PETITION FOR ZONING VARIANCE FROM AREA AND HEIGHT REGULATIONS

79-15-A
#237

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY:

Legal owner

I, XXXXX Leroy Y. Haile XXXXXXXXX of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof,

hereby petition for a Variance from Section 409.2b(3)

We are requesting a variance to zero (0) parking spaces. In lieu of the required 63 parking spaces.

of the Zoning Regulations of Baltimore County, to the Zoning Law of Baltimore County; for the following reasons: (indicate hardship or practical difficulty)

We are presently required to rent 28 parking spaces from the Revenue Authority at a cost of $430.00 per month. We have been doing this since January 1, 1978. Since that date, only 2 spaces have been used during the entire period. The rent paid to the Revenue Authority is an economic hardship and is of no benefit to the restaurant, and obviously there is no need for the rented spaces.

MAP 9C NE10-A
ELECTION DISTRICT 9
H-2778

Property is to be posted and advertised as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above Variance advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law For Baltimore County.

McDonall-Stegman & Company, Inc. — LeRoy Y. Haile
t/a Sarabande — [signature] — [signature]
Lessee — XXXXXXXXX — Legal Owner
Address 4 1/2 East Pennsylvania Ave. — Address 13 West Chesapeake Avenue
Towson, MD 21204 — Towson, MD 21204

[signature]
H. Emslie Parks Petitioner's Attorney — Protestant's Attorney
Address 305 West Chesapeake Avenue
Towson, MD 21204

ORDERED By The Zoning Commissioner of Baltimore County, this 9th day of May, 1978, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 17th day of July, 1978, at 11:00 o'clock A. M.

[signature]
Deputy Zoning Commissioner of Baltimore County.

(over)

ORDER RECEIVED FOR FILING
DATE October 25, 1978
BY [signature]

RE: PETITION FOR VARIANCE
N/S of Pennsylvania Ave., 70' W of Delaware Ave., 9th District
LeROY Y. HAILE, Petitioner

: BEFORE THE ZONING COMMISSIONER
: OF BALTIMORE COUNTY
: Case No. 79-15-A

:::::::

ORDER TO ENTER APPEARANCE

Mr. Commissioner:

Pursuant to the authority contained in Section 524.1 of the Baltimore County Charter, I hereby enter my appearance in this proceeding. You are requested to notify me of any hearing date or dates which may be now or hereafter designated therefore, and of the passage of any preliminary or final Order in connection therewith.

[signature]
Peter Max Zimmerman
Deputy People's Counsel

[signature]
John W. Hession, III
People's Counsel
County Office Building
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 22nd day of June, 1978, a copy of the aforegoing Order was mailed to H. Emslie Parks, Esquire, 305 W. Chesapeake Avenue, Towson, Maryland 21204, Attorney for Petitioner.

[signature] John W. Hessian, III

JUN 23 '78 AM
ZONING DEPARTMENT
By

RE: PETITION FOR VARIANCE
N/S of Pennsylvania Avenue, 70' W of Delaware Avenue - 9th Election District
LeRoy Y. Haile, et al - Petitioners
NO. 79-15-A (Item No. 237)

: BEFORE THE
: DEPUTY ZONING
: COMMISSIONER
: OF
: BALTIMORE COUNTY

::: ::: :::

This matter comes before the Deputy Zoning Commissioner as a result of a Petition for a Variance to permit zero parking spaces in lieu of the required 63 parking spaces on property at the above location. The subject property, improved with Sarabande restaurant, leased certain parking spaces from the Baltimore County Revenue Authority in January, 1978, as a condition to the approval of its expansion to the present size. The instant case occurred because of the Petitioners' desire to seek relief from the cost of this lease.

Testimony at the hearing indicated that the aforementioned parking charges are $430.00 per month, that most of Sarabarde's patronage consists of pedestrian traffic, and that the establishment's records show that there is no apparent need for the rented spaces. This, it was claimed, constitutes an economic hardship.

Counsel for the Protestants argued that a sufficient case for granting the Variance has not been established by the Petitioners and that financial hardship does not constitute reasonable grounds for the granting of the Variance.

By correspondence of July 11, 1978, the Director of Planning noted that the Baltimore County Planning Board has adopted, for consideration by the County Council, a report that recommends that no parking be required for restaurants in Town Centers. This matter has not been acted upon by the Council as of this date.

ORDER RECEIVED FOR FILING
DATE October 25, 1978
BY [signature]

Written comments by the Department of Traffic Engineering indicated that the "parking problem that exists in the Towson area can only be compounded by granting this variance."

It is quite clear that Sarabande chose to enter into agreement with Baltimore County to rent parking spaces from the Revenue Authority as a condition to the approval of its expansion. A reasonable observer must conclude that the costs to Sarabande were considered part of the cost of conducting a growing business and that these costs did not appear to be an intolerable burden.

It would be presumptive and injudicious of the Deputy Zoning Commissioner to anticipate what, if any, action the County Council might elect to take at some future date, regarding Town Center parking in general and Towson town center parking in particular, and to base his conclusions thereon.

Finally, the principle testimony on behalf of the Petitioners and the very verbiage of the Petition, itself, proclaimed economic hardship.

It has been well-established that financial hardship, per se, does not constitute adequate grounds for a variance and that the need to justify a variance must be substantial and urgent and not merely convenient.

Without reviewing the evidence further in detail but based upon all of the evidence presented at the hearing, it is the ineluctable conclusion of the Deputy Zoning Commissioner that the Petitioners have failed to meet the requirements of Section 307 of the Baltimore County Zoning Regulations and the Variance should not be had.

Therefore, IT IS ORDERED by the Deputy Zoning Commissioner of Baltimore County, this 25th day of October, 1978, that the Petition for the aforementioned Variance should be and the same is hereby DENIED.

[signature]
Deputy Zoning Commissioner of Baltimore County

ORDER RECEIVED FOR FILING
DATE October 25, 1978
BY [signature]

LeROY Y. HAILE

HAND DELIVERED

78-2817

LAW OFFICES
GEBHARDT & SMITH
SUITE 1544
THE WORLD TRADE CENTER
BALTIMORE, MARYLAND 21202

LAWRENCE J. GEBHARDT
JAMES M. SMITH

752-5830
AREA CODE 301

July 18, 1978

The Honorable George J. Martinak
Deputy Zoning Commissioner
County Office Building
111 W. Chesapeake St.
Towson, Maryland 21204

Re: Sarabande Zoning Variance
Hearing
Case No. 79-15-A
Item #237

Dear Mr. Martinak:

I would like to submit the following comments in support of the protestants' view opposing the Petition for a Variance in the above-referenced case, the hearing for which was held on Monday, July 17, 1978.

Section 307 of the Baltimore County Zoning Ordinance authorizes the granting of variances "only in cases where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship." The only testimony presented at the hearing by the applicant to substantiate practical difficulty or unnecessary hardship was the financial burden which the zoning regulations place upon the business being conducted at the subject property. The applicant's witness was able to provide no other reason why compliance with the zoning requirements was unreasonable or unnecessary. The Maryland Court of Appeals long ago established the rule that mere financial hardship or the fact that a property could produce a greater return for its occupants if compliance with the zoning regulations were not adhered to was insufficient to establish practical difficulty or unreasonable hardship so as to authorize the granting of a variance. In Easter v. Mayor & City Council, Baltimore 195 Md. 395, 73 A. 2d 491 (1950) the Court of Appeals stated "the mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of the setback requirements." Later, the Court of Appeals in [illegible]ino v. City of Baltimore, 215 Md. 206, 137 A. 2d 198 (1957) stated "Mere financial hardship or an opportunity to

ZONING DEPARTMENT
By

The Honorable George J. Martinak
July 18, 1978
Page 2

get an increased return from the property is not sufficient reason for granting an exception." See also Galblum v. Board of Appeals of Montgomery County, 2_3 Md. 168 A. 2d 232 (1970); Anderson v. Board of App., Town of Chesapeake Beach, 22 Md. App. 28, 322 At. 2d 220 (1974). Consequently, on the evidence presented by the applicant, a sufficient case for the granting of a variance has not been made out, as a matter of law.

Moreover, I would point out that the parking problem in the Towson area is extreme, and, as pointed out in the traffic engineer's report, granting this variance would only compound the existing problems. The Towson area is currently developing, as is evidenced by the new businesses and facilities going into the area, and the granting of this variance will serve as a precedent adverse to the general welfare of the Towson community.

I thank you for your consideration of this matter.

Very truly yours,

[signature]
LAWRENCE J. GEBHARDT

LJG/bs

cc: H. Emslie Parks, Esquire
John W. Hessian, Esquire

Enclosures

JUL 18 '78 AM
ZONING DEPARTMENT
By

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO S. Eric DiNenna, Zoning Commissioner — Date July 11, 1978

FROM Leslie H. Graef, Director of Planning

SUBJECT Petition #79-15-A. Petition for Variance
North side of Pennsylvania Avenue, 70 feet West of Delaware Avenue
Petitioner - LeRoy Y. Haile

9th District

HEARING: Monday, July 17, 1978 (11:00 A.M.)

It should be noted that on May 18, 1978, the Baltimore County Planning Board adopted, for consideration by the County Council, a report entitled "Proposed Amendment to the Baltimore County Zoning Regulations: Parking Requirements in Town Centers". Please note that this proposal, in part, contains the recommendation that no parking be required for restaurants in Town Centers.

[signature]
Leslie H. Graef
Director of Planning

LHG:JGH:rw

8/24/78 Public Hearing by Co Council

Description for Zoning Variance for Leroy Haile

Located on the north side of Pennsylvania Avenue approximately 70' west of the centerline of Delaware Avenue and running N 8° 30' E 72.4', thence N 81° 30' W 21', thence N 81° 30' W 27' thence S 8' 30' W 51.41' and thence S 81°30' E 50.75' to the place of beginning.

Also known as #4 1/2 and # 6 Pennsylvania Avenue

MAR 16 1979

Sarabande

BUISNESS LUNCH BUISNESS LUNCH BUISNESS LUNCH BUISNESS

SARABANDE WOULD LIKE YOU TO KNOW ABOUT THE SPECIAL BUISNESS LUNCH IN OUR NEW BAR. WE SERVE DAILY MONDAY TO FRIDAY FROM 11.30 am TO 3.00 pm.

HOUSE BRAND COCKTAILS	one dollar.
BOTTLED BEER (Molsons gold, National premium, Miller lite.)	one dollar.
BOTTLED COORS, BOTTLED HEINICKEN	one thirty.
DRAFT MICHELOB	eighty cents.

SANDWICH and SOUP LUNCH COMBINATION.

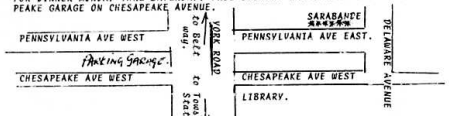
FILET MIGNON SANDWICH & SOUP.	three seventy five.
SHRIMP SALAD SANDWICH & SOUP.	two ninty five.
HAM & SWISS SANDWICH & SOUP.	two fifty.

(ALL sandwiches are served on individual Vie de France Loaves)

QUICHE & SALAD LUNCH COMBINATION.

QUICHE LORRAINE & SALAD (bacon, onions and swiss cheese)	three.
CRABMEAT QUICHE.	three ninty five.

AND IF YOU FEEL MORE ADVENTUROUS, WE HAVE A RESTAURANT NEXT DOOR WITH OVER THIRTY LUNCHEON ITEMS TO CHOOSE FROM. WE ARE ALSO OPEN FOR DINNER MONDAY THRU SATURDAY. FREE EVENING PARKING AT THE CHESAPEAKE GARAGE ON CHESAPEAKE AVENUE.



• four and a half • east pennsylvania • towson, maryland 21204 • (301) 321-9165

EX. 1,

Description for Zoning Variance

Located on the north side of Pennsylvania Avenue approximately 70' west of the centerline of Delaware Avenue and running N 8° 30' E 72.41', thence N 81° 30' W 23.75' thence S 8° 30' W 21', thence N 81° 30' W 27' thence S 8' 30' W 51.41' and thence S 81° 30' E 48.75' to the place of beginning.

Also known as #4½ and #6 Pennsylvania Avenue.

---

baltimore county
office of planning and zoning
TOWSON, MARYLAND 21204
(301) 494-3353

S. ERIC DINENNA
ZONING COMMISSIONER

George J. Martinak
Deputy Zoning Commissioner

October 25, 1978

H. Emslie Parks, Esquire
305 West Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Variance
N/S of Pennsylvania Avenue, 70' W of Delaware Avenue - 9th Election District
Leroy Y. Haile, et al - Petitioners
NO. 79-15-A (Item No. 237)

Dear Mr. Parks:

I have this date passed my Order in the above referenced matter, in accordance with the attached.

Very truly yours,

GEORGE J. MARTINAK
Deputy Zoning Commissioner

GJM:nr

Attachments

cc: Lawrence J. Gebhardt, Esquire
Suite 1544, The World Trade Center
Baltimore, Maryland 21202

John W. Hessian, III, Esquire
People's Counsel

BALTIMORE COUNTY

ZONING PLANS

ADVISORY COMMITTEE

PETITION AND SITE PLAN

EVALUATION COMMENTS

H. Emslie Parks, Esquire
305 West Chesapeake Avenue
Towson, Maryland 21204

Item No. 237

BALTIMORE COUNTY OFFICE OF PLANNING & ZONING

County Office Building
111 W. Chesapeake Ave.
Towson, Maryland 21204

Your Petition has been received and accepted for filing this 9th day of May, 1978.

S. ERIC DI NENNA
Zoning Commissioner

Petitioner Haile
Petitioner's Attorney Parks
Reviewed by
Nicholas B. Commodari
Chairman, Zoning Plans
Advisory Committee

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

OFFICE BLDG.
Chesapeake Ave.
Maryland 21204

NICHOLAS B. COMMODARI
Chairman

MEMBERS
Bureau of Engineering
Department of Traffic Engineering
State Roads Commission
Bureau of Fire Prevention
Health Department
Project Planning
Building Department
Board of Education
Zoning Administration
Industrial Development

July 6, 1978

H. Emslie Parks, Esquire
305 West Chesapeake Avenue
Towson, Maryland 21204

RE: Variance Petition
Item No. 237
Petitioner - Haile

Dear Mr. Parks:

The Zoning Plans Advisory Committee has reviewed the plans submitted with the above referenced petition and has made an on site field inspection of the property. The following comments are not intended to indicate the appropriateness of the zoning action requested, but to assure that all parties are made aware of plans or problems with regard to the development plans that may file a written report with the Zoning Commissioner with recommendations as to the suitability of the requested zoning.

Located on the north side of Pennsylvania Avenue approximately 70 feet west of Delaware Avenue in the 9th Election District, the subject property is presently improved with the existing facilities of the Sarabande Restaurant. The adjacent properties are improved with a retail sales operation to the west, an office building to the east and a parking area to the north.

A building permit application (#00590, C-1387-77), to expand the facilities to its present size, was approved by this office on January 3, 1978, with the stipulation that parking spaces be leased from the Revenue Authority parking garage. Because of your client's proposal to operate at this location without leasing these spaces in the future, this Variance is required.

H. Emslie Parks, Esquire
Page 2
July 6, 1978

This petition is accepted for filing on the date of the enclosed filing certificate. Notice of the hearing date and time, which will be held not less than 30 nor more than 90 days after the date on the filing certificate, will be forwarded to you in the near future.

Very truly yours,

NICHOLAS B. COMMODARI
Chariman
Zoning Plans Advisory Committee

NBC:nmw

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baltimore county
office of planning and zoning
TOWSON, MARYLAND 21204
(301) 494-3211

LESLIE H. GRAEF
DIRECTOR

May 15, 1978

Mr. Eric S. DiNenna, Zoning Commissioner
Zoning Advisory Committee
Office of Planning and Zoning
Baltimore County Office Building
Towson, Maryland 21204

Dear Mr. DiNenna:

Comments on Item #237, Zoning Advisory Committee Meeting, May 9, 1978, are as follows:

Property Owner: Leroy Y. Haile
Location: N/S Pennsylvania Avenue 70' W. Delaware Avenue
Existing Zoning: B.M.-C.T.
Proposed Zoning: Variance to permit 0 parking space in lieu of the required 63 spaces
Acres: 3112.37 acres
District: 9th

This office has reviewed the subject petition and offers the following comments. These comments are not intended to indicate the appropriateness of the zoning in question, but are to assure that all parties are made aware of plans or problems with regard to development plans that may have a bearing on this petition.

This plan has been reviewed and there are no site-planning factors requiring comment.

Very truly yours,

John L. Wimbley
Planner III
Current Planning and Development

baltimore county
department of public works
TOWSON, MARYLAND 21204

THORNTON M. MOURING, P.E.
DIRECTOR

July 14, 1978

Mr. S. Eric DiNenna
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Re: Item #237 (1977-1978)
Property Owner: Leroy Y. Haile
N/S Pennsylvania Ave. 70' W. Delaware Ave.
Existing Zoning: B.M.-C.T.
Proposed Zoning: Variance to permit 0 parking spaces in lieu of the required 63 spaces.
Acres: 3112.37 sq. ft. District: 9th

Dear Mr. DiNenna:

The following comments are furnished in regard to the plat submitted to this office for review by the Zoning Advisory Committee in connection with the subject item.

Highways:

Pennsylvania Avenue, an existing County street, is proposed to be improved in the future as a 40-foot closed section roadway on a 70-foot right-of-way in this vicinity. The proposed 8-foot roadway widening, to affect the 40-foot roadway, will occur along the north side of Pennsylvania Avenue, with the proposed 70-foot right-of-way centered on the proposed 40-foot roadway. Highway right-of-way widening will be required in the future, or in connection with any grading or building permit application.

Sediment Control:

Development of this property through stripping, grading and stabilization could result in a sediment pollution problem, damaging private and public holdings downstream of the property. A grading permit is, therefore, necessary for all grading, including the stripping of top soil.

Storm Drains:

The Petitioner must provide necessary drainage facilities (temporary or permanent) to prevent creating any nuisances or damages to adjacent properties, especially by the concentration of surface waters. Correction of any problem which may result, due to improper grading or improper installation of drainage facilities, would be the full responsibility of the Petitioner.

Item #237 (1977-1978)
Property Owner: Leroy Y. Haile
Page 2
July 14, 1978

Water and Sanitary Sewer:

Public water supply and sanitary sewerage are serving this property. Additional fire hydrant protection is required in the vicinity.

Very truly yours,
Ellsworth N. Diver / JRC
ELLSWORTH N. DIVER, P.E.
Chief, Bureau of Engineering

END:EAM:FWR:SS

cc: J. Trenner (Poehlman)
W. Munchel
J. Somers

N-NW Key Sheet
38 NE 3 Pos. Sheet
NE 10 A Topo
70 & 70A Tax Maps

baltimore county
department of health
TOWSON, MARYLAND 21204

DONALD J. ROOP, M.D., M.P.H.
DEPUTY STATE AND COUNTY HEALTH OFFICER

June 1, 1978

Mr. S. Eric DiNenna, Zoning Commissioner
Office of Planning and Zoning
County Office Building
Towson, Maryland 21204

Dear Mr. DiNenna:

The following are comments on Item #237, Zoning Advisory Committee Meeting of May 9, 1978:

Property Owner: Leroy Y. Haile
Location: N/S Pennsylvania Ave. 70' W Delaware Ave.
Existing Zoning: B.M.-C.T.
Proposed Zoning: Variance to permit 0 parking spaces in lieu of the required 63 spaces.
Acres: 3112.37
District: 9th

Since metropolitan water and sewer are available, no health hazards are anticipated.

Very truly yours,
Thomas H. Devlin
Thomas H. Devlin, Director
BUREAU OF ENVIRONMENTAL SERVICES

THD/JRP/fthg

baltimore county
department of traffic engineering
TOWSON, MARYLAND 21204
(301) 494-3550

STEPHEN E. COLLINS
DIRECTOR

May 24, 1978

Mr. S. Eric DiNenna
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Item No. 237 - ZAC - May 9, 1978
Property Owner: Leroy Y. Haile
Location: N/S Pennsylvania Ave. 70' W Delaware Avenue
Existing Zoning: B.M.-C.T.
Proposed Zoning: Variance to permit 0 parking spaces in lieu of the required 63 spaces.

Acres: 0.071
District: 9th

Dear Mr. DiNenna:

The variance is requesting to permit 0 parking spaces in lieu of the required 63 spaces. The parking problem that exists in the Towson area can only be compounded by granting this variance.

Very truly yours,
Stephen E. Weber
Stephen E. Weber
Engineer I

SEW/fmm

baltimore county
fire department
TOWSON, MARYLAND 21204
(301) 825-7310

Paul H. Reincke
CHIEF

Office of Planning and Zoning
Baltimore County Office Building
Towson, Maryland 21204

Attention: N. Commodari, Chairman
Zoning Advisory Committee

Re: Property Owner: Leroy Y. Haile

Location: N/S Pennsylvania Ave. 70 W Delaware Ave.

Item No. 237 Zoning Agenda Meeting of 05/09/78

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below marked with an "x" are applicable and required to be corrected or incorporated into the final plans for the property.

( ) 1. Fire hydrants for the referenced property are required and shall be located at intervals or _____ feet along an approved road in accordance with Baltimore County Standards as published by the Department of Public Works.

( ) 2. A second means of vehicle access is required for the site.

( ) 3. The vehicle dead end condition shown at _____ EXCEEDS the maximum allowed by the Fire Department.

( ) 4. The site shall be made to comply with all applicable parts of the Fire Prevention Code prior to occupancy or beginning of operations.

( ) 5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1976 Edition prior to occupancy.

( ) 6. Site plans are approved as drawn.

(x) 7. The Fire Prevention Bureau has no comments, at this time.

REVIEWED: Planning Group
Special Inspection Division

Noted and Approved: George M. Weigandt
Fire Prevention Bureau

baltimore county
department of permits and licenses
TOWSON, MARYLAND 21204
(301) 494-3610

JOHN D. SEYFFERT
DIRECTOR

May 5, 1978

Mr. S. Eric DiNenna, Zoning Commissioner
Office of Planning and Zoning
County Office Building
Towson, Maryland 21204

Dear Mr. DiNenna:

Comments on Item #237 Zoning Advisory Committee Meeting, May 9, 1978 are as follows:

Property Owner: Leroy Y. Haile
Location: N/S Pennsylvania Ave. 70' W. Delaware Ave.
Existing Zoning: B.M. - C.T.
Proposed Zoning: Variance to permit 0 parking spaces in lieu of the required 63 spaces.

Acres: 3112.37
District: 9th

The items checked below are applicable:

X A. Structure shall conform to Baltimore County Building Code (B.O.C.A.) 1970 Edition and the 1971 Supplement, State of Maryland Code for the Handicapped and Aged and other applicable codes.

X B. A building permit shall be required before construction can begin.

X C. Additional retaining walls & other misc. Permits shall be required.

D. Building shall be upgraded to new use - requires alteration permit.

E. Three sets of construction drawings will be required to file an application for a building permit.

XF. Three sets of construction drawings with a registered Maryland Architect or Engineer's original seal will be required to file an application for a building permit.

G. Wood frame walls are not permitted within 3'0" of a property line. Contact Building Department if distance is between 3'0" and 6'0" of property line.

H. Requested setback variance conflicts with the Baltimore County Building Code. See Section _____.

I. No Comment.

XJ. Comment: Indicate parking curb cuts, ramps, etc for the handicapped as required on plat plans. Does rear exit lead to a public space in compliance with Building Code requirements. Handicapped Code shall be in compliance with .

Very truly yours,
Charles E. Burnham
Charles E. Burnham
Plans Review Chief

CEB:rrj

baltimore county
department of permits and licenses
TOWSON, MARYLAND 21204
(301) 494-3610

JOHN D. SEYFFERT
DIRECTOR

RE: Permit No: Item #230
District: 9th
Address: 32 W. Pennsylvania Ave.
Towson, Md. 21204

Dear Sir:

Your revised site plans fail to reflect compliance with the Maryland State Code for the Handicapped and Aged. Specifically Section 316.3 and 316.4.

(X) Parking Spaces
(X) Parking Signs
(X) Ramp to Sidewalks
(X) Access to Structure
(X) Curb Cuts

Please review the above sections for total compliance.

Very truly yours,
Charles E. Burnham
C.E. Burnham, Chief
Plans Review

CEB:rrj

BOARD OF EDUCATION
OF BALTIMORE COUNTY

TOWSON, MARYLAND - 21204

Date: May 3, 1978

Mr. S. Eric DiNenna
Zoning Commissioner
Baltimore County Office Building
Towson, Maryland 21204

Z.A.C. Meeting of: May 9, 1978

RE: Item No: 237
Property Owner: Leroy Y. Haile
Location: N/S Pennsylvania Ave 70' W Delaware Ave.
Present Zoning: B.M.-C.T.
Proposed Zoning: Variance to permit 0 parking spaces in lieu of the required 63 spaces.

District: 9th
No. Acres: 3112.37 acres

Dear Mr. DiNenna:

No bearing on student population.

Very truly yours,
W. Nick Petrovich
W. Nick Petrovich,
Field Representative

WNP/bp

JOSEPH N. McGOWAN, PRESIDENT
T. BAYARD WILLIAMS, JR., VICE-PRESIDENT
MARCUS M. BOND, JR.
THOMAS H. BOYER
MRS. LORRAINE F. CYRICUS
ROGER B. HAYDEN
ALVIN LORECK
MRS. MILTON R. SMITH, JR.
RICHARD W. TRACEY, D.V.M.
ROBERT Y. DUBEL, SUPERINTENDENT

manner as to grant relief without substantial injury to public health, safety, and general welfare * * *."

The Board predicated its granting of the variances on the basis that there were "reasonable and essential to prevent practical difficulty and hardship in developing the property." However, there is nothing in the record which would indicate the exact type of structure that the petitioners intended to construct on Lots 10 through 19, other than that it would be in keeping with the general architectural scheme prevalent in the industrial park.

We cannot overlook the fact that in the instant case there are substantial residential properties within the immediate area. The appellant Becks resides 350 feet from Lots 10 through 19. The appellant Dahl is constructing a $33,000 home, 186 feet from Lots 10 through 19. There is another residence between Dahl's home and Lots 10 through 19. Appellant Young resides on Lot No. 26. The evidence is such as would lead a reasonable man to the belief that the granting of these variances may well affect the aesthetic ambiance of the residentially zoned properties which lie in the immediate area. For this reason we are of the opinion that the granting of these variances would be in disharmony with the "spirit and intent * * * of * * * the regulations * * *."

The "difficulties" and "hardships" to which the Board referred, although not spelled out, obviously were thought to be of such a nature that, if not overcome, would have resulted in the petitioners sustaining some financial hardship in their efforts to develop the property and in their future use of it. In Easter v. Mayor and City Council of Baltimore, 195 Md. 395, 400, 73 A.2d 491, 492 (1950) we said: "The mere fact that the variance would make the property more profitable is not a sufficient [illegible] to justify a relaxation of [illegible]

* * * but we think the detriment to the applicant must be weighed against the benefit to the community in maintaining the general plan." See also Burns v. Mayor and City Council of Baltimore, 251 Md. 554, 558, 248 A.2d 103 (1968), and City of Baltimore v. Poiakoff, 233 Md. 1, 194 A.2d 819 (1963). As we view the law, we think the granting of the variances by the Board was arbitrary and capricious.

On the basis of what he have said in this opinion we affirm the decision of the lower court in sustaining the Board's action with regard to the rezoning of Lots 10 through 19 from R-6 to M-1 (light manufacturing), and reverse the decision with respect to the court's affirming of the granting of the variances as to Lots 10 through 19 and the rezoning and variances as to Lots 22, 23 and 24.

Order affirmed in part and reversed in part as set forth in this opinion, appellees to pay costs.

258 Md. 246

Harry S. GALBLUM et al., t/a Montgomery Hills Associates

v.

BOARD OF APPEALS OF MONTGOMERY COUNTY.

No. 347.

Court of Appeals of Maryland.

May 11, 1970.

Proceeding on application for a [illegible] from a county zoning [illegible] From an order of the Circuit [illegible] Montgomery County, Ralph G. [illegible] upholding the finding of [illegible] plaintiffs appealed [illegible]

only if taxpayer should provide off-street parking facilities complying with standards set forth in another section, and standards contemplated by such section were those to be adopted by county council, and council adopted no standards, operators of trading stamp redemption center in parking lot district, who had but 18 parking spaces whereas code required 41, were not entitled to exemption from the special parking tax.

Affirmed.

[illegible] Counties ⟹192

Under county code granting exemption from special parking tax only if taxpayer should provide off-street parking facilities complying with standards set forth in such section, and standards contemplated by such section were those to be adopted by county council, and council adopted no standards, operators of trading stamp redemption center in parking lot district, who had but 18 parking spaces whereas code required 41, were not entitled to exemption from the special parking tax.

[illegible] ⟹326

[illegible] of county zoning ordinance [illegible] board of appeals to reduce the [illegible] of off-street parking spaces [illegible] upon a finding that use proposed [illegible] conducted in a building already [illegible] would be adequate for proposed [illegible] did not entitle operators of [illegible] redemption center in parking [illegible] subject to special tax to [illegible] under the ordinance, where [illegible] had but 18 parking spaces [illegible] required 41, and ordinance [illegible] specifically provided that it was [illegible] to parking lot districts.

[illegible] Bethesda (Samuel Barker [illegible] Savits, Bethesda, on the [illegible]

Montgomery County, Alfred H. Carter, Deputy County Atty., and Stanley D. Abrams, Asst. County Atty., Rockville, on the brief, for appellee.

Argued before HAMMOND, C. J., and BARNES, McWILLIAMS, FINAN and SINGLEY, JJ.

HAMMOND, Chief Judge.

Montgomery County, as part of its plan of government, utilizes four special taxing areas known as Parking Lot Districts. These districts embrace those older parts of the County which had developed commercially and industrially prior to the adoption of section 111-27 of the Zoning Regulations of Montgomery County effective in other areas of the County, which requires the furnishing of a specified number of off-street parking spaces as a prerequisite to the granting of a building or occupancy permit for a business use. The districts were formed to permit the collection of extra tax revenues to be used in the district in which collected, for the acquisition and maintenance there of public parking lots and garages.

The law governing the creation and operations of these Parking Lot Districts is now codified as Ch. 44 of the Montgomery County Code 1965. Section 44-3, as amended by Ch. 4 of the 1967 Laws of Montgomery County, authorizes the levying annually of a tax of up to one dollar per hundred dollars of real and tangible personal property in each district "used in whole or in part for commercial, industrial or general business purposes." These taxes are described as "special taxes in the nature of ad valorem taxes" and are "in every respect [to] be treated the same as ordinary taxes." By section 44-4 the County Council is authorized "to adopt and amend by ordinance standards, schedules and regulations for off-street parking

evidence concerning the physical condition of the road, claiming that those conditions would have shown an additional hazard to safety by any increased use of the road. Confining our ruling to the facts of this case, we hold the chancellor was correct. The only question to be determined was whether the Moores had a legal right to use the road for the benefit of parcel X, and, as we have already decided that they did, this argument of the appellants cannot prevail.

Decree affirmed in part, and reversed in part, and cause remanded for further proceedings not inconsistent with this opinion, appellants to pay the costs.

215 Md. 206

Frank C. MARINO et al.

v.

CITY OF BALTIMORE et al.

No. 79.

Court of Appeals of Maryland.

Dec. 20, 1957.

Proceeding to review action of board of municipal and zoning appeals, denying permit to construct a store building and adjacent parking area on unimproved lot of land in area zoned for residential use only. The Baltimore City Court, E. Paul Mason, J., entered order affirming action of board and property owners appealed. The Court of Appeals, Horney, J., held that question of whether to grant or deny exception under evidence was fairly debatable so that order of trial court must be affirmed.

Affirmed.

1. Municipal Corporations ⟹601(15), 621.8

All zoning regulation, including relevance, which are intended to relieve harshness of zonal restriction in a particular instance, is a lawful exercise of police power by sovereign state.

2. Municipal Corporations ⟹600

Individual right to use privately owned property is subordinate to paramount right of public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, providing that such zoning restriction is itself lawful and not such as to permanently deprive property owner of all reasonable use of property.

3. Municipal Corporations ⟹621.8, 621.17

Exception to zoning regulations are granted sparingly, under exceptional circumstances, but existence of an unnecessary hardship usually justifies granting of an exception.

4. Municipal Corporations ⟹621.17

Criterion for determining unnecessary hardship is whether applicable zoning restriction when applied to property in setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with basic right of private ownership.

5. Municipal Corporations ⟹621.46

Where property owners sought an exception to zoning ordinance to permit them to construct commercial building in area zoned for residential use, property owners had burden of proving that they were entitled to an exception under ordinance.

6. Municipal Corporations ⟹621.46

Where property owners sought exception to zoning ordinance under Baltimore City ordinance allowing granting of exception when land proposed to be used does present, because of topography, grade or accessibility, practical difficulties or unnecessary hardships, it was incumbent upon owners to prove that their property zoned

reasonable return from or any reasonable use of their property for residential purposes, and that the difficulties or hardships were not the result of owners' own actions. Code Supp.1957, art. 66B, § 7(g) (2,3).

7. Municipal Corporations ⟹621.21

Mere financial hardship or an opportunity to get an increased return from property is not sufficient reason for granting exception to zoning ordinance but financial advantage, although not controlling, is not entirely irrelevant.

8. Municipal Corporations ⟹621.17

Plight of owner of real property seeking exception to zoning ordinance must be due to unique circumstances and not to general conditions in the neighborhood.

9. Municipal Corporations ⟹621.39

A prior exception to zoning ordinance granted by municipality does not control the granting of a subsequent exception.

10. Eminent Domain ⟹2(1)

A zoning ordinance which permanently so restricts use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation.

11. Municipal Corporations ⟹621.55

In proceeding by property owners for review of action by municipality in denying exception to zoning ordinance so as to permit owners to construct commercial buildings and adjacent parking area on lots zoned for residential use only, evidence sustained finding that board did not abuse its discretion in denying application for exception. Code Supp.1957, art. 66B, § 7(g) (2, 3).

12. Municipal Corporations ⟹621.14

Traffic congestion is an element which the board should consider in deciding whether or not to grant variance to zoning

13. Municipal Corporations ⟹621.58

Where question of whether to grant or deny exception to zoning ordinance is, under evidence, fairly debatable, order of trial court approving action of board must be affirmed.

14. Administrative Law and Procedure ⟹763

Court may not substitute its judgment as to the wisdom or soundness of action taken by the administrative body unless it is clear that such action was illegal, arbitrary or discriminatory.

Donald N. Rothman and Robert Hammerman, Baltimore (Gordon, Feinblatt & Rothman and David P. Gordon, Baltimore, on the brief), for appellants.

Henry Vogt, Baltimore, for Wm. J. Hulser, and others, Intervenors.

Shirley B. Jones, Asst. City Sol., Baltimore (Thomas N. Biddison, City Sol. and Hugo A. Ricciuti, Deputy City Sol., Baltimore, on the brief), for City of Baltimore.

Before BRUNE, C. J., and HENDERSON, HAMMOND, PRESCOTT, and HORNEY, JJ.

HORNEY, Judge.

This is an appeal from an order of the Baltimore City Court affirming the action of the Board of Municipal Zoning Appeals, (the Board), denying a permit to construct a one-story store building and adjacent parking area on the unimproved lot of land owned by Frank C. Marino and Bernardine Marino, his wife, and the Marimar Company, Inc., (the Marinos), on the north side of Belvedere Avenue near the intersection of said Avenue with York Road, generally known as 522 East Belvedere Avenue.

The property is situated in a residential use district and has been so classified since the passage of the initial zoning act in 1931

authorized by section 44-6 of this Code."

Section 44-6 reads:

"Land and improvements thereon within each district and tangible personal property thereon or therein shall be totally exempt from the taxes prescribed in section 44-3 of this Code if the owner thereof or his lessee shall provide off-street parking facilities complying with the standards set forth in section 44-4 of this Code."

The County Council has not adopted by ordinance or otherwise standards, schedules and regulations "in order to qualify land and improvements for exemption * * *" although section 111-27 c of the zoning regulations specifies the number of off-street parking spaces every business and industrial use elsewhere in the County must furnish.[1] We were told at the argument that the practice has been to use the standards of section 111-27 c as the exemption standards for parking lot districts and that exemption from the parking tax is granted only if a business has furnished the full and exact number of spaces it would be required to furnish if it were located outside a district. In practice there has been either complete exemption or full liability with no gradation for the extent of compliance or non-compliance with section 111-27 c.

The appellants operate a trading stamp redemption center in the Montgomery Hills Parking Lot District on which they have been required to pay some $1,000 a year as special parking taxes because they have but 18 parking spaces, and the standards of section 111-27 c require 41. In an effort to escape these taxes, they applied to the Board of Appeals not for the exemption allowable by section 44-6 but for the variance which is provided by section 111-27 b (3) as follows:

"The Board of Appeals shall have authority * * * upon application by any interested party to reduce the number of parking spaces required upon a finding that the use proposed will be conducted in a building already existing and will be adequate for such proposed use."

Their theory (and their testimony) was that 18 parking spaces were adequate for their use, and if the Board reduced the requirement of 41 spaces to 18, they would be in full compliance with section 111-27 c and entitled to complete exemption from parking taxes.

Unfortunately for appellants the Board held that:

"Although Section 111-27.b.(3) gives the Board of Appeals authority to reduce the number of parking spaces required pursuant to certain findings, Section 111-27.b.(1) provides that its provisions shall not apply within any parking lot district established in accordance with the Montgomery County Code. Therefore, the authority of the Board to change the parking requirements (Section 111-27.b.(3)) is not available to the petitioner, it being conceded that the subject property is in fact within such a parking lot district."

and in the Circuit Court Judge Shure upheld the Board, finding its construction of the ordinances to have been correct.

[1] We agree that appellants are not entitled to exemption from the special parking tax. Section 44-6 grants exemption only if the taxpayer "shall provide off-street parking facilities complying with the

1. Prior to 1964 the standards for exemption referred to in section 44-6 did exist. See Montgomery County Code (1960), § 44-4; Montgomery County Code [illegible] 15 of the 1964 Laws the County Council enacted the present section 44-4 of the Code, which as quoted above authorized the Council to adopt and amend [illegible]

standards set forth in section 44-4 * * *." The standards contemplated by section 44-4 are those to be adopted by the County Council and the Council has not exercised the authority granted it by section 44-4 to set the standards on which the grant of an exemption is to be based. Appellants do not challenge the constitutionality of section 44-3 or its applicability to them, and since the legislative body has afforded them no basis on which to predicate the grant of an exemption cannot prevail in seeking to escape the tax.

[2] In an effort to escape the bind in which they find themselves, appellants somewhat ingeniously attempt to rely on section 111-27 despite its statement that generally it is not to apply to parking lot districts. That section is titled Automobile Off-Street Parking Requirements. Part a is headed General Provisions and is not pertinent here. Part b is headed Exceptions, and paragraph 1 thereof reads:

"(1) Except as hereinafter provided, the provisions of Section 111-27 shall not apply within any parking lot district established in accordance with Chapter 44 of the Montgomery County Code; provided that multi-family dwellings permitted under Section 111-21a (5) in the C-2 Zone shall provide off-street parking as required by this ordinance whether or not such dwellings are located in a parking lot district; and provided further that for any building or premises used for commercial or industrial purposes, adequate off-street space for the loading and unloading of materials shall be provided, taking into consideration the size and proposed use of the building and where access for loading and unloading is otherwise available and will not cause interference with the flow of vehicular and pedestrian traffic in the area."

Appellants say that the word "hereinafter" in the opening phrase "except as hereinafter provided" refers not only to the two exceptions immediately thereafter spelled out in paragraph (1) but to the other provisions of Part b, including paragraph (3), the variance escape valve on which appellants relied before the Board and the court.[2]

Although appellants blithely ignore part c of section 111-27, it becomes immediately manifest that unless part c, headed Schedules, which sets the required number of parking spaces for each particular business, commercial and industrial use, is made applicable under their theory to parking lot districts as an "exception" included within the reach of the opening words of paragraph (1) of Part b of section 111-27, the Board would have nothing to vary as far as parking lot districts are concerned, since there would be no requirement for parking spaces in such districts.

It is equally manifest that the Schedules—which prescribe in detail the number of parking spaces required for some 45 specified business, commercial and industrial uses—were not intended to apply to or cover parking lot districts. Under the most liberal and [illegible] the Schedules, the very heart [illegible] 111-27, which in terms is stat[illegible] certally embrace parking lot [illegible] not be considered a "hereinafter [illegible] provided" mandate which did apply to those districts. It is clear to us that on its face

2. [illegible], which authorizes the [illegible] Appeals to grant waivers of parking requirements for buildings prior to June 1, 1958, could hardly have been intended to refer to parking lot districts, [illegible] known as the Upper Montgomery County Planning District as it existed prior to March 9, 1928, [illegible] known as the Mary[illegible]

permitted but none has been constructed by the Marinos or previous owners. The plat filed with the record shows a first commercial use district on both sides of York Road — the north and south of Belvedere Avenue, an area which has been zoned commercial since the original zoning ordinance in 1931. The area between the easternmost boundary of the commercial district and the property for which an exception is sought, also owned by the Marinos, is zoned for residential use, but is now used for commercial purposes under a prior permit approved by the Board. The area immediately to the north of the property in question, above a slope, variously estimated to be ten to thirty feet high, is zoned and used for residential purposes. The sylvan area to the east, owned by the City, is also zoned residential, although a part of it may be used in the future as a portion of the proposed Northern Parkway Extension. Directly across the avenue from the Marino property there is a large parking lot, formerly zoned residential, but now used commercially. A department store is situated on the southeast corner of York Road and Belvedere Avenue, but it is within the first commercial use district referred to. Other nonresidential uses have, by way of exceptions, invaded the residential use district. However, the major part of the originally zoned residential district still remains zoned and is used for residences.

On October 5, 1953, an ordinance was introduced in the City Council of Baltimore City to rezone the property in question from residential to first commercial. On October 30, 1953, the Board approved and recommended passage of the proposed ordinance stating that "it is not suitable for residential development." The Planning Commission of Baltimore City suggested an [illegible] of the proposed ordinance [illegible] on June 1, 1954, the ordinance as amended was rejected by the City Council.

At the hearing before the Board evidence was produced to the effect that the property was unsuitable for residential use; that to use it for that purpose would be wasteful, improvident, economically unsound, and impossible to finance; and that the property was best suited for commercial use. There was also testimony that the value of the property for commercial use was many times that for residential use, and that such use would not affect the value of neighboring properties. On the contrary there was evidence, some of it on cross examination, to the effect that the property was suitable for residential purposes; that houses costing from $12,000 to $15,000, if built, could be readily sold; and a banker testified that his savings and loan association would "entertain" an application for a loan for residential development of the property. The protestants, who testified, objected to any further encroachment by commercial interests because it would tend to depreciate the value of their properties. One witness, a real estate appraiser and broker, attempted to testify that the present use of the property as a "dump" and a "parking lot" created a health as well as a safety problem, but his testimony had little probative value. Because vacant lots vexed him, another real estate developer, who had seen the property used as a dump inhabited by mice and rats and perhaps a few snakes, and used as a playground for children, thought the residential restriction had created a health, safety and morals hazard, but he was not an expert in either field.

There was some testimony, pro and con, before the Board as to the effect of traffic congestion in the area. In court, the director of traffic, who had made several traffic surveys of the cross-streets area

showed that 47,988 vehicles passed through the area in a twenty-four hour period, 18,782 of which were going "to the east of York Road". Over a period of four years there were fifty-seven accidents at the intersection. He further testified that the parking lot across the avenue had created traffic congestion and that another on the Marino property would make it "doubly worse", and that the congestion is already great and the street arrangements are not such as permit a present solution of the problem. The traffic director was also of the opinion that the development of a large department store and parking lot in the area was a serious error traffic-wise which ought not to be repeated.

The authority of the Board to make an exception under the Enabling Act, [Code, Cum.Sup. (1957), Art. 66B, sec. 7(g) (2), (3)], and Section 36(b) and (c), [formerly 33(b) and 33(c)], of the Baltimore City Zoning Ordinance, (the ordinance), is not disputed. Furthermore, the City and the intervenors admit that in this case the proper tribunal to hear and determine the appeal from the Board was the Baltimore City Court.

Section 7(g) (3), supra, provides that the Board shall have the power, among others:

"To authorize upon appeal in specific cases such variance from the terms of the ordinance as is necessary to avoid arbitrariness and so that the spirit of the ordinance shall be observed and substantial justice done."

The ordinance provides that the Board shall have power: (i), by Section 35(g) 2, to "hear and decide special exceptions * * *"; and (ii), by Section 35(g) 3, the same [general] power as that granted by Section 7(g) (3), supra, of the enabling act. Section 36(b) and (c) [illegible]

"(b). Grant a permit where the use or change of use of land, * * proposed to be used is limited as to its location because of the * * * topography, grade or accessibility."

[and]

"(c). Grant a permit where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of the * * * [zoning ordinance]."

Section 36(b) and (c), supra, also provide that the Board shall act as a fact-finding body and, in arriving at a decision, shall give consideration to the rules, regulations, restrictions, guides and standards set forth elsewhere in the ordinance.

Ordinarily, there is a marked distinction in the law of zoning between a variance and an exception,[1] but there is none in Baltimore City since an exception, apparently, overlaps a variance inasmuch as both may be granted where there are "practical difficulties or unnecessary hardships". This is the reason why many cases which arise in Baltimore City, such as this one, discuss exceptions and variances without differentiation.

[1,2] Basically, of course, all zoning regulation, including rezoning, as well as an exception and a variance, which are intended to relieve the harshness of a zonal restriction in a particular instance, is a lawful exercise of its police power by the sovereign state. It is axiomatic that the individual right to use privately owned property is subordinate to the paramount right of the public whenever such use tends to affect injuriously the health, comfort, safety and general welfare of all persons in a community, provided, however, that such [illegible]

the word "hereinafter" means "within this paragraph." It is significant that the description in paragraph b (1) of the first use in parking lot districts to which section 111-27 is to apply is preceded by the word "provided" and that the second description is preceded by the words "further provided." There is no similar use of "provided" thereafter in section 111-27. In effect, as we see it, section 111-27 b (1) reads:

"* * * none of the provisions of Sec. 111-27 shall apply within any parking lot district except that multi-family dwellings shall provide off-street parking as required by this ordinance whether or not in a parking lot district and except that adequate off-street parking must be provided for the loading and unloading of materials in parking lot districts as elsewhere."

That this is the interpretation of section 111-27 intended by the County Council when it enacted that section becomes clear when it is recognized that until 1959 what is now section 111-27 b (1) read simply, "The provisions of this section shall not apply within any parking lot district now established by law." See Montgomery County Code (1955), § 107-18 b. (Amendments in 1959 and 1960 changed the language of the section to read as it does today. See Ordinance No. 4-22, 1960 Laws of Montgomery County at 46; Ordinance 4-53, 1961 Laws of Montgomery County at 41.) The reason why these provisions were not made applicable to parking lot districts also becomes obvious when it is recognized that at that time separate exemption provisions were provided for parking lot districts. See note 1, supra.

Many of the purposes of and benefits of Ch. 44 would be defeated or frustrated if section 111-27 were read as appellants [illegible]

258 Md. 141

Charles McElfresh SMITH, Jr., et al.

v.

The FREDERICKTOWN BANK & TRUST COMPANY, Ex'r u/w of Charles McElfresh Smith.

No. 387.

Court of Appeals of Maryland.

May 8, 1970.

Proceeding upon suggestion of removal under constitutional provision. The Circuit Court, Frederick County, Robert E. Clapp, Jr., J., denied removal on the ground of noncompliance with a circuit rule relating to removal. Appeal was taken. The Court of Appeals, Digges, J., held that where Sixth Circuit rule providing that the right of removal should be deemed waived unless a written suggestion was filed within 45 days after the cause was at issue or any such issue or appeal was filed or within 45 days from docketing of any such cause removed from outside circuit unless party making suggestion can satisfy court there is reasonable ground for same did not become effective until October 5, 1969, it was error to apply such Sixth Circuit rule to a case in which issues had been filed in the circuit court on June 10, 1969.

Order reversed and case remanded for removal.

1. Appeal and Error ⟹70(6)

Where denial of right to remove civil case from circuit court of its origin as provided by Constitution allegedly involved denial of absolute constitutional right, it was necessary for court of appeals to entertain appeal from denial though order of denial was seemingly interlocutory in nature. Const. art. 4, § 8; Code 1957, art. 75, § [illegible]; Maryland Rules, Rule 542.

waived unless written suggestion was filed within 45 days after cause was at issue or any such issue or appeal was filed or within 45 days from docketing of any such cause removed from outside circuit unless party making suggestion can satisfy court there is reasonable ground for same did not become effective until October 5, 1969, it was error to apply such Sixth Circuit rule to case in which issues had been filed in circuit court on June 10, 1969. Const. art. 4, §§ 8, 18A; Code 1957, art. 75, § 44; Maryland Rules, Rule 542.

Herbert D. Morrison, Frederick, for appellants.

Donald E. Sharpe, Baltimore, for appellee.

Argued before HAMMOND, C. J., and BARNES, FINAN, SMITH and DIGGES, JJ.

DIGGES, Judge.

[1] We are here involved with the denial of the right to remove a civil case from the circuit court of its origin as provided by Article IV, Section 8 of the Maryland Constitution, Article 75, Section 44 of the Maryland Code (1957, 1969 Repl. Vol.) and Maryland Rule 542. Even though the order denying removal is seemingly interlocutory in nature we must entertain this appeal because it involves the denial of an absolute constitutional right, Elliott v. Larrimore, 203 Md. 526, 101 A.2d 817 (1954); Griffin v. Leslie, 20 Md. 15 (1863). Note the full discussion of the right of appeal from a removal decision in criminal cases in Pearlman v. State, 226 Md. 67, 172 A.2d 395 (1961).

[illegible] 10, 1969, the Circuit Court for [illegible] The Fredericktown Bank and Trust Company as executor under the will, was named as the caveatee and is the appellee in this appeal. The case was ultimately set for trial on January 13 and 14, 1970, but on January 8 the caveators filed a suggestion of removal under Article IV, Section 8 of the Maryland Constitution, alleging merely that they could not have "a fair and impartial trial" in Frederick County. The trial court (Clapp, J.) denied the motion on the ground that they had not complied with Sixth Circuit Rule 542. That rule provides:

"RULE 542. REMOVAL OF CAUSES

The right of removal of all actions at law, issues from the Orphans' Court or from any court sitting in equity or appeals from the Workmen's Compensation Commission shall be waived by a party unless a written suggestion is filed within 45 days after such cause is at issue or when any such issue or appeal is filed, or within 45 days of the docketing of any such cause being removed from a court outside the Sixth Judicial Circuit, unless a party making the suggestion can make it satisfactorily appear to the court that there is reasonable ground for the same."

Judge Clapp observed that they had neither filed the suggestion of removal forty-five days after the filing of issues nor made it appear that there were reasonable grounds for removal. In addition Judge Clapp pointed out that "this case had been at issue for more than 45 days after the first day of October, 1969, the date on which the above Rule became effective."

The question presented here is whether the judicial circuits can use their local rule making powers, which are recognized in [illegible]

See Grant v. Mayor and City Council of Baltimore, 1957, 212 Md. 301, 315, 129 A.2d 363; and Walker v. Board of County Comm'rs of Talbot County, 1955, 208 Md. 72, 87, 116 A.2d 393, and the cases therein cited; and City of Baltimore v. Cohn, 1954, 204 Md. 523, 105 A.2d 482.

[3,4] As a general rule exceptions are granted sparingly, and under exceptional circumstances. To do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations, and thus detrimentally affect the marketability of property within zoned areas. On the other hand, the existence of an unnecessary hardship usually justifies the granting of an exception. The criterion for determining unnecessary hardship is whether the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership. As was stated in Carney v. City of Baltimore, 1952, 201 Md. 130, 137, 93 A.2d 74, 76-77:

"The need sufficient to justify an exception must be substantial and urgent and not merely for the convenience of the applicant, inasmuch as the aim of the ordinance is to prevent exceptions as far as possible, and a liberal construction allowing exceptions for reasons that are not substantial and urgent would have the tendency to cause discrimination and eventually destroy the usefulness of the ordinance. * * *"

"The expression 'practical difficulties or unnecessary hardships' means difficulties or hardships which are peculiar to the situation of the applicant for the permit and are not necessary to carry out the spirit of the ordinance and which are of such a degree as to [illegible]

[5,6] We think that the primary question we must decide on this appeal is whether the Marinos met the burden of proving that they were entitled to an exception under Section 36(b) and (c), supra. See Easter v. Mayor and City Council of Baltimore, 1950, 195 Md. 395, 73 A.2d 491; Gleason v. Keswick Imp. Ass'n, 1951, 197 Md. 46, 78 A.2d 164; Serio v. Mayor and City Council of Baltimore, 1951, 208 Md. 545, 119 A.2d 387. Although the Marinos based their application for an exception in part under Section 36(b), supra, on the claim that their property was peculiar in that its topography as well as the grade between it and the adjacent land to the north rendered it impossible to construct dwellings thereon, the testimony as to such peculiarities was so meager that it was not unreasonable for the Board and the trial court to have concluded that the property was not unique and therefore was not such as to justify an exception for those reasons. With respect to meeting the required burden under Section 36(c), supra, it was incumbent upon the Marinos to have shown (i) that if they complied with the ordinance they would not be able to secure a reasonable return from, or to make any reasonable use of, their property, (ii) that the difficulties or hardships were peculiar to the property in question in contrast with those of other property owners in the same district, and (iii) that the hardship was not the result of the applicants' own actions.

[7] Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting an exception. Easter v. Mayor and City Council, supra. However, financial advantage, although not controlling, is not entirely irrelevant. Serio v. Mayor and City Council of Baltimore, supra. Obviously, if unnecessary hardships referred only to economic disadvantage, an ex[illegible]

Md. 176, 23 A.2d 64; Gleason v. Keswick Imp. Ass'n, supra; Kracke v. Weinberg, 1951, 197 Md. 339, 79 A.2d 387; Serio v. Mayor and City Council of Baltimore, supra. Thus, an analysis of zoning cases demonstrates that the differences between a situation in which the applicant complains that he could secure a greater return from his property if granted an exception and a situation in which the applicant contends that it is impossible to secure a reasonable return from or to make a reasonable use of such property is one of degree rather than kind. In the first instance, his application would invariably be refused. But, in the second instance, if other conditions were met, an exception would likely be allowed. On the whole, this Court, as well as those in other jurisdictions, applies the same rules, but the decisions inevitably depend on the facts of each case.[2]

[8] The plight of the owner must be due to unique circumstances and not to general conditions in the neighborhood. The rule was accurately and succinctly stated by Judge Henderson in Easter v. Mayor & City Council, supra, when he said in 195 Md. at page 400, 73 A.2d at page 492, "* * * it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." Thus, it is clear that the Board, in refusing to grant the Marinos an exception, applied the correct principle of law when it said:

"It is the Board's understanding * * * that in order to make an exception to the use regulations, so as to permit a commercial use in the residential zone, evidence must be produced to show that the practical difficulties and unnecessary hardships involved in the use of the land in question or in the making of improvements on such land must be peculiar to the property in question and the difficulties or hardships must not be such as prevail generally with respect to the use of other similarly situated areas * * *."

[9] While it is true that the Marinos did not purchase the property in question with the thought in mind of applying for an exception—actually they purchased it some years before they petitioned for an exception—they knew, of course, that it was restricted to residential use when they purchased it. More to the point, however, it is a fact that a prior application by them, which was granted, for a commercial use of a part of the property, is without doubt one of the reasons why the remainder is less adaptable now for residential use purposes. Certainly a prior exception granted by the Board does not control the granting of a subsequent exception. Easter v. Mayor & City Council, supra, 195 Md. at page 400, 73 A.2d 491.

[10,11] The Marinos contend that there is no legal principle which requires that

2. Some of the leading cases in other jurisdictions on this issue in which variance was granted include: Nagyvaros v. Jackson, 1938, 253 App.Div. 348, 8 N.Y.S.2d 706; Hickox v. Griffin, 1948, 298 N.Y. 365, 83 N.E.2d 836; Otto v. Steinhilber, 1939, 282 N.Y. 71, 24 N.E.2d 851; Colorado Springs v. Miller, 1934, 95 Colo. 237, 36 P.2d 161; Levy v. Board of Standards and Appeals, 1935, 267 N.Y. 347, 196 N.E. 284; Young Women's Hebrew Ass'n v. Board of Standards and Appeals, 1935, 266 N.Y. 270, 194 N.E. 751; Jersey Mfg. Co. v. Zoning Board [illegible] 1929, 250 N.Y. 371, 166 N.E. 323; Joyce v. [illegible]

[illegible]

BOARD OF APPEALS, TOWN OF CHESAPEAKE BEACH, Maryland, et al.

No. 531.

Court of Special Appeals of Maryland.

July 12, 1974.

Appeal from an order of the Circuit Court, Calvert County, Perry G. Bowen, Jr., J., affirming a decision of town's board of appeals granting variances from town's zoning ordinance requirement relating to distance between facing walls of buildings and granting special exception for multiple dwellings in commercial recreation district. The Court of Special Appeals, Davidson, J., held that zoning ordinance authorizing granting of an area variance only if strict application of ordinance regarding distance between buildings would result in practical difficulty and unnecessary hardship required that applicant also prove hardship and not merely proof of practical difficulties, and that board's action in granting variances without proof of hardship was arbitrary.

Reversed.

1. Zoning ⟹503

An "area variance" is a variance from area, height, density, setback or sideline restrictions.

See publication Words and Phrases for other judicial constructions and definitions.

2. Zoning ⟹502

A "use variance" is a variance permitting a use other than that permitted in particular district by zoning ordinance.

See publication Words and Phrases for other judicial constructions and definitions.

[illegible] A use variance changes the character of the zoned district while an area variance does not.

4. Zoning ⟹495

Use variances are customarily concerned with hardship cases, where land cannot yield a reasonable return if used only in accordance with use restrictions of the zoning ordinance and a variance must be permitted to avoid confiscatory operation of ordinance, while area variances are customarily concerned with practical difficulty.

5. Zoning ⟹536

In order to obtain a use variance, applicant must prove that if he complied with ordinance he would be unable to secure a reasonable return from or make any reasonable use of property, that difficulties or hardships are peculiar to his property in contrast with other property in same district, and that hardship was not result of applicant's own actions.

6. Zoning ⟹538

An applicant for an area variance does not have to show a taking in a constitutional sense but must show that compliance with strict letter of restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent him from using property for permitted purpose or render conformity with restrictions unnecessarily burdensome, that grant of variance would do substantial justice to applicant as well as to other property owners in district, that relief can be granted in such fashion that spirit of ordinance will be observed and public safety and welfare secured.

7. Zoning ⟹536

Impact of an area variance is less drastic than that of a use variance so hardship placed on one seeking area variance is less than burden placed on one seeking a use variance.

Proof of practical difficulties alone is insufficient to justify granting of area variance under zoning ordinance prohibiting granting of use variance and allowing the granting of area variance only where strict application of ordinance would result in practical difficulty and unnecessary hardship depriving owner of reasonable use of land or building involved.

8. Zoning ⟹538

One who shows no more than that the granting of the variance would do no harm and that it would be profitable to him fails to meet burden of justifying granting of area variance under ordinance allowing the granting of an area variance only where strict application of ordinance would result in practical difficulty and unnecessary hardship.

[illegible] Zoning ⟹538

Where applicant for area variance presented only proof that strict application of zoning ordinance, which allowed area variance only where strict application of ordinance would result in practical difficulty and unnecessary hardship, would result in loss of profit and poor planning and evidence established that it was possible for applicant to develop land at maximum permitted density in accordance with distance between buildings requirement of ordinance and that such development would be less costly than mode of development proposed, action of town's board of appeals in granting variance was arbitrary and capricious.

[illegible] Zoning ⟹501

Where grant of special exception to permit multiple dwellings was conditioned on adherence to a site plan in which, absent variances, buildings were located in manner violative of zoning ordinance, special exception could not be sustained.

[illegible] whom were Patrol & Stanley, Upper Marlboro, on the brief, for appellants.

Steve H. Hoyer, District Heights, with whom were Hoyer & Fannon, District Heights, and Allen S. Handen, Prince Frederick, on the brief, for appellees.

Argued before MOYLAN, MENCHINE and DAVIDSON, JJ.

DAVIDSON, Judge.

This appeal is from an order of the Circuit Court for Calvert County which affirmed a decision of the Board of Appeals of the Town of Chesapeake Beach granting variances from the town's zoning ordinance's requirement relating to minimum horizontal distance between facing walls of two buildings and granting a special exception for multiple dwellings in the MCR (Marine Commercial Recreation) district.

After a careful review of the record, we hold that the action of the Board of Appeals in granting the variances was arbitrary and capricious and should not be sustained. Because the special exception is conditioned on the placement of the buildings as shown on the site plan, and because that placement, absent the grant of the requested variances, is violative of the "distance between facing walls" requirement of the ordinance, the granting of the special exception should not be upheld.

On 28 May 1972 the Mayor and Town Council of Chesapeake Beach enacted a zoning ordinance for the town, which is located in Calvert County. Section 3.0 of the ordinance divides the town into six classes of districts, or zones, one of which was designated as the Marine Commercial Recreation (MCR) district. Sections [illegible] provide that multiple dwellings may be permitted in the MCR district if the Board of Appeals grants a special exception and certain other specified requirements are met. One such specified requirement, contained in § [illegible]

the difficulties and hardships referred to in Section 36(c), supra, must be peculiar to their property and not applicable to other property in the same zoning district, citing N. V. Merchants Terminal v. O'Rourke, 1948, 191 Md. 171, 60 A.2d 743; Hoffman v. Mayor and City Council of Baltimore, 1951, 197 Md. 294, 79 A.2d 367, and City of Baltimore v. Cohn, supra. They also insist that the Board abused its discretion in denying an exception on the assumption that the evidence showed that their property was wholly unsuitable for residential use, relying principally, on the Terminal, Hoffman and Cohn cases, supra, to support this contention. Obviously, their interpretation of the Board's finding was erroneous, and the Marinos' contention that it is impossible to use their property for the purposes to which it is restricted by the ordinance is a debatable question. In the Terminal case, in which we applied the presumption of reasonableness to the facts in that particular case, we declared that the rezoning ordinance was invalid because it was unreasonable, arbitrary and contrary to Section 3 of Article 66B of the Code (1951). Likewise in the Hoffman case we held that it was unnecessary to consider the "exceptions" as such because we could and did determine the ordinance to be *pro tanto* invalid on the facts of that case. And in the Cohn case, again on the particular facts there present, we held that a particular application of a zoning ordinance may be held invalid when it restricts property to uses for which the property was not adapted. We did not consider the question of the existence of practical difficulties or unnecessary hardships in any of those cases. Instead we reaffirmed the established constitutional doctrine "that a zoning ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as taking of property without compensation." [illegible] minal, Hoffman and Cohn cases were vastly different from the facts here. In the case at bar, there are insufficient facts to show indisputably that the residential use ordinance so restricts the use of their property that it cannot be used for any reasonable purpose. Nor are we persuaded that the Board abused its discretion in denying the Marinos' application for an exception for the reason that their property was unsuitable for residential use. In fact, we believe it is fairly debatable under the testimony in this case whether the owners are able to secure a reasonable return from, or to make any reasonable use of their property. Furthermore we do not believe that it was necessary for the Board to make a specific finding that the Marino property was suitable for residential use. Instead we think that such a finding was implicit in their sole finding that there were no practical difficulties or unnecessary hardships peculiar to the property in question.

[12] There is yet another aspect of this case which is an important factor, although not necessarily controlling. We have recognized repeatedly that traffic congestion is an element which the Board should consider when deciding whether to grant a variance. Hardesty v. Board of Zoning Appeals, 1956, 211 Md. 172, 126 A.2d 621; Temmink v. Board of Zoning Appeals, 1957, 212 Md. 6, 128 A.2d 256; Price v. Cohen, 1957, 213 Md. 457, 132 A.2d 125. In fact, the enabling act [Code (1951), Art. 66B, sec. 3], specifically provides, *inter alia*, that zoning regulations shall be made in accordance with a comprehensive plan and "designed to lessen congestion in the streets." The testimony before the Board on the question of traffic congestion was not extensive, but the weight of what there was is to the effect that at certain hours it is next to impossible to get through the Belvedere Avenue-York Road intersection except at a very slow [illegible]

sidered to be among the heaviest traveled corners in the city. His opinion was based on the result of several traffic surveys of the area. It was also his opinion that the proposed commercialization of the whole of the Marino property would not help the situation. The Board did not assign the traffic problem as a reason for declining the exception but the trial court did. Such consideration was proper. It is apparent from the testimony of the traffic director, the only traffic expert who testified, that the layout of the streets in the area is not such as would permit a solution of the problem. And there was no evidence that a relocation of the streets was contemplated in the near future. We think it is clear that to grant the exception sought would tend to increase congestion in the streets, not to lessen it, as the clear mandate of the enabling act contemplates. Hardesty v. Zoning Board, supra; Temmink v. Board of Zoning Appeals, supra.

[13,14] We believe that the question whether to grant or deny an exception under the evidence in this case was fairly debatable. This being so, the order of the trial court must be affirmed. A court may not substitute its judgment as to the wisdom or soundness of the action taken by an administrative body unless it is clear that such action was illegal, arbitrary or discriminatory. Serio v. Mayor and City Council of Baltimore, supra.

Since the Board has broad discretionary powers which a court cannot set aside without sound legal reasons, we are not persuaded that either the Board or the trial court erred in refusing to grant the Marinos an exception to the residential use restriction to which their property is presently subject. If it is a fact that the character of the neighborhood is gradually changing as a result of additional commercial uses from time to time, then the City Council might well extend the adjacent first commercial district to include [illegible]

Div. 962, 105 N.Y.S.2d 474, 475, in which it was said:

"* * * where a claimed hardship is common to other properties in the area and not one special and peculiar to the specific property, the remedy is by change in the zoning ordinance itself." (Italics supplied.)

There is one remaining objection which requires a brief comment. We think that the admission in evidence of the agreement between the Marinos and certain neighborhood interests concerning the use of the property in question was at the most no more than a harmless error. All that it shows is that the Marinos had a different concept in 1946 as to the use of the property than they had in 1956 when they applied for another exception. Clearly the agreement had no evidentiary value bearing on the finding made by the Board and the question the trial court decided, which we are about to affirm. There is nothing in the record to indicate that the agreement was prejudicial or in any way influenced either the action of the Board or the decision of the trial court.

Order affirmed, the appellants to pay the costs.

Clarence E. TYLER

v.

WARDEN, BALTIMORE CITY JAIL.

Application No. 51.

Court of Appeals of Maryland.

Nov. 24, 1957.

Habeas corpus proceeding to secure re[illegible]

MAR 16 1979

192 A. 159; Linden Methodist Episcopal Church v. City of Linden, 113 N.J.L. 188, 173 A. 593; Snow v. Johnston, 197 Ga. 146, 28 S.E.2d 270; Mueller v. C. Hoffmeister Undertaking & Livery Co., 343 Mo. 430, 121 S.W.2d 775.

[15] We have found no facts in this record so extraordinary as to persuade us to withdraw the case from application of the accepted rule. The ordinance under review is a clear case of "spot zoning." The property in dispute is situated in an area that has been zoned as residential ever since the enactment of the City Zoning Ordinance in 1931. The amending ordinance contains a proviso that the premises shall be used only as a funeral home and that no embalming shall be done on the premises. However, Paragraph 8 of the City Zoning Ordinance explicitly provides that no land or building in a residential use district shall be used for "undertaking business or establishment or funeral home."

The amending ordinance reclassifies a single lot in a district where undertaking establishments are not permitted, thus establishing a permissive district within the restricted district. Armacost, who has been engaged in the undertaking business in Howard Park for some years, contracted to purchase the property in dispute upon the condition that if he could not secure a permit to use it as a funeral home, the contract would be rescinded. In January, 1949, after getting the approval of a number of residents of the neighborhood for the establishment of the funeral home, he had the proposed ordinance introduced in the City Council. A number of residents appeared before the Committee on Building and Building Regulations, and no objections were heard to the ordinance. Cassel declares that he was one of the opponents who appeared at the hearing, but that the proponents outnumbered the opponents because it seemed "rather futile." However that may be, the ordinance was passed by the City Council in March, and eleven days later it was approved by the Mayor, the Buildings Engineer issued the permit.

At the trial of this case Cassel asserted positively that there is no need for a funeral home at 5118 Gwynn Oak Avenue. He showed that the property in dispute is only three blocks from Woodlawn Avenue, which is in a first commercial use district. Charles E. Delosier, secretary of the State Board of Funeral Directors, who was called to the stand by appellees, acknowledged that there are three other funeral homes within a radius of about ten blocks. Armacost testified that he spent a large sum of money to paint, paper and wire the house, but neither this fact nor the allegation that the funeral home will be a convenience for the tenants in nearby apartment houses is sufficient to save the ordinance. It was urged that there are about 20,000 inhabitants of the Howard Park section, but Armacost admitted that he has conducted only about two funerals a month from the funeral home since he opened it. It is impossible to avoid the conclusion that the ordinance is an arbitrary and unreasonable discrimination for the reason that it does not operate alike on all persons residing within the residential area. As we are convinced that the ordinance is beyond the statutory power of the City Council, we must declare it void. If a funeral home were permitted here, it might be an opening wedge for other enterprises in this and other residential districts of the city.

For these reasons we must reverse the decree dismissing the bill of complaint and remand the case for the passage of a decree granting the relief prayed for by appellants.

Decree reversed and case remanded, with costs.

EASTER v. MAYOR & CITY COUNCIL OF BALTIMORE et al.

No. 176.

Court of Appeals of Maryland.

May 12, 1950.

Action by Andrew J. Easter against Mayor and City Council of Baltimore and others challenging validity of city's approval of construction of addition in front of store and dwelling. The Baltimore City Court, Emory H. Niles, J., rendered judgment for defendants and plaintiff appealed. The Court of Appeals, Henderson, J., held that granting of variance of setback requirements and occupancy rule was not warranted.

Reversed.

1. Municipal corporations ⟹621.39

Board of Zoning Appeals of City of Baltimore in granting special exceptions must consider the factors set out as standard in zoning ordinance, and its action must be reasonable in light of these and all other pertinent facts.

2. Municipal corporations ⟹621.39

The power of Board of Zoning Appeals of City of Baltimore under zoning ordinance to grant exceptions must be strictly construed.

3. Municipal corporations ⟹621.45

Burden of showing facts to justify an exception of variance under zoning ordinance rests upon applicants, and it must be shown that hardship affects particular premises and is not common to other property in neighborhood.

4. Municipal corporations ⟹621.21

Mere fact that variance would make property more profitable is not a sufficient ground to justify granting of variance from setback requirements of Baltimore Zoning Ordinance.

5. Municipal corporations ⟹621.25

That other buildings extended to front line of lot and lot was irregular did not authorize Board of Municipal and Zoning Appeals of City of Baltimore to grant a permit for construction of addition on front of store and dwelling in variance of setback requirements of Baltimore Zoning Ordinance.

John F. Heath, Baltimore, for appellant.

Benjamin Kann and Malcolm J. Coan, Baltimore, for appellees J. P. Easter and wife.

Thomas N. Biddison, City Sol., Edwin Harlan, Deputy City Sol., and Hamilton O'Dunne, Asst. City Sol., Baltimore, for appellee Mayor and City Council of Baltimore.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

HENDERSON, Judge.

This appeal is from a judgment of the Baltimore City Court affirming the action of the Board of Municipal and Zoning Appeals in granting a permit for the construction of a one-story and basement addition on the front of a store and dwelling at 6418 Belair Road, owned by John P. Easter. The only protestant, Andrew J. Easter, is a brother of the permittee, residing at 6420 Belair Road, where he conducts a tavern.

As stated by the trial Court, "The property is in a First Commercial Use, C Area District, and the permit would allow the store front to be brought out to the building line, in contravention of paragraph 24 of the Zoning Ordinance, which requires a 10-foot minimum depth of front yard in the area in question, and of the percentage of occupancy requirements under paragraph 21, bringing the percentage of occupancy to 85% as opposed to 60%, as provided in the Ordinance. The Board of Municipal and Zoning Appeals granted the permit under the provision of Paragraph 33(c) on the ground that '* * * due to its peculiar location and surroundings it is a case of practical difficulty and unnecessary hardship, since the Tavern already obstructs the view of the store where the addition is now proposed'". The court thought there was "evidence sufficient to support the legal definition of a hardship and * * * in fact, it would be a hardship to allow one brother

relate to the minimum horizontal distance permitted between facing walls of any two buildings on one lot.[1]

On 19 January 1973 Ronald W. Pickett, contract purchaser of the subject property and one of the appellees in this proceeding, filed an application for a zoning permit and an application for a special exception to develop 22.03 acres of land zoned MCR with 320 condominium apartment units and a 38,000 square foot convenience shopping center. A site plan was attached which indicated that in addition to the commercial facility the applicant proposed to build four apartment buildings, each nine stories high. Parking spaces were to be provided for 898 cars, with 640 spaces allocated to service the apartment dwellers and 258 to service the shopping center. An existing swimming pool, bathhouse and clubhouse were to be improved and retained for use by the residents of the proposed condominiums,[2] and four tennis courts were to be constructed for their enjoyment. All four buildings were to be positioned in a row along the edge of the Chesapeake Bay and were to be parallel to one another. The existing swimming pool and bathhouse lies between the proposed

Building No. 1 and Building No. 2, which were to be separated by a distance of more than 150 feet. The distance between Buildings No. 2 and No. 3 was to be approximately 90 feet while that between Buildings No. 3 and No. 4 was to be approximately 150 feet. Section 406(5)(b)(i) requires a minimum distance of about 250 feet between buildings of the height proposed.[3]

On 7 February 1973 the application for a special exception and the accompanying site plan were reviewed by the Planning and Zoning Commission. The minutes of that meeting reflect that a member of the staff of the State Planning and Zoning Commission advised the Commission not only that variances were required because of non-compliance with § 406(5)(b)(i) but also that the inclusion of a shopping area was violative of § 406.[4] The Planning and Zoning Commission voted to recommend to the Board of Appeals that the proposed special exception be granted, "providing that all commercial buildings be deleted and that the Board of Appeals grant a variance for the non-compliance of distances between buildings." On 13 February 1973 the Board of Appeals received the follow-

1. More specifically, § 406(5)(b)(i) provides: "Where two (2) facing walls both contain a window or windows the minimum horizontal distance shall be three (3) feet of horizontal distance for each four (4) feet of average height of the facing walls of the building with greatest height but in no case less than seventy-five (75) feet."

2. The site was previously occupied by the Chesapeake Beach Amusement Park.

3. The record is unclear as to the precise distances required. The minutes of a meeting of the Planning and Zoning Commission held on 7 February 1973 indicate that the proposed buildings were to be 96 feet high, which would necessitate a distance of 278 feet between buildings, and that the distance between Buildings No. 2 and No. 3 was to be 100 feet, while between Buildings No. 3 and No. 4 the distance was to be 150 feet.

ing testified at the public hearing held by the Board of Appeals on 12 April 1973 that the maximum height would be 80 feet. A site plan submitted to the Board of Appeals at this hearing indicates a distance of approximately 100 feet both between Buildings No. 2 and No. 3 and between Buildings No. 3 and No. 4. Under this set of facts, two variances of either 143 or 140 feet each would be required.

However, at the hearing before the Board of Appeals and here on appeal the parties agree that the ordinance requires a minimum distance of 240 feet between the buildings and that variances of 153 feet and 143 feet are necessary.

4. Section 406 provides for a minimum lot area of 3,000 square feet for each unit in an MCR development. The staff member pointed out that on a tract of 22.1 acres where 38,000 square feet would be needed

ing written communication from the Chairman of the Planning and Zoning Commission:

"The Planning and Zoning Commission accepts the plan submitted by Mr. Ron Pickett to construct four nine-story buildings on site of attached plan providing you delete all commercial on said plan and that you grant a variance for the non-compliance of distances between buildings required in Section 406(5)(b)(i)."

Thereafter Mr. Pickett filed an application for a variance alleging that:

"Due to the exceptional physical characteristics of the site a hardship is created by conforming to the 3' for 4' which would deprive me of the reasonable use of the land and buildings."

On 12 April 1973 a hearing was held before the Board of Appeals. The site plan submitted there deleted the proposed commercial use in its entirety, but the four proposed apartment buildings remained in approximately the same position they had occupied on the original site plan.

Two witnesses testified with respect to the need for the requested variances. Mr. Ronald W. Pickett, the contract purchaser of the property, testified that the property, bounded on the west by Route 261 and the east by the Chesapeake Bay, is "very shape." It is "almost like an L shape" with the southern portion of the property being considerably narrower than the northern portion. Building No. 1 is located on Pool Hill, a hill which slopes rather quickly down to the swimming pool. The location of Building No. 1 was dictated by the setback requirements of the ordinance and the slope of the hill, which together prohibited the placement of the building on any other spot. According to Mr. Pickett "there is no other way for us to locate that building . . . . We

ments of the ordinance and the dimensions of the building, that building had to go there."

Mr. Pickett further testified that the topography of the site also dictated the location of the remaining three buildings. He pointed out that the terrain generally slopes upward from Route 261, the western boundary of the property, to the center of the property, and then slopes downward, finally leveling off near the water's edge. Three alternatives were available. Buildings No. 2, No. 3 and No. 4 could have been located near the western boundary of the property at the bottom of the slope, "which would have meant that our people wouldn't even have any view of the water." They could have been located on the top of the hill, "which would have given us higher elevations and probably more water view," but which also "would have been much more obstrusive from Route 261." Finally, they could have been located on the level land on the east side of the slope near the water's edge. The latter alternative was chosen to maximize the residents' view of the water and minimize the visibility of the structures from Route 261.

Mr. Pickett testified that the possibility of replacing Buildings Nos. 2, 3 and 4 with two buildings was considered. He pointed out that in order to "use the density to maximize the value of the property" the two substitute buildings would have to be 12 or 13 stories in height. While such a mode of development would have obviated the need for a variance and would have been more economical to construct, this alternative was rejected "in order to minimize the appearance of the structures from the road." Consideration was also given to placing Building No. 3 to the rear of, rather than between, Buildings No. 2 and No. 4. This alternative was rejected for a variety of reasons. Since the balconies on the rear building would overlook the balconies on the front buildings, the arrange-

to have a tavern all the way out to the street, and to deny the other brother the right to build his store out to the same line as the tavern."

The Board found that the store was "on the west side of Belair Road, 105 feet south of Easter Terrace. * * * Adjacent to the premises under appeal is a building containing a tavern which is built out to the front line of the lot. To the north between Easter Avenue and Kenwood Avenue there are several buildings constructed to the front lines of the lot and the proposed addition would not affect access or light and air to any neighboring properties, nor would it even cut off the view up and down the street. The lot in question is of very shallow depth and irregular in shape * * *." The store and tavern were built as semi-detached buildings. In 1935 Andrew J. Easter obtained a permit to build a sort of covered entrance-way out to the building line. John P. Easter did not object, and there were no protests. In his present application John P. Easter states that since his brother "has built out in front of us it has hid our store making it difficult to rent." There is a small triangular vacant lot to the south of 6418, and a church property adjoining to the south, across an alley laid out but apparently not opened. The church is set back the required distance. Andrew J. Easter has applied for a permit, and obtained the approval of the Board, to develop the land to the north, comprising about six acres, as a shopping center with off-street parking facilities and the required set-back. If this project is carried out, he states that he proposes to remove the entrance in front of his tavern.

[1, 2] We may assume here, as we have assumed in previous cases, that the delegation to the Board of Zoning Appeals of the power to make special exceptions or variances is valid, and that the standards set up in Section 32(j) are adequate. Colati v. Jirout, 186 Md. 652, 656, 47 A.2d 613; Heath v. Mayor and City Council of Baltimore, 187 Md. 296, 49 A.2d 799; Heath v. Mayor and City Council of Baltimore, Md., 58 A.2d 896, 898. The Board must consider the factors set out in that section and "its action must be reasonable in the light of these and all other pertinent facts." Heath v. Mayor and City Council of Baltimore, supra, 187 Md. 305, 49 A.2d 804. The power to grant exceptions must be strictly construed. Colati v. Jirout, supra, 186 Md. page 659, 47 A.2d 613.

[3, 4] The burden of showing facts to justify an exception or variance rests upon the applicant, and it must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood. Rathkopf, Zoning, 2d Ed., p. 215; Levy v. Board of Standards and Appeals, 267 N.Y. 347, 196 N.E. 284. The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. Garden View Homes v. Board of Adjustment, 137 N.J.L. 44, 57 A.2d 677.

In the instant case there is no suggestion that the Board failed to "act as a fact-finding body" or to "give consideration to the rules, regulations, restrictions, guides and standards set forth" in the Ordinance (paragraph 33(c)). The question is whether the undisputed facts support the Board's action. The fact that the lot is irregular has no bearing on the question, nor is it material that three buildings, some distance to the north, extend to the building line. These may have been built before the passage of the Ordinance, or they may have been built under permit or without permit. As was said in Potts v. Board of Adjustment, 133 N.J.L. 230, 43 A.2d 850, 854: "Prior exceptions granted by the adjustment board are not in themselves controlling. Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If that were not so, one variation would sustain if it did not compel others, and thus the general regulation eventually would be nullified. The annulment of zoning is a legislative function that is beyond the domain of the zoning board." See also the cases collected in a note 168 A.L.R. 13, 41-44. The same principle was announced and applied in Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896, 898, Mayor and City Council of Baltimore v. Byrd, Md., 62 A.2d 588, 591, and Cassel v. Mayor and City Council of Baltimore, Md., 73 A.2d 486.

The principal fact relied upon to justify an exception to the area and set-back rules, adopted in the general interest under the police power, is the existence of an exception on the adjoining lot. Undoubtedly this is detrimental to the applicant, although his case is somewhat weakened by his tacit acceptance of the situation over a period of years. But we think the detriment to the applicant must be weighed against the benefit to the community in maintaining the general plan. "It is by these gradual encroachments, individually or relative insignificance, that the integrity of the general scheme is undermined and ultimately shattered. One departure serves as justification for another * * *." Dubin v. Wich, 120 N.J.L. 469, 200 A. 751, 754. In the case of non-conforming uses, the ordinance tolerates their continuance, but looks towards their ultimate elimination. Colati v. Jirout, supra. The same principle applies to special exceptions. Heath v. Mayor and City Council of Baltimore, supra, Md., 58 A.2d 896. Use variances are doubtless more serious than dimensional changes, but that is only a matter of degree.

In People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 286, 155 N.E. 575, 577, it was contended that the existence of a garage immediately adjoining the proposed garage was sufficient justification for the grant of an exception on the ground of unnecessary hardship. But the Court, speaking through Chief Judge Cardozo, said: "We think the reasons assigned are insufficient to supply a basis for a departure from the map. They amount to nothing more than this, that a garage may be built because there is another one next door." See also Ventresca v. Exley, 358 Pa. 98, 56 A.2d 210, 212. No estoppel can be raised against the Board by reason of its approval of similar extensions in other cases. Appeal of Valicenti,

[illegible] 1509, 1517.

[5] Under the circumstances we think the action of the Board cannot be sustained.

Judgment reversed, with costs.

195 Md. 314

REINDOLLAR et al. v. KAISER et ux.

No. 161.

Court of Appeals of Maryland.

May 10, 1950.

Robert M. Reindollar and others, as Commissioners of the State Roads Commission of Maryland, instituted a condemnation suit for land necessary for road purposes against Frederick A. Kaiser and wife in the Circuit Court, Howard County, James Clark, J. The Roads Commission appealed from a judgment assessing damages in the amount of $12,500. The Court of Appeals, Collins, J., held that the trial judge did not err in charging the jury either by minimizing the weight of appellant's evidence or by assuming facts not in evidence.

Judgment affirmed.

1. Eminent domain ⟹124, 138

In condemnation proceedings, measure of loss is value of land taken at time taken; and when land is part of larger tract, diminution in value of larger tract caused by taking particular segment thereof must also be considered.

2. Eminent domain ⟹222(5)

In condemnation proceedings it was not error, in charging jury, for trial judge to use word "only" to show minimum appraisement when he went on to inform jury that they had exclusive prerogative and duty to determine amount of damages.

3. Trial ⟹185

Review of evidence by trial judge in charge to jury should be impartial.

which would interfere with the residents' view of the natural beauty of the shoreline. Either Building No. 3 would have to be located on the crown of the hill, making the building more visible from the road, or the crown of the hill would have to be removed to make the building less visible from the road, neither of which was a desirable mode of development. Finally, the principles of sound planning would be violated by the changes in the traffic patterns which would be required and which would result to residents from all the buildings driving in front of Building No. 3. Under the proposed site plan, mobile activity is confined to the rear of all the buildings.

Mr. Herbert Fleischer, an architect, engineer and planner, who had prepared the site plan for the subject property, qualified as an expert. He testified that the subject property had "intriguing natural beauty" with distinct contours and vegetation which should not be disturbed. He opined that the buildings are located so as to preserve the shoreline and indeed to enhance the view from the bay toward the project. He stated that although it would have been possible to place Building No. 3 in a different location, the plan as drawn maximized the permissible density while producing a "well-organized project." In his view, the four roughly parallel buildings are more in harmony with the appearance and character of Chesapeake Beach than a "staggered" layout would be. Moving the building to the west, behind Buildings No. 2 and No. 4, would mean building it in a "hole" behind the hill. In addition a parking area would be required in front of the building which would have divided the planned open park recreation area. Such a parking lot would destroy the "resort" character of the project and create traffic hazards for pedestrians attempting to use it. Mr. Fleischer concluded his testimony on direct examination by stating that the grant of the requested variances would enhance the general area.

view, the development as planned would enhance the general area.

On redirect-examination the following colloquy took place:

"Q. The only other question I would ask, can you tell the board what hardship would be suffered by your client if the variance was not granted?

"A. The only hardship would be the loss of income because you couldn't have the other buildings. You see, you have to approach it two ways. My opinion is, the density that we have is a low one, in my opinion.

"Q. If you would just try to answer the question directly, if you can, what hardship would you suffer if the variance is not granted?

"A. Maybe poor planning.

"Mr. Handen [Town Attorney for Chesapeake Beach]: I think we have batted back and forth enough, gentlemen, it's got to come to an end."

On 18 April 1973 the Board of Appeals issued a written statement and decision. With respect to the request for variances, the Board of Appeals found, among other things:

"1. That, as a matter of fact, the variance requested will not be contrary to the public interest and that practical difficulties and unnecessary hardship would result if it is not granted.

* * * * * *

"4. That, as a matter of fact, the Petitioner met the burden of proving unique circumstances in that a strict application of the Zoning Ordinance would deprive the Petitioner of the reasonable use of his land and proposed buildings.

"5. That, as a matter of fact, Petitioner met the burden of proving [illegible] as required by the Ordinance

"6. That, in addition to paragraphs numbered 1 through 5 above, the Board found as a fact that the granting of the variance is necessary for the reasonable use of the land and Petitioner's buildings; that the hardship complained was not economical nor self-created; that the hardship resulted from the application of the Ordinance and that the hardship would be specifically suffered by the property in question."

With respect to the special exception the Board of Appeals found:

"7. That, as a matter of fact, the special exception requested is consistent with the spirit, purpose and intent of the Ordinance.

"8. That, as a matter of fact, the special exception requested is suitable for the property in question and designed to be in harmony with and appropriate and appearance with the existing and intended character of the general vicinity; and that the special exception does not adversely effect street traffic and safety."

The Board of Appeals granted the variances and special exception subject to a condition, among others, "that petitioner shall substantially adhere to matters of construction to the initial plans presented to the Board."[5]

On 2 August 1973 the Circuit Court for Calvert County affirmed the grant of the variances and the special exception. With respect to the variances, the Court said:

"Finally, with respect to the granting of the Variance, the Appellant's position seems to be that because the Applicants' desire to use their land to the fullest extent, the need for the Variance is something they created and, therefore, it should not be considered. The Board, however, seemed to take the position that there was a problem created by the special topographic features and existing structures on this property, as well as its relation to the principal natural feature of the area; that is, the Chesapeake Bay, which entitled the Applicants to some consideration. Once again, this is a matter of judgment and in view of the evidence bearing on this question, the Court is satisfied that the Board had before it sufficient evidence to support the result it reached."

The appellants, McRae and Carmen Anderson, who opposed the granting of the application at the Board of Appeals hearing and appealed the Board's decision to the Circuit Court, contend that the zoning ordinance of the Town of Chesapeake Beach requires the applicant to show that a denial of the requested variance would result not only in "practical difficulty" but also in an "unnecessary hardship" depriving the owner of the reasonable use of the land or building involved. They maintain that because this dual showing was not made, the action of the Board in granting the variances was arbitrary and capricious.

[1, 2] The appellees, the Board of Appeals and Mr. Pickett, the applicant, contend that the variances requested in this case involve an "area variance" (a variance from area, height, density, setback, or sideline restrictions, such as a variance from the distance required between build-

5. Section 1002(e) of the zoning ordinance requires that each resolution of the Board of Appeals "shall contain a statement of the grounds and any finding forming the basis of such action or decision." Despite repeated admonitions by the Court of Appeals that decisions of administrative boards are not to be limited to conclusions couched in the language of the ordinance, the Board issued a statement and decision in a boilerplate form employing the terms of the ordinance itself without setting forth any specific findings of fact. See, e. g., Hooper v. City of Gaithersburg, 270 Md. 628, 637, 313 A.2d 491, 496 (1974); Baker v. Board of Trustees, 269 Md. 740, 747, 309 A.2d 768, 771-772 (1973); Pistorio v. Zoning Board, 268 Md.

ings) and not a "use variance" (a variance which permits a use other than that permitted in the particular district by the ordinance, such as a variance for an office or commercial use in a zone restricted to residential uses). They maintain that area variances may be allowed on proof of "practical difficulty" alone and that such variances do not require a showing of "undue hardship." They insist that more than sufficient evidence was presented to make the question of whether practical difficulties would result from the denial of the requested variances "fairly debatable." They conclude that the action of the Board in granting the requested variances and the special exception should be upheld.

[3-5] The Court of Appeals has recognized a distinction between a use variance, which changes the character of the zoned district, and an area variance, which does not. Use variances are customarily concerned with "hardship" cases, where the land cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and a variance must be permitted to avoid confiscatory operation of the ordinance, while area variances are customarily concerned with "practical difficulty." Loyola Loan Ass'n v. Buschman, 227 Md. 243, 248, 176 A.2d 355, 358 (1961). Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:

1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make any reasonable use of his property. Frankel v. Baltimore, 223 Md. 97, 104, 162 A.2d 447, 451 (1960); Marino v. City of Baltimore, 215 Md. 206, 218, 137 A.2d 198, 203 (1957); see Salisbury Bd. v. Bounds, 240 Md. 547, 553, 214 A.2d 810, 813 (1965). Mere financial hardship or an opportunity to get an increased return

Bd. v. Bounds, supra, 240 Md. at 555, 214 A.2d at 814; Marino v. City of Baltimore, supra; Easter v. City of Baltimore, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).

2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district. Burns v. Baltimore City, 251 Md. 554, 559, 248 A.2d 103, 106 (1968); Marino v. City of Baltimore, supra; Easter v. City of Baltimore, supra.

3) The hardship was not the result of the applicant's own actions. Salisbury Bd. v. Bounds, supra; Marino v. City of Baltimore, supra; Gleason v. Keswick Impr. Ass'n, 197 Md. 46, 50-51, 78 A.2d 164, 165-166 (1951).

[6, 7] Where the standard of "practical difficulty" applies, the applicant is relieved of the burden of showing a taking in a constitutional sense, as is required under the "undue hardship" standard. In order to justify the grant of an area variance the applicant need show only that:

"1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

"2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

"3) Whether relief can be granted in such fashion that the spirit of the ordi-

Zoning and Planning, 45-28-29 (3d ed. 1972).

The lesser burden is permitted because the impact of an area variance is viewed as being much less drastic than that of a use variance.

While a distinction between use and area variances has been recognized and clearly articulated in Maryland, the Court of Appeals has applied the "practical difficulty" standard to area variance applications in only three cases. McLean v. Soley, supra, 270 Md. at 213-214, 310 A.2d at 786-787; Zengerle v. Bd. of Co. Comm'rs, 262 Md. 1, 21, 276 A.2d 646, 656 (1971); Loyola Loan Ass'n v. Buschman, supra, 227 Md. at 248-250, 176 A.2d at 358-359. In each of them the governing local ordinance authorized the grant of an area variance when strict compliance with the regulations would result in practical difficulties or unreasonable hardship. In each of them the Court of Appeals emphasized that the grant of the requested area variance was justified on proof of "practical difficulty" alone and that proof of hardship was not required because the governing zoning ordinance, which phrased the criteria of practical difficulty or unreasonable hardship in the disjunctive, could be construed as requiring that only the lesser standard of proof be applied.

The zoning ordinance of the Town of Chesapeake Beach differs from those ordinances in a number of significant respects. Section 1005(c)(2) of the ordinance prohibits the Board of Appeals from granting the variance. Section 1005(a) authorizes the Board to grant an area variance only where the strict application of the regulations "would result in practical difficulty and unnecessary hardship depriving the owner of the reasonable use of land or building involved. . . ." (Emphasis

phasis added.) Section 1005(c)(3) provides that:

"There must be proof of unique circumstances . . . and that said circumstances or conditions are such that strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of such land or building."

Finally, § 1005(c)(5) requires an applicant to show:

"That the granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that will accomplish this purpose. It is not sufficient proof of hardship to show that greater profit would result if the variance were awarded. Furthermore, hardship complained of cannot be self-created; it cannot be claimed by one who purchases with or without the knowledge of restrictions; it must result from the application of the Ordinance; it must be suffered directly by the property in question; and evidence of variance granted under similar circumstances shall not be considered."

[8] Thus the zoning ordinance of the Town of Chesapeake Beach permits area variances only. Not only does it express the criteria of practical difficulty and unnecessary hardship in the conjunctive, but it also independently requires that no area variance be granted unless it is shown that strict application of the regulations will deprive the applicant of the reasonable use of his land and that the grant of the variance is necessary for the reasonable use of the land. It defines the hardship which must be shown as the equivalent of a constitutional taking, and utilizes the same criteria

ance can be granted only if there is proof that the strict application of the regulations would result in an unnecessary hardship which deprives the owner of the reasonable use of his land. Proof of "practical difficulties" alone is insufficient. McLean, Zengerle, and Loyola, supra, are inapposite.

[9] Appellees do not contend that the applicant presented sufficient proof of an unnecessary hardship which deprived the owner of the reasonable use of his land. The record shows that the only hardship allegedly suffered by the applicant as a result of the strict application of the ordinance is "loss of profit" and "maybe poor planning." This evidence falls far short of a showing of unnecessary hardship as defined by the specific ordinance here involved as well as by the Court of Appeals. One who shows no more than that the granting of the variance would do no harm and that it would be profitable to him fails to meet the burden. M. & C. C. v. Polakoff, 233 Md. 1, 9, 194 A.2d 819, 824 (1963). Moreover, the very testimony which shows the practical difficulties encountered in attempting to develop the land at a maximum density in accordance with the distance between buildings restriction simultaneously establishes unequivocally that not only is it possible to develop the land as the maximum permitted density in accordance with the distance between buildings requirement, but also that such development could be less costly than the mode of development proposed. Given the evidence presented on behalf of the applicant, it is impossible for him to contend that the strict application of the ordinance prevents him from making a reasonable use of his land.

[10, 11] Based on the record before us, we find that the question of whether the strict application of the distance between buildings requirement would result in an unnecessary hardship [illegible]

land was not fairly debatable. Baltimore v. Sapero, 230 Md. 291, 296, 186 A.2d 884, 887 (1962); Marino v. City of Baltimore, supra, 215 Md. at 222, 137 A.2d at 205. The action of the Board of Appeals in granting the variances was arbitrary and capricious and cannot be sustained. Daihl v. County Bd. of Appeals, supra, 258 Md. at 167, 265 A.2d at 232; Dampman v. M. & C. C. of Baltimore, 231 Md. 280, 286-287, 189 A.2d 631, 634 (1963). Because the grant of the special exception is conditioned on adherence to a site plan in which, absent the variances, the buildings are located in a manner violative of the ordinance, it too cannot be sustained. Accordingly, the order of the lower court affirming the grant of the variances and the special exception shall be reversed.[6]

Order reversed. Costs to be paid by appellees.

22 Md.App. 39

SANITARY FACILITIES II, INC.

v.

John J. BLUM et ux. et al.

No. 755.

Court of Special Appeals of Maryland.

July 15, 1974.

Certiorari Denied Sept. 25, 1974.

Purchasers of lots brought a class action to remove a cloud on title. They were granted a summary judgment by the Circuit Court, Anne Arundel County, James L. Wray, J., and the defendant corporation appealed. The Court of Special Appeals, Moore, J., held that where a conveyance in the purchasers' chain of title was by "deed and agreement" which purported to subject

by ultimate purchasers, but the charges were not imposed on the estate granted the immediate purchaser, which agreed only that it would not alienate except subject to the charges, and neither the grantor corporation nor the grantee corporation, under common ownership, nor any other corporation under such ownership incurred any cost of constructing the facilities, the covenant did not run with the land though it was provided in express terms that it would; neither were the charges enforceable as "annuities" made chargeable upon real estate.

Judgment affirmed.

1. Judgment ⟹185(3)

If facts bearing on motion for summary judgment are susceptible of more than one inference, inferences must be drawn in light most favorable to party opposing motion, and in light least favorable to moving party.

2. Judgment ⟹186

Where fact finding implied in summary judgment was at variance with averment in affidavit and where affidavit had been submitted in response to summary judgment motion which did not address itself to question of whether there was potential fraud, it was misapplication of summary judgment procedure to "pierce the corporate veil" so as to prevent perpetration of fraud.

3. Appeal and Error ⟹855

Where question had been presented by both sides to court below and there was no genuine dispute of fact which precluded determination of issue on review, issue could be disposed of on review though summary judgment procedure had been applied below. Maryland Rules, Rule

5. Covenants ⟹58

Where conveyance in chain of title was by "deed and agreement" which purported to subject land to annual charges for sewer and water facilities to be installed, to be paid by ultimate purchasers, but charges were not imposed on estate granted immediate purchaser, which agreed only that it would not alienate except subject to the charges, and neither grantor corporation nor grantee corporation, under common ownership, nor any other corporation under such ownership incurred any cost of constructing the facilities, the covenant did not run with the land though it was provided in express terms that it would; neither were charges enforceable as "annuities" made chargeable upon real estate.

Eugene Herman, Baltimore, for appellant.

John Henry Lewin, Jr., Baltimore, with whom were Benjamin R. Civiletti, Baltimore, and L. Vernon Miller, Jr., Annapolis, on the brief, for appellees.

Argued before ORTH, C. J., MOORE, J., and HOWARD S. CHASANOW, Special Judge.

MOORE, Judge.

Several purchasers of Levitt homes in the Rock Creek Estates, II subdivision of Anne Arundel County prevailed below on a motion for summary judgment in a class action to remove a cloud on title. The appellant, Sanitary Facilities II, Inc., is a private corporation whose sole remaining asset, allegedly acquired under a "Deed and Agreement" dated April 1, 1968, is a purported right to collect water and sewer charges [illegible]

MAR 1

PETITION FOR VARIANCE
5th DISTRICT

ZONING: Petition for Variance
LOCATION: North side of Pennsylvania Avenue, 70 feet West of Delaware Avenue
DATE & TIME: Monday, July 17, 1978, at 11:00 A.M.
PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland 21204.

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Variance to permit zero (0) parking spaces in lieu of the required 63 parking spaces.

The Zoning Regulations to be excepted as follows:
Section 409.2b(2) — one parking space for each 30 square feet of total floor area.

All that parcel of land in the Ninth District of Baltimore County

Located on the north side of Pennsylvania Avenue approximately 70' west of the centerline of Delaware Avenue and running N 5° 30' E 72.4', and thence N 82° 30' W 21', thence N 82° 30' W 27' thence S 5° 30' W 51.41' and thence S 82° 30' E 50.72' to the place of beginning.

Also known as No. 4½ and No. 6 Pennsylvania Avenue.

Being the property of LeRoy Y. Haile, as shown on plat plan filed with the Zoning Department.

Hearing Date: Monday, July 17, 1978 at 11:00 A.M.

Public Hearing: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Md. 21204.

By Order of:
S. ERIC DINENNA
Zoning Commissioner and
GEORGE J. MARTINAK,
Deputy Zoning Commissioner
of Baltimore County

June 29

CERTIFICATE OF PUBLICATION

TOWSON, MD., June 29, 1978

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., once in each of one time successive weeks before the 17th day of July, 1978, the first publication appearing on the 29th day of June 1978.

THE JEFFERSONIAN,

S. Lisa Strauss
Manager.

Cost of Advertisement, $

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Public Hearing: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Md.

BY ORDER OF
S. ERIC DI NENNA,
ZONING COMMISSIONER
AND
GEORGE J. MARTINAK,
DEPUTY ZONING COMMISSIONER
OF BALTIMORE COUNTY

June 29

OFFICE OF
THE TIMES NEWSPAPERS

TOWSON, MD. 21204 June 29 1978

THIS IS TO CERTIFY, that the annexed advertisement of PETITION FOR VARIANCE - Leroy Y. Haile was inserted in the following:

- ☐ Catonsville Times
- ☐ Dundalk Times
- ☐ Essex Times
- ☐ Suburban Times East
- ☒ Towson Times
- ☐ Arbutus Times
- ☐ Community Times
- ☐ Suburban Times West

weekly newspapers published in Baltimore, County, Maryland, once a week for one successive weeks before the 30th day of June 19 78, that is to say, the same was inserted in the issues of June 29, 1978

STROMBERG PUBLICATIONS, INC.

BY Esther Burger

BALTIMORE COUNTY OFFICE OF PLANNING AND ZONING

County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Your Petition has been received * this 25th day of April 1978. Filing Fee $ 25.00. Received ✓ Check ___ Cash ___ Other

S. Eric DiNenna
S. Eric DiNenna,
Zoning Commissioner

Petitioner Leroy Haile Submitted by H. Ernest Parker

Petitioner's Attorney H. Ernest Parker Reviewed by [illegible]

* This is not to be interpreted as acceptance of the Petition for assignment of a hearing date.

79-15A

CERTIFICATE OF POSTING
ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

District 9th Date of Posting 6/30/78

Posted for: Variance to permit 0 parking spaces in lieu of the req. 63

Petitioner: LeRoy Y. Haile

Location of property: N/S of Pennsylvania Ave, 100' W. of Delaware Ave.

Location of Signs: Placed in side of window of Sarabande Restaurant

Remarks:

Posted by [illegible] Signature Date of return: 6/30/78

1 Sign

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 73532

DATE Sept. 25, 1978 ACCOUNT 01-662

AMOUNT $41.16

RECEIVED FROM Sarabande, 1½ E. Pennsylvania Ave. Towson, Md.

FOR 21204, Cost of Advertising and Posting for Case No. 79-15-A

862 PRSD 27 41.16 MS

VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 73342

DATE June 20, 1978 ACCOUNT 01-662

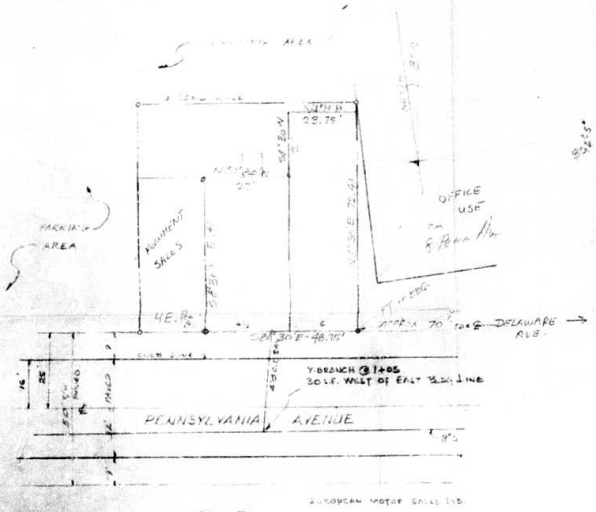
AMOUNT $25.00

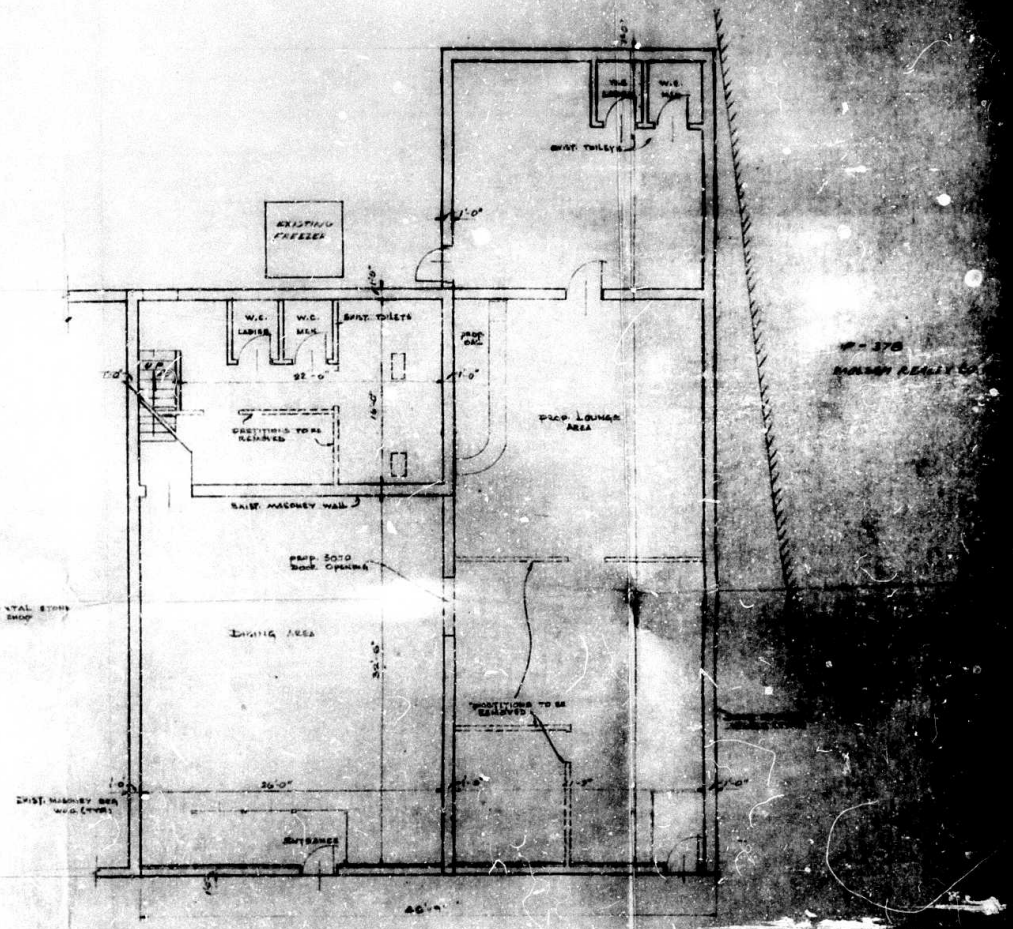
RECEIVED FROM Sarabande, 1½ E. Pennsylvania Ave. Towson, Md.

FOR 21204, Filing Fee Case No. 79-15-A

877 PRJUN 21 25.00 MSC

VALIDATION OR SIGNATURE OF CASHIER





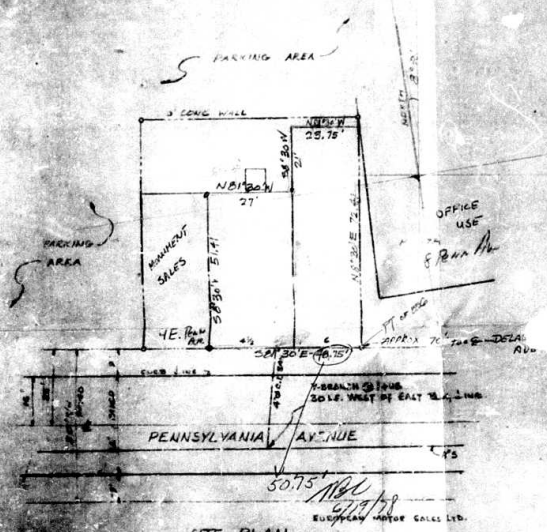
FLOOR PLAN
SCALE 3/16" = 1'-0"

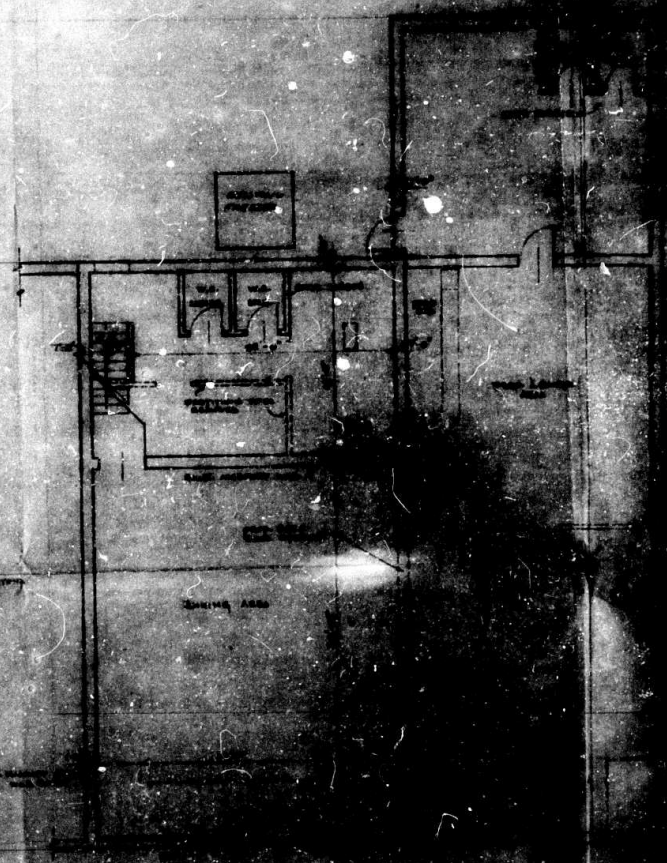
NOTES:
1- ALL CONSTRUCTION [illegible]
2- ALL [illegible]

PROPERTY REFERENCES
PARCEL : 135
LOT :
BLOCK : 15
LIBER : 1560 FOLIO : 178
OWNER : LEROY Y. HAILE
E.D. : 9
PRESENT USE : COMMERCIAL

NOTE: EXISTING RESTAURANT IS C PROPERTY
REQUIRING PARKING SPACES FOR THE
PROPOSED USE. THIS VARIANCE IS REQUESTED
TO REQUIRE 0 PARKING SPACES IN
LIEU OF THE REQUIRED 63. IF GRANTED
THIS WILL ALLOW THE RESTAURANT TO OPERATE
WITHOUT REQUIRING THE LEASING OF SPACES

MAR 16 1979





PLAT TO ACCOMPANY VARIANCE
PETITION FOR SARABANDE RESTAURANT

MAP 32
NO. 19-B
9
4-23-79
✓
MH

PROPERTY REFERENCES
PARCEL: 123
15
1320 FOLIO: 178
LEROY V. HAILE

EXISTING ZONING - B.M.
AREA #4½ PENN AVE = 1370.5 □'
AREA #6 PENN AVE = 1741.87 □'
TOTAL AREA = 3112.37 □'
PARKING REQ. = 3112.37 □'/50 = 62.25
63 SPACES
PARKING PROVIDED = 0

NOTE: EXISTING RESTAURANT IS CURRENTLY LEASING PARKING SPACES FOR THE EXISTING USE. THIS VARIANCE IS REQUESTED TO REQUIRE 0 PARKING SPACES IN LIEU OF THE REQUIRED 63. IF GRANTED THIS WILL ALLOW THE RESTAURANT TO OPERATE WITHOUT REQUIRING THE LEASING OF SPACES.

MICROFILMED

MAR 16 1979