

HIGH'S OF BALTIMORE, INC. * BEFORE THE ZONING BOARD
AND LDG, INC., * OF HOWARD COUNTY
PETITIONERS * ZONING BOARD CASE NO. 1080M

* * * * *

DECISION AND ORDER

On February 16, 2010, March 10, 2010, April 21, 2010 and May 4, 2010, the Zoning Board of Howard County, Maryland considered the petition of High's of Baltimore, Inc. ("High's") and LDG, Inc. ("LDG") (collectively "Petitioners") to amend the Zoning Map of Howard County so as to reclassify from the RC-DEO (Rural Conservation - Density Exchange Option) District to the BR (Business: Rural) District, 2.51 acres of land located on the east side of Livestock Road, beginning about 155 southwest of MD 32, also known as 12701 and 12705 Livestock Road, Tax Map 15, Block 5, Parcels 43, 102, and Part of 12, in the Fifth Election District of Howard County.

The notice of hearing was advertised, the subject property was posted with notice of the hearing, and the adjoining property owners were mailed notice of the hearing as evidenced by the certificates of posting, advertising and mailing to adjoining property owners which were entered into the record. Pursuant to the Zoning Board's Rules of Procedure, all of the reports and official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning, and the Planning Board's recommendation, were entered or incorporated into the record of the hearing. The Department of Planning and Zoning recommended denial of the petition in its June 24, 2009 Technical Staff Report, but later indicated at the Planning Board hearing on January 21, 2010 that it supported the proposed BR District. The Planning Board recommended approval of the petition.

The Petitioners were represented by William Erskine, Esq. A significant number of protestants testified in opposition to the petition. The Board conducted hearings on the petition on February 16, March 10, April 21, and May 4, 2010.

After careful evaluation of all the information presented, the Zoning Board of Howard County makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Petitioners request rezoning of 2.51 acres of land (“the subject property”) from the RC-DEO District to the BR District. Petitioners’ proposal for rezoning is subject to a Preliminary Development Plan (“PDP”), pursuant to Section 117.1 of the Howard County Zoning Regulations. The PDP depicts a gasoline service station, a 3,500 sq. ft. convenience store, and 144 sq. ft. farmer’s market stand. *See* PDP. Petitioner High’s operates a gasoline service station and convenience store on MD 144 in the West Friendship Shopping Center, several thousand feet south of the subject property. Petitioners maintain that the Maryland State Highway Administration (“SHA”) has notified High’s of its intent to condemn a portion of the property on which the West Friendship store is located in order to accommodate future improvements to MD 32. *See* Narrative in Support of Petition to Amend the Zoning Map of Howard County, p. 1. High’s wishes to relocate to the subject property in order to “retain the goodwill and loyal customer base it has acquired” at the West Friendship store. *See id.*

2. The following individuals testified in support of the petition for BR District rezoning: (1) Mike Nalepa, Traffic Engineer; (2) Brianna Darnell, Director of Real Estate for High’s; and (3) Ronald Thompson, Civil Engineer.

3. Mr. Mike Nalepa, Traffic Engineer, testified at the February 16, 2010 hearing that he was engaged by Petitioners to conduct a Traffic Impact APFO Study with respect to the

subject property and the proposed PDP. Mr. Nalepa opined that the subject property can be safely accessed from Livestock Road and MD 32, without the need for additional road improvements. Specifically, Mr. Nalepa testified that vehicles can safely cross several lanes of traffic and turn left from Livestock Road onto MD 32 North due to "gaps" in traffic created by the signalized intersection at Route 99 and MD 32. Mr. Nalepa testified that he reviewed three years of available traffic accident data and that they revealed only 7 accidents at the intersection of Livestock Road and MD 32. Mr. Nalepa testified that none of those accidents involved a vehicle entering MD 32 from Livestock Road.

4. At the March 10, 2010 hearing, the Board incorporated into the official record a letter from Steven D. Foster, Chief, Engineering Access Permits Division of SHA, to Cindy Hamilton, Chief of Zoning Administration and Public Service for Howard County. The letter stated that SHA had recently met with the developer, Howard County staff, and representatives of a local citizens safety group to address two traffic issues posed by the proposed development: (1) "the weave additional traffic must make from the I-70 west bound off ramp to north bound MD 32 and then over into the left turn lane for Livestock Road, and [(2)] the left turns out of Livestock Road northbound on MD 32." In order to address these traffic safety concerns, Mr. Foster recommended that certain improvements be provided by the developer as a condition of approval, including the elimination of left turns out of Livestock Road by way of a restrictive raised island in the throat of Livestock Road and additional signage and radius improvements "to address the less than adequate weave length on MD 32." March 9, 2010 Letter from Steven D. Foster to Cindy Hamilton, p.2. Petitioners agreed to make the improvements recommended by SHA and asked that their petition be amended by Petitioners' Exhibit 2, a diagram entitled Route 32 Safety Improvement Plan Layout 2, which depicts the improvements recommended by SHA

in its March 9, 2010 letter. Petitioners' attorney, Mr. Erskine, stated that approval of the petition and the issuance of use and occupancy permits for the proposed gasoline service station and convenience store could be made subject to construction of the road improvements set forth in Exhibit 2.

5. Mr. Nalepa opined at the March 10 hearing that restricting Livestock Road to "right in, right out" would make the intersection of Livestock Road and MD 32 safer. He stated that anytime you restrict access to a road, you make it safer. On cross-examination, Mr. Nalepa was asked about the safety of making a U-turn at the signal located at the I-70 off ramp, which would be necessary for those who exit Livestock Road and want to travel North on MD 32. Mr. Nalepa acknowledged that he had not examined that issue, that he "presumed" that it would be safe, and that if it was not safe, the State would require modifications.

6. Brianna Darnell, Director of Real Estate for High's, testified at the March 10 hearing in support of the proposed rezoning. Ms. Darnell generally testified regarding the business difficulties posed by the uncertainty surrounding SHA's planned improvements to MD 32, namely, whether and when SHA will condemn the property on which High's West Friendship store is situated. Ms. Darnell testified that High's is not able to make necessary improvements to the West Friendship store given the lack of information from SHA.

7. Ronald Thompson, Civil Engineer, conducted site layout for the proposed PDP. Mr. Thompson testified at the March 10 hearing that the subject property has a private well and septic and is within the No Planned Service Area of the Howard County Water and Sewerage Plan. Mr. Thompson further testified that the site meets the other requirements of Section 117.1 of the Zoning Regulations, specifically, that it has at least 60 feet of frontage on Livestock Road, a local road, it adjoins MD Route 32, and that access is within 400 feet of MD 32. Mr.

Thompson opined that a BR District at the proposed location would be compatible with existing land uses in the vicinity, given the other commercial establishments along Livestock Road. Mr. Thompson also testified that the proposed PDP satisfies the site distance requirements of the BR District.

8. A number of individuals testified in opposition to the proposed rezoning, including Howard Blackman, Bob Miller, Theodore Mariani, Bridget Mugane, Don Ahlberg, Susan Booth, Sandy Renevitz, Gabrielle Von Rabeinstein, Susan Brickel, Matt Horn, Howard Baker, Sr., and Kathy Lyon. The protestants expressed a number of common concerns, among them, the safety of restricting access from Livestock Road onto MD 32 North and the U-turn at the I-70 off ramp, which would be necessary for cars wishing to travel north on MD 32 after turning right from Livestock Road. Mr. Horn, a business owner on Livestock Road, testified that trucks leaving his business would be unable to make the U-turn at the I-70 off ramp and, therefore, be unable to leave his business and travel north on MD 32.

The protestants also expressed the lack of need for another gas station in the area and, therefore, Petitioners' failure to establish that the purposes of the BR District will be satisfied by the proposed rezoning. The protestants further testified that the West Friendship store had not been condemned, that SHA had not stated definitively that it ever would be and, therefore, Petitioner High's did not need the requested rezoning. Finally, several of the residents testified that, given the likelihood of some future improvements to MD 32 and the lack of information as to how the proposed rezoning would affect those future improvements and safety along MD 32, any rezoning of the subject property was premature.

9. At the conclusion of the March 10 hearing, the Board determined to send a letter to SHA asking for clarification regarding two issues raised by its letter of March 9 at the March

10 hearing and on March 26, the Board sent such a letter to SHA. The Board's March 26 letter asked Mr. Foster of SHA to provide comments on two issues: (1) "the safety and/or feasibility of ... U-turn movements on MD 32, and what improvements, if any, would be required to make those U-turns safe and/or feasible"; and (2) detail and documentation as possible including the taking line of the project as it relates to the existing gas station and the finality of the taking line and status of the project in the official State budget. March 26, 2010 Letter from Jennifer Terrasa, Chairperson of the Zoning Board to Steven D. Foster of SHA.

10. At the April 21, 2010 hearing, the Board accepted into evidence four letters: (1) the Board's March 26 letter, identified in Finding of Fact 9; (2) an April 2, 2010 letter from William Erskine, attorney for Petitioners, to Mr. Foster of SHA; (3) Mr. Foster's response to Ms. Terrasa, Zoning Board Chair, dated April 14, 2010; and (4) Mr. Foster's response to Mr. Erskine, also dated April 14, 2010.

11. In his letters to the Board and Mr. Erskine, Mr. Foster stated that SHA's traffic engineers "have determined that the proposed U-turns at the off-site MD 32/I-70 ramp intersection would be performed under existing traffic signal control and with possible minor geometric changes to that intersection [and] would not create a safety or operational problem." Mr. Foster stated that "SHA will request the opportunity to review turning templates to assure these turns can be made safely." April 14, 2010 letter from Foster to Terrasa.

With respect to future MD 32 improvements and condemnation of the property on which the existing High's store is situated, Mr. Foster stated that "SHA cannot provide any type of timeline or prediction regarding the start or completion of this project" and that "it is impossible ... to provide assurances to High's that SHA will not proceed with condemnation of the exiting High's store at any time in the next 17 years." April 14, 2010 letter from Foster to Erskine.

12. At the April 21 hearing, Petitioners called two witnesses in rebuttal, Briana Darnell and Mike Nalepa. Ms. Darnell testified that if SHA proceeds with plans it has publically made available and for which it has expressed approval, the existing High's store will be unable to operate at its current location.

Mr. Nalepa testified that he prepared turning templates of the type referred to by Mr. Foster in his April 14, 2010 letter to the Board. Mr. Nalepa testified that he determined that the WB 67 (a 67 foot truck from bumper to bumper), the worst-case scenario used by SHA to determine U-turn feasibility, could successfully make a U-turn at the signal at the I-70 off ramp. Mr. Nalepa testified that the truck would have to use the shoulder of MD 32 in order to accomplish the U-turn and that SHA would allow the shoulder to be used so long as Petitioners demonstrated that the shoulder was "traffic bearing." Mr. Nalepa testified that he believed the shoulder to be traffic-bearing but that, if it was not, Petitioners could make it traffic-bearing.

On cross-examination, Mr. Nalepa acknowledged that he had not studied the feasibility of truck and trailer combinations, which have a different turning radius, making the proposed U-turn. Mr. Nalepa also acknowledged that road shoulders are commonly used for passing and broken down vehicles and that if a vehicle was on the shoulder of MD 32, a truck may be unable to make a U-turn at the I-70 off ramp. Finally, Mr. Nalepa testified that his testimony regarding the feasibility of trucks accomplishing U-turns at the I-70 off ramp would change in the event the median on MD 32 is widened.

CONCLUSIONS OF LAW

1. Petitioners, as those seeking a piecemeal reclassification to the BR District, have the burden of demonstrating that their petition and proposed PDP meet all of the standards for approval set forth in Sections 117.B.1.-3. and 117.1G.3. of the Howard County Zoning

Regulations. If Petitioners do not meet their burden, the Zoning Board is not permitted to grant the requested rezoning. Petitioners have the burden of showing, by a preponderance of the evidence, that their request meets all of the standards and requirements, pursuant to Section 2.403D.3 of the Board's Rules of Procedure. The Board concludes that Petitioners have failed to meet their burden.

2. "The BR District may be established at a particular location if ... [t]he proposed BR District is within the No Planned Service Area of the Howard County Water and Sewerage Master Plan [and] [t]he proposed BR District has safe road access and at least 60 feet of frontage on: (a) [a] collector or arterial highway[,] or (b) [a] local road provided the subject property adjoins a collector or arterial highway and the local road access point is within 400 feet of the collector or arterial highway and there are no intervening residential parcels on the same side of the local road." Section 117.1B.1. and 2 (emphasis added). The Board concludes based on Finding of Fact 7 that the subject property is within the No Planned Service Area and has at least 60 feet of frontage on Livestock Road, a local road that adjoins MD 32. The Board further concludes based on Finding of Fact 7 and the Department of Planning and Zoning's Technical Staff Report that access to and from Livestock Road from the subject property is within 400 feet of MD 32 and that there are no intervening residential parcels on the same side of Livestock Road.

3. Petitioners, however, failed to meet their burden of demonstrating that "[t]he proposed BR District has *safe road access* ..." in accordance with Section 117.1.B.2. of the Zoning Regulations. The Board bases its conclusion on Findings of Fact 5, 8, and 12 and, more specifically, Petitioners' failure to present the Board with evidence sufficient for the Board to conclude that the U-turn at the I-70 off ramp, made necessary by Petitioners' proposed

improvements to the intersection of Livestock Road and MD 32, is feasible and safe for all vehicles. Mr. Nalepa, Petitioners' Traffic Engineer, testified at the March 10 hearing that he "presumed" that the U-turn would be safe, but stated that he had not yet evaluated the movement. At the April 21 hearing, Mr. Nalepa testified that he conducted turning templates with a number of vehicles, but acknowledged that he had not evaluated whether truck and trailer combinations could make the U-turn. Mr. Nalepa further acknowledged that trucks would have to use the shoulder of MD 32 in order to accomplish the U-turn and that the shoulder would not be available for that purpose if it was occupied by a broken down vehicle. Given Petitioners' failure to present adequate, persuasive evidence for the Board to conclude that the U-turn at the I-70 off ramp is safe for all vehicles, a movement that would frequently occur as a result of the proposed improvements to Livestock Road and MD 32, the Board is unable to conclude that "[t]he proposed BR District has *safe road access* ..." in accordance with Section 117.1.B.2. of the Zoning Regulations.

4. In order for the subject property to be eligible for BR District rezoning, Petitioners must also demonstrate that "[a] BR District at the proposed location will be compatible with existing land uses in the vicinity of the site." Section 117.B.3. Petitioners have failed to meet their burden of demonstrating that a BR District on the subject property will be compatible with the other businesses on Livestock Road. Restricting vehicles, particularly large trucks that frequent the businesses on Livestock Road, from turning left onto MD 32 North from Livestock Road would not only present an inconvenience for their drivers, it would potentially pose a safety hazard given Petitioners failure to demonstrate the safety of the U-turn at the I-70 off ramp, as set forth in Conclusion of Law 3 above.

5. The Board concludes that Petitioners have not met their burden of demonstrating that rezoning the subject property BR would “accomplish the purposes of the BR District.” Section 117.1G.3.a. The purpose of the BR District is “to allow the development of business which will support the agricultural industry, serve the needs of the rural residential and farming communities, and provide opportunity for a combination of business and industrial uses not otherwise permitted in the rural areas of the County.” Section 117.1A, first paragraph. The Board concludes based on the petition and the narrative in support of the petition that the proposed gasoline service station, convenience store, and farmer’s market stand would serve the needs of the nearby residential and farming communities. However, based on its findings and conclusions as to lack of safe road access and incompatibility with existing land uses, the Board concludes that the proposed BR District will not “be appropriate with respect to road access and compatibility with neighboring land uses.” Section 117.1A, third sentence of the second paragraph.

6. The Board concludes that Petitioners have failed to meet their burden of demonstrating that “[t]he site meets the criteria listed in Subsection B” of Section 117.1. that “the proposed BR District has safe road access” under Subsection B.2 for reasons already stated in Findings of Fact 5,8, and 12 and Conclusion of Law 3 above.

7. The Zoning Board concludes that Petitioners have failed to meet their burden of demonstrating that “[t]he roads providing access to the site are appropriate for serving the business-related traffic generated by the proposed district,” Section 117.1G.3.c., based upon Findings of Fact 5, 8, and 12 and the rationale set forth in Conclusions of Law 3 and 4 above.

8. The Board concludes that Petitioners presented sufficient evidence to meet all the remaining standards contained in Section 117.1.G.3 of the Zoning Regulations, including that

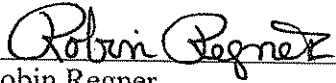
“[a]dequate sight distance along roads can be provided at proposed points of access to the site” and that “[t]he proposed landscaped area can provide adequate buffering of the permitted uses from existing land uses in the vicinity.” Section 117.1.G.3.d. and e.

9. The Board is not unsympathetic to Petitioner High’s desire to relocate its West Friendship store given the uncertainty surrounding SHA’s planned improvements to MD 32 and, specifically, whether and when SHA will condemn the property on which the West Friendship store is situated. However, “need” for the requested rezoning is not pertinent to the Zoning Board’s review. The Board may grant a petition for BR District rezoning only if the proposed rezoning satisfies *all* of the standards for approval set forth in Section 117.1. The Board concludes that it may not grant the petition because Petitioners failed to meet their burden of proof with respect to Sections 117.1A., 117.1.B.2., B.3., G.3.b., and G.3.c.

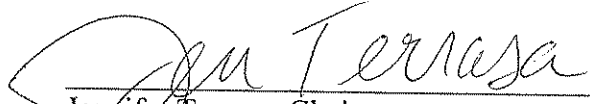
For the foregoing reasons, the Zoning Board of Howard County, Maryland, on this 13th day of September, 2010, hereby **DENIES** the Petitioner’s request for rezoning of the subject property from the RC-DEO to the BR District.

ATTEST:

ZONING BOARD OF HOWARD COUNTY



Robin Regner
Administrative Assistant



Jennifer Terrasa, Chairperson

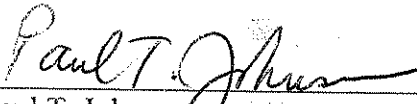


Calvin Ball, Vice Chairperson

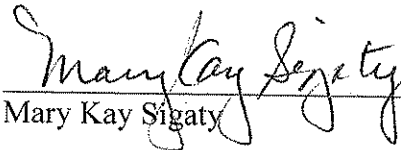
PREPARED BY HOWARD COUNTY
OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR



Greg Fox



Paul T. Johnson
Deputy County Solicitor



Mary Kay Sigaty



Courtney Watson