

**Tax Map/Block/Parcel
No. 73-5-612**

**Building Permit/Zoning
Certificate No. 97-3367**

Case 4292

**OFFICIAL DECISION
BOARD OF ZONING APPEALS
CARROLL COUNTY, MARYLAND**

APPLICANT: Talles-Robbins Eldersburg Development Co. LLC
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Pikesville, Maryland 21208

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PROTESTANTS:** Michelle M. Ostrander, Esquire
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PROTESTANTS: Mrs. Roberta Windham
Mr. & Mrs. Albert J. Slack
Mr. & Mrs. Scott Lambros
Carrolltowne Center Merchant Association

REQUEST: A conditional use request for a planned business center

LOCATION: Maryland Route 32 and Londontown Boulevard intersection on property zoned "I-R" Restricted Industrial District in Election District 5

BASIS: Article 12, Section 12.2(b); Ordinance 1E (The Carroll County Zoning Ordinance)

On December 19, 1997, the Board of Zoning Appeals, (hereinafter the "Board"), received the application of Talles-Robbins Eldersburg Development Co. LLC for a conditional use for a planned business center on 36 acres of land zoned "I-R" (Restricted Industrial), located on the intersection of Route 32 and Londontown Boulevard. The applicant is the contract purchaser of the property, owned by Bevard Square Partnership who joins in the request. Six full days of hearings were held on the application, January 29, February 24, March 6, March 18, March 30 and April 20, 1998. At the conclusion of the hearings, the Board deliberated in open session and by a vote of 2 to 1, (Mr. Hobart Wolf and Mr. Karl Reichlin voted in the affirmative and the Chair, Mr. James Schumacher, in dissent, voted to deny the request) granted the conditional use. The following are the Board's findings and conclusions.

The applicable law permitting a planned business center as a conditional use in the Industrial Restricted District is Section 12.2(b) of "I-R" Restricted Industrial District of the Carroll County Zoning Ordinance, (hereinafter the Ordinance) which states in part,

"Sec. 12.2 Conditional Uses (requiring Board authorization)

. . .

(b) Any use permitted and as regulated as a principal permitted use and conditional use in the "B-L" and "B-G"¹ District, . . ., provided that in addition to criteria set forth under Section 17.6 [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 or any other "B-L" or "B-G" use that is determined by the Board to be of the same general character as a planned business center in accordance with the stated purpose in the "I-R" District."²

Extensive testimony was presented advocating that the land in question should not be utilized for a commercial use and should be retained for "purely" an industrial use. The Board is without authority to restrict the land uses of the subject property to

¹Sections 10.1(e) and 11.1 (b) of the Ordinance permit planned business centers in the Business Local and Business General zoning districts as a principal permitted use.

²

The purpose of the "I-R" district is found in the preamble to the "I-R" district wherein it states in part:

". . .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 district; 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)

(Emphasis added).

"purely" industrial uses. While it is not the purpose of the district to promote or encourage the development of the land in the "I-R" district as planned business centers, the Board finds that planned business centers are, nevertheless, permitted lawful conditional uses. The Court of Appeals, in explaining the status of a conditional use in the overall zoning scheme, stated, that

"[t]he special exception use [conditional use] is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan."

Schultz v. Pritz, 291 Md 1, at 11. See also, Richmarr Holly Hills Inc. v. American PCS, L.P., 117 Md. App. 607 (1997). The standard the Board uses in determining whether to grant or deny a conditional use request was established in the Schultz case. The test can be stated as whether the evidence presented demonstrates that the use proposed, at the location proposed, has any adverse effects on the neighboring properties above and beyond those inherently associated with such use irrespective of its location within the same zone.

The adverse effects the Board considers are enumerated in Section 17.7 of the Ordinance. The section requires the Board to consider all the evidence to determine whether the use proposed would adversely affect

"the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood."

In deciding such matters, The Board shall give consideration, among other things, to the following:

- (a) The number of people residing or working in the immediate area concerned.
- (b) The orderly growth of a community.
- (c) Traffic conditions and facilities.
- (d) The effect of the proposed use upon the peaceful enjoyment of people in their homes.
- (e) The conservation of property values.
- (f) The effect of odors, dust, gas, smoke, fumes,

vibrations, glare and noise upon the use of surrounding property values.

- (g) The most appropriate use of land and structures.
- (h) The purpose of this ordinance as set forth herein.
- (i) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches, and the like."

Section 17.7 of the Zoning Ordinance.

The use proposed is for a movie/restaurant/shopping complex. The applicant proposes to establish three restaurants, a 14 screen theater with stadium seating, 321,500 square foot retail complex and a two story office center of approximately 36,250 square feet. The tenants of the complex will include a large anchor "soft goods" retailer. However, the exact composition of the tenants can not be determined at this time as it is too early in the development process for tenants to commit to a lease.

The Board is asked to assess the effects this proposed use will have at this location. "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 establishing affirmatively that his proposed use would be a benefit to the community. 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." (Emphasis added) Id. at p. 11.

The evidence before the Board is that the applicant will develop a highly attractive center. The center will generate tax revenue for the County, address a failing intersection and create employment opportunities. In doing so however, it will also increase traffic. To assist the Board in its evaluation of the effect the increased traffic would have in the area, the applicant arranged for a traffic study. The traffic study was conducted by The Traffic Group Incorporated. John W. Guckert, president of Traffic Group Inc. also testified as an expert in the of field traffic analysis. The Board also received into evidence as Protestants' Exhibit 5, the draft of the *Freedom Area Transportation Study*, prepared by Whitney, Bailey, Cox & Magnani, and the testimony of James Hall, a traffic engineer with extensive experience in the field.

Mr. Hall's report and testimony focused on the Freedom Area in general. Mr. Guckert's report and testimony focused on the immediate intersections surrounding the site and considered the existing traffic conditions taking into account the approved subdivisions yet to be built. The four intersections considered by Mr. Guckert were: (a) MD26 and MD32, (b) MD32 and Bartholow Road, (c) MD 26 and Georgetown Blvd., and (d) MD32 and Progress Way. Mr.

Hall's report, which was commissioned by the Carroll County Planning Department, was more comprehensive and more exhaustive, assessing the long range effect of traffic in the Freedom area and intended to be utilized in the development of the area master plan. However, the data and evidence of both experts and reports were consistent.

It is evident in assessing the evidence, that the intersection of MD 26 and MD 32 has reached or is fast approaching its capacity. Mr. Guckert rated the intersection as having a level of service of D³. If nothing is done to this intersection, Mr. Guckert and Mr. Hall both projected that it will fail reaching a level of service F⁴ by the year 2002. The three other intersections have acceptable levels of service.

Using the *Institute of Transportation Engineers' Trip Generation Report* (6th Edition), Mr. Guckert was able to determine the estimated number of vehicle trips the proposed center would generate. It was estimated that the center would generate 15,000 vehicle trips per day. The effect of this number of vehicle trips on any road system is significant. If unimproved and the use is approved, it is anticipated that two of the adjacent intersections would immediately reach an E level of service and a third would fail altogether. To address this serious adverse effect, the applicant proposes to make improvements to the four immediate intersections. The improvements are outlined in Mr. Guckert's report; the cost of which is approximately \$800,000. With the noted improvements and the proposed complex the level of service for the intersections would either improve or remain the same. In addition, while the intersection of Md26 and 32 would not show improvement, it would not fail as projected. The levels of service with the proposed use and noted improvements would be: Md 26 and 32-D, Md 32 and Londontown Blvd-B, Md 26 and Georgetown Blvd-C, and Md 32 and Progress Way-A.

The Protestants raise the concern that the proposed use will tend to create congestion and unsafe conditions on neighboring roads and streets. The Board finds that this concern is not supported by the evidence before the Board. Other than the intersection of MD32 and 26, as previously noted, the Protestants'

³As noted on page 4 of the Mr. Hall's report level of service D describes operation with delays in the range of 25.1 to 40.0 seconds per vehicle. At level D. congestion becomes more noticeable. Longer delays result. Many vehicles stop, and the proportion of vehicles not stopping declines.

⁴Level of service F describes operation with delays in excess of 60.0 seconds per vehicle. This is considered unacceptable to most drivers, and occurs when arrival flow rates exceed the capacity of the intersection.

transportation study does not project any intersection in the area will fail. (See Protestants' Exhibit 5 Draft of *Freedom Area Transportation Study* figures 3 and 4). While the Board is concerned with the traffic conditions in the area, the Board finds that the traffic generated from the proposed use at this location, with the improvements proposed, to be no more adverse at this location than elsewhere in the industrial zone. (This finding is not meant usurp the authority of the Planning Commission to modify, alter or request additional improvements after it has reviewed the traffic matter more closely. Rather, the finding accepts that the applicant can make necessary improvements to ameliorate the effects of the use proposed).

The Protestants also argue that the proposed use would have a depressing psychological effect that would interfere with their quiet enjoyment of their property. They argue the use would increase traffic throughout the area and would attract negative elements into the neighborhood that would interfere with their enjoyment of their properties and their quality of life. They allege that the use would make their properties not appreciate in value as much as other homes in the area and would make them less saleable. The Protestants fear that the use would be a local hangout, attracting transients, criminals, vandals and other nefarious elements to their otherwise peaceful neighborhood. However, the record does not support such assumptions and assertions. There is no probative evidence of such harm or disturbance. The testimony presented indicates that the applicant proposes to construct an attractive, upscale business center. The Board accepts the testimony of Mr. Gerry Bitzel, that the use proposed will not adversely affect the property values of the surrounding neighborhood, and is consistent with other land uses in the immediate area. There was no credible evidence that neighboring property values would suffer and that the use would attract crime to the neighborhood.

The Board notes that every use has some inherent adverse effect upon persons residing in the immediate neighborhood. The Board must look beyond the inherent adverse effects for detrimental effects above and beyond the inherent ones associated with the use. The planned business center, as a conditional use in the Industrial Restricted zone, is part of the comprehensive zoning plan and therefore, is presumed valid notwithstanding its inherent deleterious effect. Therefore, the Board finds that the use proposed will have no greater adverse effects enumerated in Section 17.7 of the Ordinance, at this location than elsewhere in the "I-R" Restricted Industrial Zone.

The Ordinance further subjects the Planned Business Center use to the requirements of Section 14.61(a), (b) and (c) which provides:

"It shall be the duty of the Commission [the Board] 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 Board adopts the testimony of Mr. Joseph M. Cronyn, Senior Associate with Lipman, Frizzell and Mitchell, LLC and his supporting comprehensive report titled *Bevard Square Planned Business Center Market Feasibility Analysis* (Applicant's Exhibit 5) as its findings that a need for such shopping facilities exists at the location and that the proposed center is adequate to serve this need.

For the previously noted reasons, the Board finds that the center will not cause points of traffic congestion on existing or planned future roads in the area. The Board, by a vote of 2 -1 hereby approves the request. As noted previously, the decision is dependent in large part on the assertions that the traffic improvements contemplated will address the adverse effects of the proposed uses. The Board recommends that the Planning Commission thoroughly review the traffic study, analysis and proposed improvements to ensure that the adverse effects can be properly ameliorated.

The chair respectfully dissents from the findings and decision of the Board, and finds the following. The use proposed is ill-suited for the industrially zoned land. It will generate traffic that will overwhelm the area. The testimony of Mr. Steve Horn, Bureau Chief Department of Planning for Carroll County and Mr. Stuart Fisher, Senior Vice President and General Counsel of Londontown Industries clearly support that the traffic generated from the use will be more adverse at this location than elsewhere in the industrial zone. Mr. Horn indicated that the service roads contemplated by the master plan and intended to maintain the orderly flow of traffic, have not been constructed. Mr. Fisher testified that Londontown relies heavily on the free flow of traffic which will materially be affected by the additional traffic. The use proposed will cause traffic congestion in the

immediate area and the surrounding neighborhoods.

Numerous neighbors testified of their legitimate concerns regarding the adverse effects that the proposed use would have on their ability to quietly enjoy their homes. They also testified that their property values would be adversely affected. The traffic generated by this use will cause additional noise and deprive the neighbors of their ability to peacefully enjoy their property. It will depreciate the value of adjoining properties. There will be more accidents as a result of the increased traffic at this location than would occur for this use elsewhere in the I-R zone.

Finally, the intersection of Md 32 and 26 will, with the improvements contemplated, remain at a level of service D, which is unacceptable. It is the responsibility of the Board to deny a conditional use when the level of service of an intersection is so low.

May 29, 1998

Date

James L. Schumacher

James L. Schumacher, Chairman

IM/bmh/c4292dec.bmh
May 28, 1998