

Tax Map/Block/Parcel
No. 59-17-665

Building Permit/Zoning
Certificate No. 95-3533

Case 4065

OFFICIAL DECISION
BOARD OF ZONING APPEALS
CARROLL COUNTY, MARYLAND

APPLICANT: Max Acquisition Limited Partnership
c/o Robert Max
1777 Reisterstown Road
Suite 293E
Baltimore, Maryland 21206

ATTORNEY: David K. Bowersox, Esquire
Hoffman, Comfort, Galloway & Offutt
24 North Court Street
Westminster, Maryland 21157

REQUEST: A conditional use to allow a "B-G" General Business District use in the "I-R" Restricted Industrial District, to wit: a planned business center on 8.28± acres

LOCATION: Northwest corner of Baltimore Boulevard (Md. Rt. 140) and Dede Road intersection in Election District 4; Walnut Park Industrial Park subdivision, lot 2 recorded in Carroll County Plat Records in book 19, page 95

BASES: Article 12, Sections 12.2(b); Article 11, Section 11.1(b); Article 14, Section 14.6; Article 4, Section 4.26; Ordinance 1E (The Carroll County Zoning Ordinance)

HEARING HELD: February 28, 1996

On February 28, 1996, the Board of Zoning Appeals (Board) heard testimony and received evidence concerning the conditional use request to allow a planned business center (center) in the "I-R" Restricted Industrial District on lot 2 of Walnut Park Industrial Park subdivision, located at the northwest corner of Baltimore Boulevard (Md. Rt. 140) and Dede Road intersection in Election District 4.

Articles and Sections cited below are of Ordinance 1E.

For clarification, a planned business center is defined in Article 20 as:

Three or more retail stores or service establishments designed as a unit and primarily served by common accessories such as signs, parking lots, arcades and walkways.

In accordance with the provisions of Sections 17.6 and 17.7, and the Board's long standing policy of visiting sites prior to public hearing, the Board visited the site February 21, 1996. The purpose of the visit was for the Board to view the site

and adjacent properties so that the Board would be reasonably familiar with the properties to assist in the Board's appraisal of testimony and evidence, either pro or con, presented during the public hearing.

The application, testimony and evidence comprising the record of this case are hereby included by reference in this decision.

Based on the record and in accordance with the state Open Meetings Act, the Board authorized the conditional use. The pertinent findings determining the Board's decision include the following facts.

FINDINGS OF FACT

The 8.28± acre lot comprises the northwest corner of Md. Rt. 140 and Dede Road intersection and is identified as lot 2 of Walnut Park Industrial Park subdivision. A restriction noted on the subdivision plat prohibits access to Md. Rt. 140. Vehicular traffic is controlled by signal lights at the intersection. The lot was extensively graded in the past, but has not been improved otherwise since being recorded in 1978.

The area is not served by public water or sanitary sewerage systems. In order to develop the lot, the applicant must satisfy the requirements of the Carroll County Health Department regarding an acceptable potable water supply, and on-site sanitary sewerage disposal system, in addition to all other applicable law.

As a result of resubdivision and one lot created by deed, there are 10 lots that front on, and are provided vehicular access by Dede Road, which is a cul-de-sac. Business or industrial uses served by Dede Road include a racquet club and fitness facility on the lot created by deed adjoining the front portion of the northerly property line of the site. Continuing northward, a waste removal business had operated from lot 3 until several months ago. The status of the business and use of the premises are uncertain. Next, a beer distributor business is located on lot 7-A. The building on lot 6 is vacant, however, apparently part of the lot is leased for parking commercial vehicles. A trucking business is located on lot 9. Business and industrial uses are located in the building on lot 4 at the end of the cul-de-sac. Proceeding southward on the east side of Dede Road, lot 5-A is improved with three bituminous asphalt plants. A restaurant and planned business center were authorized by the Board in June 1986 in Case 2530 for development on lot 11, which adjoins the southerly property line of lot 5-A. Neither the restaurant or the planned business center have been developed. A post office, authorized by the Board in June 1983 in Case 1980 has been developed on lot 10, which is the northeast corner of the intersection, opposite the proposed site. The parcel abutting the west property line is recorded in the plat records as unbuildable. The confronting properties on the south side of Md. Rt. 140 are zoned "B-G" General Business District.

Mr. Robert Max testified on behalf of the application and noted:

- the site is visible from the highway and is appropriate for businesses
- although two industrial buildings and part of a third building are available within the subdivision, no office or retail business space is available between Reisterstown and Westminster

- the lot is really not suited for industrial development
- the one story office/retail buildings will be designed as flex-space to accommodate business offices, retail sales, and services
- vehicular traffic to the racquet club and fitness facility is essentially passenger vehicles
- truck traffic of the beer distributor involves seven trucks leaving in the morning and returning after completing deliveries once a day
- truck traffic to and from the bituminous asphalt plants during a twelve hour day from 6:00 a.m. to 6:00 p.m. is about fifty trips a day, or four trips per hour; however, there may be more trucks during summer and only a few trucks a day during winter months
- there are three fuel (gasoline) stations between Reisterstown and Westminster on the south side of Md. Rt. 140, but only one station located on the north side of the highway
- the waste removal company does not appear to be operating from lot 3

Mr. Max also presented a fiscal and economic impact analysis of the proposed center, Applicant's Exhibit 4, prepared by Joseph M. Cronyn, Vice President of Legg Mason Realty Group indicating:

- the highest and best use of the lot is for retail and mixed commercial uses due to the lot's location, and that it is not a prime industrial site
- the plan includes six buildings designed for retail and flex-space with a total area of 30,750 square feet
- approximately 87 full and part-time retail and service jobs with an estimated payroll of approximately \$1.35 million could result from development of the center
- an estimated 85 percent of the employees would be Carroll County residents with annual piggyback tax revenues estimated at \$21,000
- development of the center would provide construction jobs and additional piggyback tax revenues
- the estimated value of the center upon build-out would be approximately \$4 million with annual real estate taxes to the county of \$37,200 and personal property tax revenue of \$7,000
- the transfer fee for recordation of the lot to the developer is estimated at \$4,700
- additional revenue to the county would occur with development of the center as a result of permit, inspection and impact fees

Mr. Jack Lyburn, Director of Economic Development for Carroll County, testified on behalf of the request that due to characteristics of the site, its highest and best use would be for business purposes--not industrial development, the center will complement existing business and industrial uses in the area, and that the Carroll County Economic Development Commission unanimously supports use of the site as a planned business center. Mr. Lyburn also indicated that the costs of commercial or business development versus industrial development to the county have not been determined.

Witnesses accepted as experts in land planning, and traffic engineering and transportation planning also testified and presented evidence on behalf of the request.

The sketch plan, identified as Applicant's Exhibit 1, depicts six buildings with parking. The buildings include: a bank with four drive-thru lanes, a fast food restaurant with drive-thru service, a gas/convenience mart with four pumping stations (eight fueling stations), a future retail/service building, and two buildings for office/retail use. As noted on the sketch plan, more parking spaces than required are depicted on the plan. Vehicular access is limited to one driveway connection to Dede Road. The proposed location complies with the minimum distance requirements governing entrances.

The traffic impact analysis, Applicant's Exhibit 3, is based on the following uses, as listed on page 10:

- a walk-in bank; 2,625 square feet
- a fast food restaurant with a drive-thru window; 2,150 square feet
- a gas/convenience mart, with six fueling stations (two less than portrayed on the sketch plan)
- general office space; 9,500 square feet
- retail space; 13,350 square feet

The traffic impact analysis acknowledges that the existing traffic on Md. Rt. 140 is a problem, that the problem is regional use of the highway, and suggests consideration be directed to increasing the width of the highway to six lanes in the future¹. In addition, the expert cited the relative short length of the acceleration lane on Md. Rt. 140 for westbound traffic, and implied that the length of the lane may need to be increased. However, with regard to the impact of the proposed shopping center, the expert concluded that the center would have a minimum impact upon the operation of Md. Rt. 140 and Dede Road intersection particularly during peak traffic hours compared to traffic that could be generated by industrial development of the site.

Mr. Philip Rovang, Director of Planning and Development for Carroll County, testified regarding concerns expressed in his January 25, 1996, letter to the Board pertaining to the proposed center including: applicable provisions of the zoning ordinance; environmental factors related to establishing the center; existing and future vehicular traffic; existing land uses in the area and appropriate land use of the site; and, evidence demonstrating a need for the center and who would use it.

Mr. James Slater, Administrator of the Office of Environmental Services for Carroll County cited concerns in a January 25, 1996, memorandum to Mr. Rovang regarding water quality management and groundwater in the area. Mr. Slater noted previous incidents of groundwater contamination, and that it was unlikely that a new potable water supply well on the site would be approved by the health department. Mr. Slater's memorandum was attached to Mr. Rovang's February 26, 1996 letter.

Mr. Ronald Burns, Chief of the Engineering Access Permits Division of the State Highway Administration recommended by letter November 2, 1995, that a traffic impact analysis be preformed at the time of development to determine impacts to Md. Rt. 140

¹Applicant's Exhibit 3, Traffic Impact Analysis for the Walnut Park Property, Lot #2, pp. 2, 18

and Dede Road.

The Board suggests that since the traffic impact analysis, Applicant's Exhibit 3, is based on traffic counts obtained January 29, 30, and February 5, 1996 (Appendix B and C), even though the weather conditions were described as fair and cold January 29 and 30, the number of vehicular trips may have been reduced and the Planning Commission may request an analysis based on traffic this spring or as recommended by Mr. Burns, above.

Mr. Leslie C. Hopkins, Acting Chief of the Department of Public Works for the City of Baltimore forwarded a letter February 27, 1996, noting that the City opposed the request because of the proximity of the site to the City's watershed property. (The site is within one mile of the watershed property of Liberty Reservoir.)

In regard to the concern expressed in Mr. Hopkins' letter, the Board notes that the existing "I-R" Restricted Industrial District allows manufacturing and industrial land uses as principal permitted uses, which do not require Board authorization. However, such land uses including the proposed center are subject to requirements of Section 4.26 regarding submission and approval of a site development plan, as well as all other applicable laws and ordinances. The process of reviewing the site development plan will include consideration of factors relevant to the City's watershed property.

APPLICABLE LAW

The lot is zoned "I-R" Restricted Industrial District as depicted on zoning map 59B, which is consistent with the Comprehensive Plan for the Finksburg Area and Environs adopted January 6, 1981. Section 12.2, Conditional Uses, paragraph (b) reads in relevant part:

Any use permitted and as regulated as a principal permitted use...in the "B-L" and "B-G" District,..., provided that in addition to the criteria set forth under Section 17.[7], the Board shall also consider criteria set forth under Section 14.61 (a), (b) and (c) in authorizing the use of any land for a planned business center..., in accordance with the stated purpose of the "I-R" District.

Article 11, "B-G" General Business District; Section 11.1, Principal Permitted Uses, paragraph (b), states, "Planned Business Centers, subject to the provisions of Section 14.6."

Article 14, Special Provisions, DIVISION VI, Planned Business Centers (Shopping Centers), Section 14.6, Types and Authorization Thereof specifies:

In any "B-L" or "B-G" District, the Commission may approve a neighborhood type shopping center or a community-type shopping center subject to the provisions hereinafter set forth under this section. The Commission, likewise, may approve plans submitted for a planned business center in any "I" District provided the use of the property for such

purpose has received prior approval of the Board as otherwise provided by this ordinance.

Section 14.61, Approval by Planning Commission reads in relevant part:

It shall be the duty of the Commission to ascertain whether the location, size and other characteristics of the site, and the proposed plan comply with the following conditions:

- (a) A need is evident for such shopping facilities at the proposed location, such need being demonstrated by the developer by means of market studies and such other information as the Commission may require.
- (b) That the proposed planned business center is adequate to serve the needs of the population which reasonably may be expected to be served by such shopping facilities.
- (c) That the proposed planned business center will not cause points of traffic congestion on existing or planned future roads in the areas of such proposed location.

The center is also subject to the provisions of Section 4.26 regarding site development plans, however in the interests of brevity, the provisions will not be quoted.

The purpose of the "I-R" Restricted Industrial District, as stated in the preamble of Article 12, reads:

(The purpose of this district is to provide locations for some of the lighter manufacturing processes and which may not be as extensive as those provided in the "I-G" District. For the most part, the manufacturing is composed of processing or assembly of previously processed materials. It is not the purpose of this district to promote or encourage the use of land within the district for retail services or planned business centers normally expected to be located within the established business districts; however, it is anticipated that there may be areas or locations where retail services or planned business centers can be reasonably and logically considered due to their relationship with other uses existing within the district, as well as their relationship with the district boundary line or the configuration of the property and the relative scale of the project.)(Amended 9/22/77)

Article 17, Board of Appeals; Section 17.7, Limitations, Guides and Standards governs the Board in considering conditional uses. For brevity, the provisions will not be quoted.

As defined in Article 20, conditional uses are the same as special exceptions.

The Board is also governed by decisions of the courts. In the case of *Mossburg v. Montgomery County*, 107 Md. App. 1, 7-8 (1995) the Court stated:

...a special exception/conditional use in a zoning ordinance recognizes that the legislative body of a representative government has made a policy decision for all inhabitants of the particular governmental jurisdiction, and that the exception or use is desirable and necessary in its zoning planning provided certain standards are met.

In *Turner v. Hammond*, 270 Md. 41, 55 (1973), the decision reads:

While the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material but if there is no *probative* evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious and illegal. (Citation omitted.)

In the case of *Schultz v. Pritts*, 291 Md. 1, 22 (1981) the court wrote:

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. (Citations omitted.)

REASONING

The zoning plan for the county provides for a variety of zoning districts. Land uses legislatively deemed to be similar and compatible are permitted in the respective districts. The districts range from the "C" Conservation District, which is among the more restrictive districts, to the "I-G" General Industrial District, which is the least restrictive district.

Land uses allowed as principal permitted uses² in more restrictive districts are routinely allowed as principal permitted uses in less restrictive districts. For example single-family dwellings are permitted in the "C" Conservation District, the "H" Historic Zoning District, the "A" Agricultural District, residential districts and business districts. However, in order to promote the purpose³ of the zoning ordinance, uses first allowed in a less restrictive district are not allowed in more restrictive districts. For example, uses first allowed in an industrial district are not allowed in business districts.

The operative premise is: Uses allowed in a more restrictive district will be compatible with uses first allowed in the succeeding less restrictive districts. In this instance, the ordinance does not follow that premise. The proposed planned business center is a principal permitted use in the "B-G" General Business District, but is designated as a conditional use in the "I-R" Restricted Industrial District. If the operative premise were followed, planned business centers would be listed as a principal permitted use. Or if the intention of the legislative body was not to permit planned business centers in the "I-R" Restricted Industrial District, the use would not be included as either a principal permitted use or a conditional use in the Article 12.

Regardless of the explanation of the purpose of "I-R" Restricted Industrial District, planned business centers are allowed as conditional uses in the district, and the standard governing authorization of conditional uses established in *Schultz v. Pritts, supra*, is the applicable law.

In considering the testimony and evidence comprising the record of this case relative to the provisions of Section 17.7 and *Schultz v. Pritts*, the Board finds that there is no probative evidence that the proposed planned business center would have adverse effects at this site above and beyond those effects inherently associated with planned business centers.

Furthermore, the Board is convinced that the applicant has met his burden of proof regarding the criteria of Section 14.61 (a), (b), and (c).

CONCLUSION

Based on the findings of fact, applicable law, and reasoning expressed above, the conditional use is hereby authorized in accordance with the Board's oral decision at the conclusion of the public hearing.

3.27.96

Date

Karl V. Reichlin

Karl V. Reichlin, Chairman

²Uses that do not require Board authorization.

³Article 1, Section 1.0, Ordinance 1E.