduce the visibility of a conforming sign at, as do utility poles and landscaping trees. These obstructions impede northbound motorists' ability to see a conforming sign in a safe manner, causing practical difficulties and unnecessary hardship in complying with this subtitle, in accordance with Section 3.513.(b)(2).

3. Or, that there are historical, architectural, or aesthetic characteristics which shall be considered.

There are no historical, architectural, or aesthetic characteristics of the Property to be considered under section 3.513.(b)(3).

4. That the variance, if granted, will not adversely affect the appropriate use or development of adjacent properties, nor result in a dangerous traffic condition.

There is no evidence of a dangerous traffic condition resulting from the proposed sign. Although Opponent Michele Miller testified the sign would be visible to adjacent residential properties, she presented no evidence to establish this point as an adverse effect.

It is a different matter when we consider the Route 1 Manual's recommendations in relation to the evaluation of adverse effects on the use or development of adjacent properties. The Manual recommends the use of monument or low-profile, ground mounted type signs instead of freestanding pole mounted signs and placing freestanding signs closer to the property line to promote a street edge appearance. As discussed in the 5th criteria for evaluating a requested sign variance, Sign A appears to be a standard corporate freestanding pole sign. Its location, height and design are intended less to identify or advertise the business, as the Sign Code requires, than to satisfy the Petitioner's desire to construct a standard corporate sign in order to compete for the visual attention and impulses of motorists traveling northbound on US 1, who will more readily see the Burger King sign.

Because the proposed sign does not comport with the intent and purpose of the Sign Code and with the Route 1 Manual's location and physical design recommendations, Sign A necessarily generates adverse effects on the use and development of adjoining properties. Sign A does not accord with Section 3.513.(3)(4).

The sign does comport with the Route 1 manual's recommendation that freestanding sign incorporate material and colors with materials and design elements/character from the principal buildings on the site, but it does not bring the identity of the building to the street edge, as the Manual recommends, because it would be set back some 14 feet.

5. That the requested variance is the minimum necessary to afford relief, and can be granted without substantial impairment of the intent, purpose and integrity of this subtitle.

DILP recommends the proposed sign be denied because it is not the minimum necessary to afford relief. The TSR reasons the utility poles and trees so close to US 1 would block the view of the proposed sign. It would therefore not be visible until a northbound motorist is about 100 feet from the McDonald's entrance/egress.

The Hearing Examiner concludes the Petitioner has not sustained its burden of production and persuasion that the sign itself is the minimum necessary. In addition to the TSR's evaluation of Sign A, the Hearing Examiner observes the sign petition in this case asks the Hearing Examiner to consider the fact that "[t]his signage was approved in McDonald's request for its Jessup location in Board of Appeals Case No. 09-001S." Having reviewed this earlier case, the Hearing Examiner finds that proposed Sign A and the sign approved in BA 09-001S are identical in height (40 feet) and have identical sign cabinets and McDonald's arches. That the Petitioner asks the Hearing Examiner to consider the identicalness of Sign A in this case and the sign approved in Board of Appeals Case No. 09-001S gives lie to its claim about the proposed signage not setting a precedent. The very reference in a sign variance petition to an identical sign approved in a previous sign variance case is clearly intended to support a positive evaluation of the requested variance.

Returning to this section's mandate that a sign variance shall be issued only upon a determination that the variance is the "minimum necessary," the Hearing Examiner finds that "minimum necessary to afford relief" means relief with a minimum deviation from the

requirements of the Sign Code, and as of 2004, from the recommendations of the Route 1 Manual. By this language, the Hearing Examiner need grant a petitioner approval to erect a sign only to the height, location, and physical design that she believes will provide minimum relief and preserve the integrity of the Sign Code and the Route 1 Manual. Because the proposed sign in this case and the sign approved in Board of Appeals Case No. 09-09-001S are the same, the Hearing Examiner must necessarily conclude Sign A is not the minimum necessary to afford relief; rather, it appears in all respects to be a standard corporate pole sign that the Petitioner would like to use in multiple locations.

Given that the extent of the variance requested is not the minimum necessary, the Hearing Examiner believes there are alternatives that could limit the extent of the variance, if not obviate the need for one, without significant deviation from the Route 1 Manual. But as proposed, Sign A will not protect the visual character of the Route 1 community; it will instead contribute to the visual clutter the Sign Code and Route 1 Manual sign recommendations are intended to prevent. The proposed Sign A does not accord with Section 3.513(b)(5).

That such practical difficulties or hardships have not been created by the applicant; provided, however, that where required findings pursuant to section 3.513 are made, the purchase or lease of the property on which a proposed sign is to be located subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

The practical difficulties are a result of unique Property conditions, vicinal obstructions, and highway conditions. The Petitioner did not create these conditions, in accordance with Section 3.513(b)(6).

Sign B.

Sign B, a 24 aggregate square foot changeable text sign 13 feet high from grade to the top of the sign would be attached beneath Sign A. Because the Hearing Examiner is denying the principal Sign A, the Hearing Examiner does not evaluate the secondary sign for compliance with the sign variance criteria.

The Hearing Examiner does take notice that Sign B is an electronically changeable text sign. DILP has a long-standing policy of recommending approval for such signs subject to the condition that the text change only once every 24 hours. Because neither the petition nor the TSR reference such condition, this alone is grounds to deny the proposed sign.


ORDER

Based upon the foregoing, it is this **28th day of February 2011**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

A. That the petition of Sweet Pea Foods, Inc., t/a McDonald's, for a variance to erect a 9'11" (H) x 10' (W), 99.2 aggregate square foot pole sign 40 feet from grade to the top of the sign in total height, with a 14-foot setback from the US 1 right-of-way rather than the 99'2" foot-setback required in relation to the aggregate sign area and the 80-foot setback required in relation to the sign height is hereby **DENIED**.

B. That the petition of Sweet Pea Foods, Inc., t/a McDonald's, for a variance to erect a 3' (H) x 8' (W), 24 aggregate square foot changeable text sign 13 feet high from grade to the top of the sign on the same pole as the above sign is hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFavre

Date Mailed: 3/1/11

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.