

IN RE: PETITION FOR ZONING VARIANCE
S/S Melrose Avenue, 370' W of
the c/l of Ingleside Avenue
(17, 19 & 21 Melrose Avenue)
1st Election District
1st Councilmanic District
Robert C. Morsberger, et al
Petitioners

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioners herein request a variance to permit 11 parking spaces in lieu of the required 36 spaces and to allow a parking space setback of 8 feet from the street right-of-way in lieu of the required 10 feet, as more particularly, described in Petitioner's Exhibit 1.

The Petitioners, Robert C. and Jeffrey D. Morsberger, appeared, testified, and were represented by Thomas B. McCarty, Esquire. Also appearing on behalf of the Petition were Louis P. Morsberger, Jeff's father, and Elmer L. Morsberger, Robert's father. Appearing as interested parties were: Jean S. Walsh, Frances G. Medicus, Stephen W. Whalen, Jr., Florence Kennedy-Stack, on behalf of the Central Catonsville Neighborhood Association, and William Hughey, Area Planner with the Baltimore County Office of Planning and Zoning. There were no Protestants.

Testimony indicated that the subject property, zoned B.L.-C.C.C., consists of approximately 0.45 acres located on the south side of Melrose Avenue, between Melrose Avenue and the Baltimore County Revenue Authority's public parking lot off of Frederick Road. Said property, currently known as Caton Plaza Center, is presently improved with a 60' x 60' commercial building accommodating three retail uses. Testimony indicated Petitioners are desirous of constructing a commercial building addition of approximately 60' x 60' to permit three additional commercial retail spaces.

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By [Signature]

Interest shall at all times maintain the dumpster enclosures and surrounding area.

5) Petitioners shall landscape the site at a minimum in compliance with the Baltimore County Landscape Manual. A landscaping plan shall be submitted for approval by the Baltimore County Landscape Planner prior to the issuance of any permits. The landscaping shall at all times be maintained by the property owner.

ANN:bjh
Deputy Zoning Commissioner
for Baltimore County

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ex. Testimony indicated that the addition cannot be constructed without the requested parking variances. Petitioners testified that in lieu of placing additional parking on the lot behind the property, which is also owned by them and is zoned R.O., they have negotiated with the Baltimore County Revenue Authority to lease a minimum of 10 parking spaces on the lot directly abutting the stores on the subject property. Said parking will be designated for use by visitors to the Caton Plaza Center.

Testimony presented indicated that Petitioners and the community felt that parking on the rear lot, which abuts residential property, is not in the best interests of the surrounding community. The community felt that a rear parking lot would encourage loitering and that the additional lighting from the commercial use would have a less desirable impact on nearby residents than the present situation.

Testimony further indicated that the use of the Baltimore County Revenue Authority lot during peak hours is currently less than 50%. Mr. Whalen, Secretary for Catonsville 2000, testified that on three occasions prior to the hearing during peak hours, he counted the parking spaces used and found a minimum of a 50% vacancy rate. Petitioners further argued that the granting of the variances will not result in any traffic congestion due to the availability of parking and pedestrian traffic to and from stores in the area. Petitioners argued that to deny the variances would result in practical difficulty and detriment to the community. To support Petitioners' testimony as to the adequacy of parking in the area and the Baltimore County Revenue Authority's agreement only to commit to ten (10) spaces at this time, a letter dated October 26, 1989 from Kenneth P. Mills, Jr., Executive Director, has been incorporated into the file.

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- 2 -

Testimony further indicated that the Petitioners had worked with the community regarding the materials to be used for the exterior of the building, landscaping, and the location of the dumpsters. Petitioners have agreed that, except for windows and doors, all exposed sides of the proposed building will be finished in brick. Further, Petitioners will place brick veneer on the rear wall of the existing building. The dumpsters and trash facilities servicing the site will be located on the lot and will be screened by either an opaque wood, fence or brick wall. Petitioners agreed to maintain the landscaping at all times, replacing trees and shrubs as necessary.

An area variance may be granted where strict application of the zoning regulations would cause practical difficulty to the Petitioner and his property. McLean v. Soley, 270 Md. 208 (1973). To prove practical difficulty for an area variance, the Petitioner must meet the following:

- 1) whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;
- 2) whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief; and
- 3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Anderson v. Bd. of Appeals, Town of Chesapeake Beach, 22 Md. App. 28 (1974).

It is clear from the testimony that if the variance is granted, such use as proposed would not be contrary to the spirit of the B.C.Z.R. and would not result in substantial detriment to the public health, safety, and general welfare.

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PETITION FOR ZONING VARIANCE TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY: 90-129-A

The undersigned, legal owner(s) 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 5-102.6 and 5-102.8.A.4. to permit 11 parking spaces in lieu of the required 36 spaces and to allow a parking space setback of 8 feet from street right-of-way in lieu of the required 10 feet.

the required 10 feet setback of the subject property, to the Zoning Law of Baltimore County; for the following reasons: (Indicate hardship or practical difficulty)

1. Available offsite parking is presently restricted to R.O. zoning which is undesirable to neighborhood assoc. Parking lot lighting would be objectionable also.
2. S.W.M. problems would be alleviated by not requiring additional parking spaces on the North side of Melrose Avenue.
3. Plentiful parking is now available on Public Parking Lot; traffic congestion on Melrose & Ingleside Ave. would be alleviated; loitering problem on parking lot Property is to be fenced and advertised as prescribed by Zoning Regulations. SEE ATTACHED

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.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser:
(Type or Print Name)

Signature

Address
City and State

Legal Owner(s):
Robert C. Morsberger
(Type or Print Name)

Signature

Address
City and State

THOMAS BOWIE MCCARTY 788-3800

McCarty & McCarty
ATTORNEYS AT LAW

1606 FREDERICK ROAD
CATONSVILLE, MARYLAND 21228

Attorney's Telephone No.: 788-3800

713 Frederick Rd.
Catonville, Maryland 21228

Name, address and phone number of legal owner, contract purchaser or representative to be contacted

Name
Address
Phone No.

ORDERED BY The Zoning Commissioner of Baltimore County, this 12th day of 1989.

of 1989, 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 held before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 10th day of Oct. 1989, at 2:30 o'clock P.M.

By [Signature]
Zoning Commissioner of Baltimore County

ORDER RECEIVED FOR FILING
Date 11/15/89
By [Signature]

FILED BY JLL 6/24/89

TIME OR DATE

1/2 HR. HEARING TIME

MR. MORSBERGER SIGNED IN PRESENCE OF TWO WITNESSES ON SITE

#4 The new rule requires a 10 foot setback between road curb and the on site parking. Our on site parking was built in 1964 to satisfy the old requirement existing at that time. Our parking curbs are all in place and fully satisfactory to the previous requirement. It would be an extreme hardship to completely revamp the whole side of our parking lot to comply with a change of only two feet. This hardship was not the result of the applicant's own actions.

BEGINNING FOR THE FIRST at a stone planted at [] and of the first line of John Burner's [] of the land conveyed by Amelia [] to August Seichel by Deed dated [] 1879 and recorded among the [] and Records of Baltimore County in Liber B.B. No. 113 folio 332, etc. and running thence north 82 degrees east 5 perches to a large gate post thence north 13 degrees west 8 perches and two-tenths of a perch to a stone planted thence south 82 degrees west 7 perches and two tenths of a perch to a stone planted thence south 82 degrees west 7 perches and two tenths of a perch to a stone thence south 28 degrees east 8 perches and eight-tenths of a perch to the place of beginning. Containing 52 square perches of land, more or less.

SAVING AND EXCEPTING THEREFROM all that portion of said lot which was granted and conveyed by the said Otto K. Seiche, widower, to Wallace O. Phillips and Beale M. Phillips, his wife, dated January 18, 1955 and recorded among the Land Records of Baltimore County in Liber G.L.B. No. 2641 folio 573.

BEING the same property described in a Deed dated April 7, 1960 and recorded among the Land Records of Baltimore County in Liber M.B. No. 3745 folio 587 from Elva Jaiche Young and Bernard K. Young, her husband, et al, unto the parties of the first part herein.

BEGINNING for the second on the south side of Fustings Avenue No. 1 also called Melrose Avenue at the northeast corner of Leonard Birkner's lot and running 4nd binding on said lot South 12 3/4 degrees East 136 feet to the line of the ground of Charles Thomas thence on said line North 81 3/4 degrees East about 621 feet to the ground belonging to Sullivan and Shipley thence by a straight line at right angles to Fustings Avenue No. 1 about 135 2/3 feet to said avenue and thence on the south side of Fustings Avenue No. 1 South 81 3/4 degrees West 73 feet to the place of beginning. Containing 34 square perches more or less.

BEING the same property described in a Deed dated January 19, 1965 and recorded among the Land Records of Baltimore County in Liber B.B. No. 4415 folio 408 from Florence B. Silbertstone and husband unto Elmer L. Morsberger and Louis P. Morsberger, as tenants in common.

2 lots on south side of Melrose Ave

Pursuant to the advertisement, posting of the property, and public hearing on this Petition held, and for the reasons given above, the variance requested should be granted.

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this 15th day of November, 1989 that the Petition for Zoning Variance to permit 11 parking spaces in lieu of the required 36 spaces and to allow a parking space setback of 8 feet from the street right-of-way in lieu of the required 10 feet, in accordance with Petitioner's Exhibit 1, be and is hereby GRANTED, subject, however, to the following restrictions which are conditions precedent to the relief granted:

- 1) The Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the Petitioners would be required to return, and be responsible for returning, said property to its original condition.
- 2) Petitioners and/or their successors in interest shall lease at a minimum 10 parking spaces from the Baltimore County Revenue Authority. In the event that said lease is terminated, Petitioners shall submit proof of an alternative parking arrangement within walking distance of the site for a minimum of 10 replacement parking spaces. The adequacy of the alternative spaces shall be determined by the Deputy Zoning Commissioner or Zoning Commissioner, in their sole discretion. The failure of the Petitioners and/or their successors in interest to provide a minimum of ten (10) off-site parking spaces shall result in the loss of use of occupancy of the proposed 60' x 60' addition as set forth in Petitioner's Exhibit 1.
- 3) The proposed building shall be faced in brick. The rear and exposed sides of the existing building shall be faced in a matching brick or brick veneer.
- 4) The dumpster and trash facilities servicing the subject property shall be located on the lot and fully screened on all sides by either an opaque wood fence or brick wall of a height at least that equal to the dumpsters. The Petitioners and/or their successors in

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- 4 -

Columbia Office
Walter Part
Registered Surveyor
Phone 730-9000

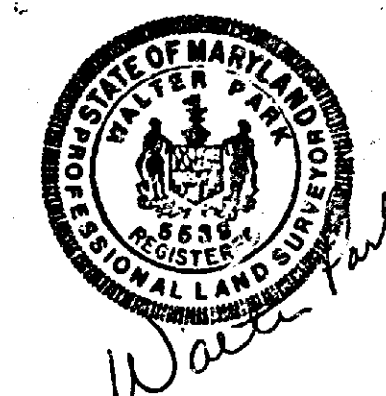
M. J. L. DEVELOPMENT ENGINEERS, INC.
200 EAST JOPLA ROAD
ROOM 101, SHELL BUILDING
TOWSON, MARYLAND 21204

June 23 1989

CATON PLAZA CENTER
17-19-21 MELROSE AVE
TAX MAP 101 PARCEL 1023
BALTIMORE COUNTY, MARYLAND 21228

Beginning for the same at a point on the south side of Melrose Ave (30 feet wide) and being South 78 degrees 22 minutes 50 seconds West 370.00 feet, more or less, from the center line of Ingleside Ave, said beginning point being the northeast corner of the property being described, thence running with the outline of said property (1) South 11 degrees 35 minutes East 139.69 feet to the southeast corner of said property, thence (2) South 41 degrees 52 minutes 23 seconds West 57.54 feet and (3) South 79 degrees 40 minutes 49 seconds West 87.14 feet to the southwest corner of said property, thence (4) North 16 degrees 31 minutes 33 seconds West 135.84 feet to the northwest corner of said property, and using a point on the south right of way line of Melrose Ave, thence running with the south side of Melrose Ave (5) North 78 degrees 22 minutes 50 seconds East 156.29 feet to the place of beginning.

Being a part of that parcel in Liber 6548 at folio 696, etc., was granted and conveyed by Elmer L. Morsberger, and wife, Louis P. Morsberger and wife, unto Jeffrey D. Morsberger and Robert C. Morsberger.



Baltimore County
Zoning Commissioner
Office of Planning & Zoning
Towson, Maryland 21204
(301) 887-3353

J. Robert Haines
Zoning Commissioner

August 21, 1989

NOTICE OF HEARING



Dennis F. Rasmussen
County Executive

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing on the property identified herein in Room 106 of the County Office Building, located at 111 W. Chesapeake Avenue in Towson, Maryland as follows:

Petition for Zoning Variance
CASE NUMBER: 90-129-A
S side Melrose Avenue, 370' W of c/l of Ingleside Avenue
Caton Plaza Center, 17-19-21 Melrose Avenue
1st Election District - 1st Councilmanic
Petitioner(s): Robert C. Morsberger, et al
HEARING SCHEDULED: TUESDAY, OCTOBER 10, 1989 at 9:30 a.m.

Variances To permit 11 parking spaces in lieu of the required 36 spaces and to allow a parking space setback of 8 feet from street right-of-way in lieu of the required 10 feet.

In the event that this Petition is granted, a building permit may be issued within the thirty (30) day appeal period. The Zoning Commissioner will, however, entertain any request for a stay of the issuance of said permit during this period for good cause shown. Such request must be in writing and received in this office by the date of the hearing set above or presented at the hearing.

J. Robert Haines

J. ROBERT HAINES
ZONING COMMISSIONER
BALTIMORE COUNTY, MARYLAND

JRH:ga

Cc: Robert & Jeffrey Morsberger
File

BALTIMORE COUNTY, MARYLAND INTER-OFFICE CORRESPONDENCE

TO: J. Robert Haines, Zoning Commissioner
FROM: Pat Keller, Deputy Director, Office of Planning and Zoning
SUBJECT: Robert C. Morsberger, Item 573
Zoning Petition No. 90-129A

DATE: October 3, 1989

The petitioner requests a Variance to permit 11 parking spaces in lieu of the required 36 spaces and allow a parking space setback of 8 feet from the street right-of-way in lieu of the required 10 feet.

In reference to this request, staff supports the petitioner's request and offers the following comment.

Should the petition be granted, this office suggests that the petitioner enter into a lease agreement with the Revenue Authority to ensure that adequate off-street parking is provided.

If there should be any further questions or if this office can provide additional information, please contact Jeffrey Long in the Office of Planning at 887-3211.

PK/JL/pat

OCT 03 1989

rec. late mail

Baltimore County
Department of Public Works
Bureau of Traffic Engineering
Courts Building, Suite 406
Towson, Maryland 21204
(301) 887-3554

RECEIVED
AUG 3 1989

31, 1989

Mr. J. Robert Haines
Zoning Commissioner
County Office Building
Towson, MD 21204

ZONING OFFICE



Dennis F. Rasmussen
County Executive

Item #573
Property Owner:

Location:

Existing Zoning:
Proposed Zoning:

Area:
District:

July 11, 1989
Robert C. Morsberger &
Jeffrey D. Morsberger
S. side of Melrose Ave. 370' W.
of centerline of Ingleside Avenue.
BL. - C.C.C.
Variance to permit 11 parking
spaces in lieu of the required
36 spaces and to allow a parking
space setback of 8' from the
street right of way in lieu
of the required 10'.
.529 acre
1st Election District

Dear Mr. Haines:

The requested variance to parking can be expected to add to the already existing parking problems in the area. This area has been the source of many complaints about parking.

Very truly yours,

Michael S. Flanagan
Michael S. Flanagan
Traffic Engineer Associate II

MSF/lab

Baltimore County
Fire Department
800 York Road
Towson, Maryland 21204-2586
(301) 887-4500

Paul H. Reincke
Chief

JULY 19, 1989



Dennis F. Rasmussen
County Executive

J. Robert Haines
Zoning Commissioner
Office of Planning and Zoning
Baltimore County Office Building
Towson, MD 21204

RE: Property Owner: ROBERT C. MORSBERGER AND JEFFREY D. MORSBERGER

Location: S SIDE OF MELROSE AVENUE, 370' W OF CENTERLINE OF INGLESIDE AVENUE

Item No.: 573 Zoning Agenda: JULY 11, 1989

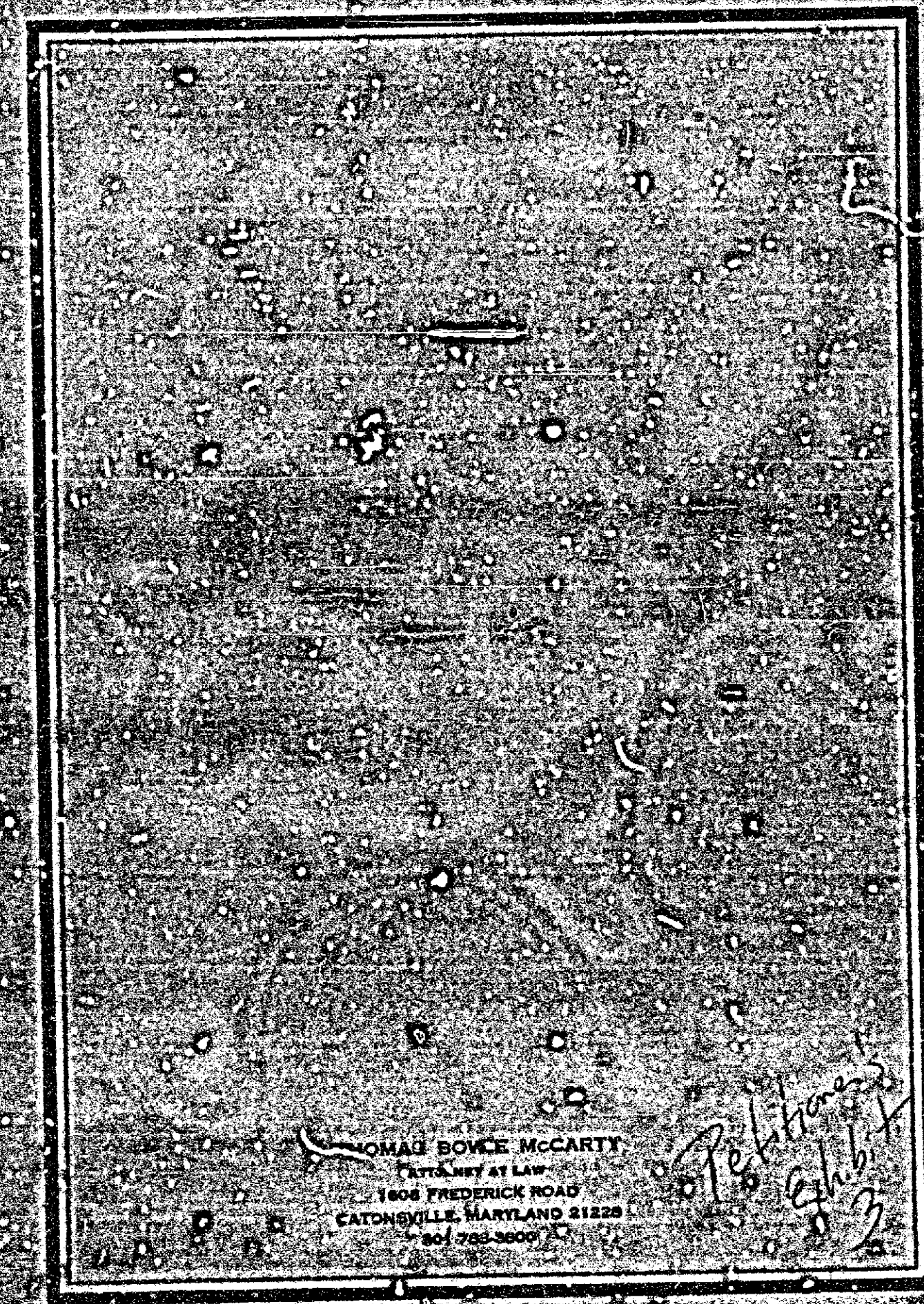
Gentlemen:

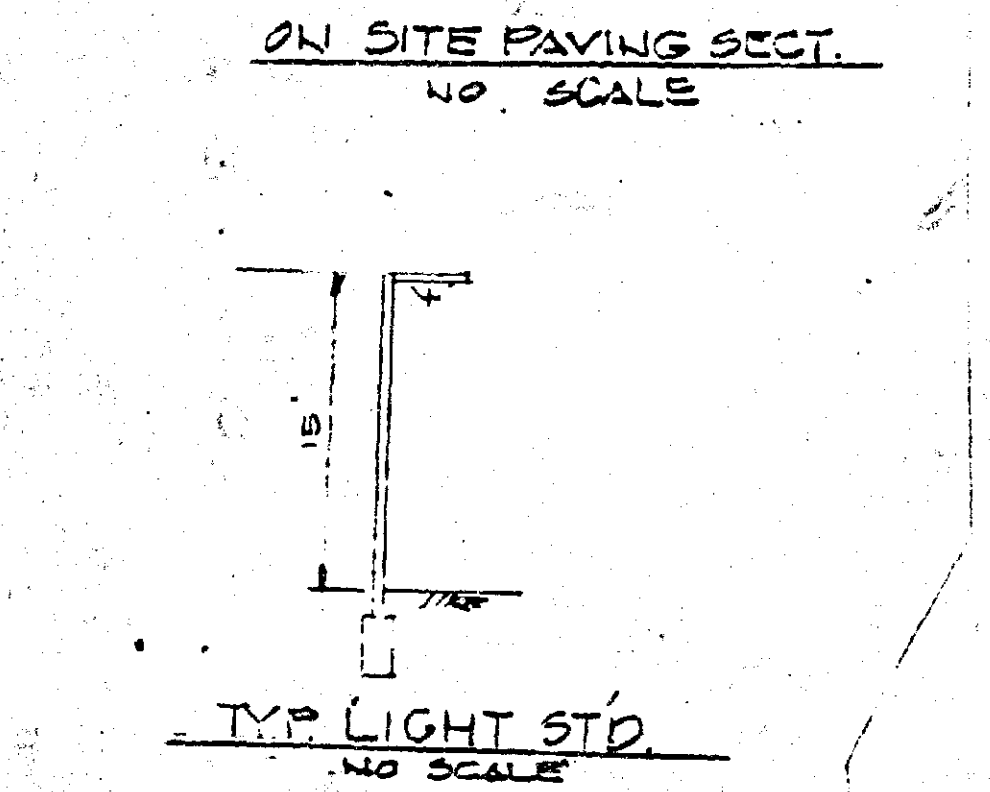
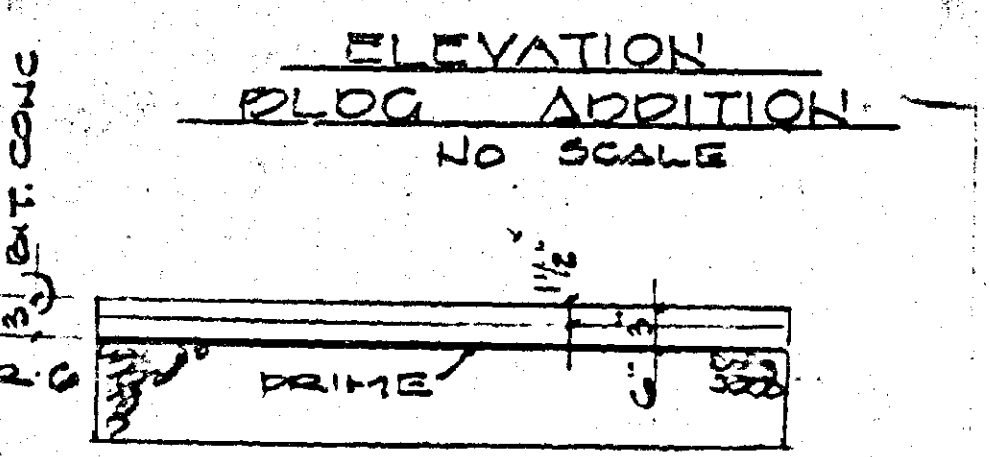
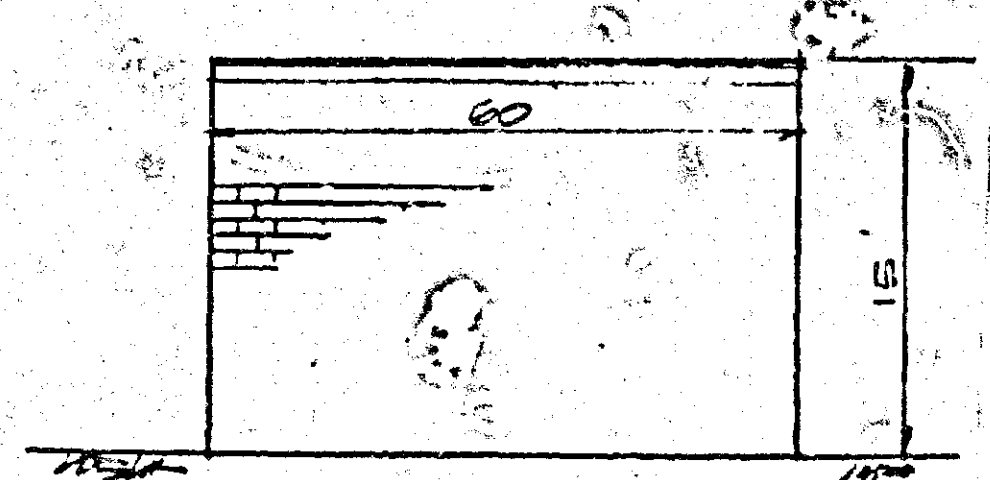
Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below are applicable and required to be corrected or incorporated into the final plans for the property.

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", 1988 edition prior to occupancy.

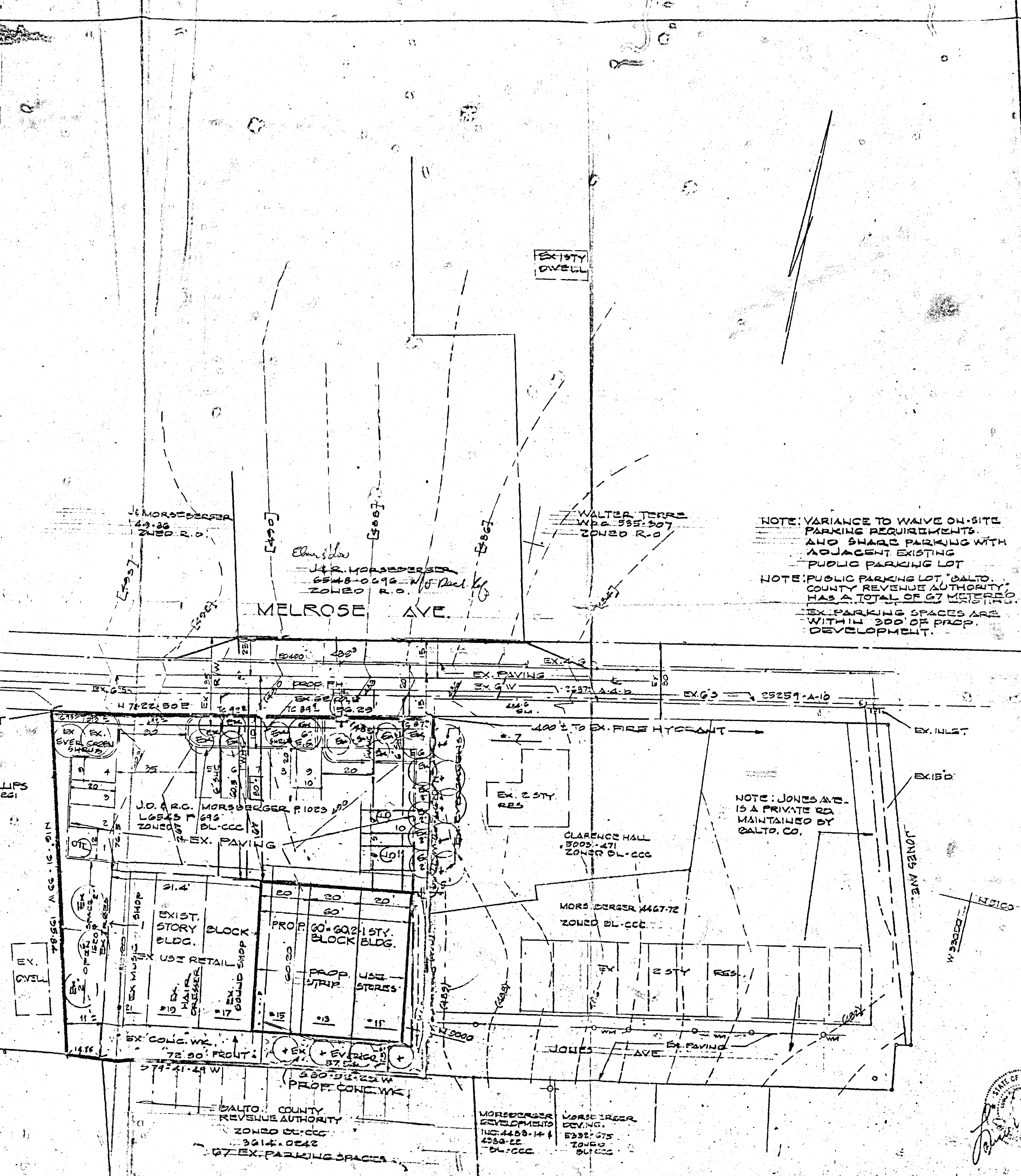
REVIEWER: *Pat Keller* Noted and Approved *Pat Keller*
Planning Group Fire Prevention Bureau
Special Inspection Division

JK/KEK



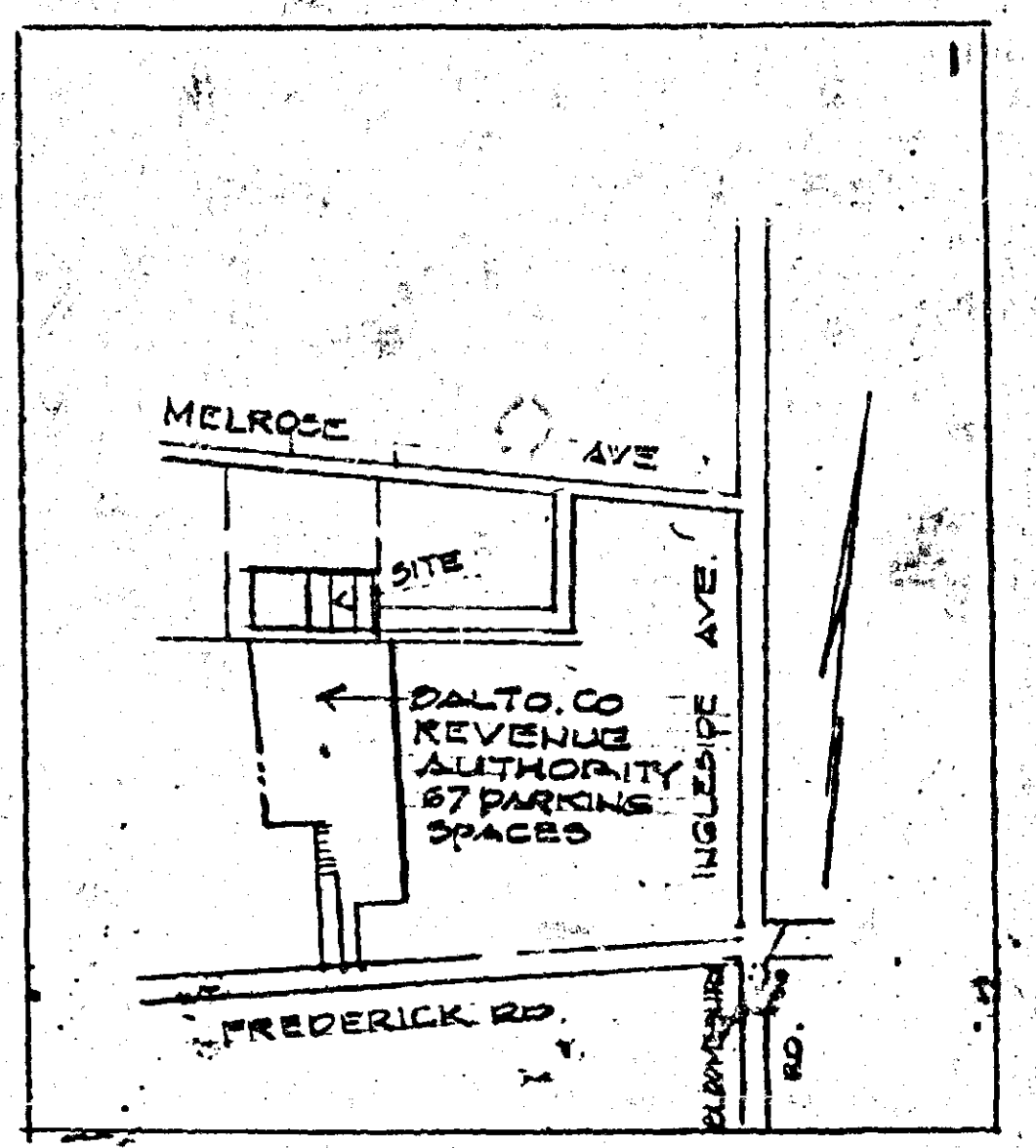


REVISION NO.	DESCRIPTION	DATE
1	REVISION	DATE



NOTE: VARIANCE TO WAIVE ON-SITE PARKING REQUIREMENTS AND SHARE PARKING WITH ADJACENT EXISTING PUBLIC PARKING LOT.

NOTE: PUBLIC PARKING LOT, BALTO. COUNTY REVENUE AUTHORITY, HAS A TOTAL OF 67 METERS. EX. PARKING SPACES ARE WITHIN 300' OF PROP. DEVELOPMENT.



BENCH MARK: DESCRIPTION: BOLT IN SEAM IN CONC. WALK EAST SIDE OF INGLETSIDE AVE. D.C. HUB NO. 15801 E.L. 438.492

DESCRIPTION: CUT IN CONC. SIDEWALK 3' SIDE OF BLOOMSBURY AVE 3' SIDE OF WARDEN AVE. D.C. 14990 E.L. 479.207

1. DEVELOPMENT NAME: ELMER AND LOUIS MORSBERGER 713 FREDERICK ROAD, BALTO. MD. 21228. PHONE: 747-8801.
2. PLAT BY: LOUIS A. SPITTEL, 1920 WOODSTOCK RD., WOODSTOCK MD. 21169. PHONE: 301-425-2090.
3. PROJECT ELECTION DISTRICT: 1ST.
4. COUNCILMANIC DISTRICT: 4008.
5. CENSUS TRACT: 4008.
6. WATER SEED: 30 SUBSEWER: 76.
7. SITE ACREAGE: 23,026.50 GROSS. 13,741.25 NET.
8. OPEN SPACE: 11,285.25 GROSS. 6,143.75 NET.
9. REQUIRED AMOUNT OF OPEN SPACE: 11,285.25 GROSS. 6,143.75 NET.
10. PARKING REQUIRED: 30 SPACES. 115.5' FOR 200' OF RETAIL SPACE. 750' FOR 100' OF RETAIL SPACE. SEE NOTE THIS SITE.
11. SITE USE: 115.5' FOR 200' OF RETAIL SPACE. 750' FOR 100' OF RETAIL SPACE.
12. ZONING CLASSIFICATION: DL-CC (COMMERCIAL).
13. QUANTITY OF LANDSCAPE PLANTING REQUIRED: 1 MAJOR DECIDUOUS TREE 15' TO 20' DBH. 4 TREES 10' TO 15' DBH.
14. SOIL TYPE DATA: SOIL SHEET NO. 46. TYPE C10 CHILLUM URBAN LAND.
15. AREA SITE: TYPE C10 PAVING SITE.
16. A.D.T. CARRY TRIP GENERATION: 150 A.D.T. 499.12.
17. THERE ARE NO HAZARDOUS MATERIALS ON SITE.
18. THERE ARE NO ARCHEOLOGICAL SITES.
19. 85% OF EXISTING WOODS TO BE REMOVED.

PUBLIC SERVICES C.R.G. NO. A8209

PLANNING NO.

DEED REF. PROP. PARKING LOT: L6543 F66% BLOC. ADDITION: L6548 F66%

TAX ACCOUNT NO. 01-013732781 & 01-010200240

NOTE: THERE ARE NO STREAMS, FLOODPLAINS, OR WETLANDS ON SITE.

NOTE: FLOOR AREA RATIO, FAR = 15,215/1000 = 15.215

NOTE: SITE WAS THE SUBJECT OF ZONING HEARING 77-47KA - 31 OCT. 1975.

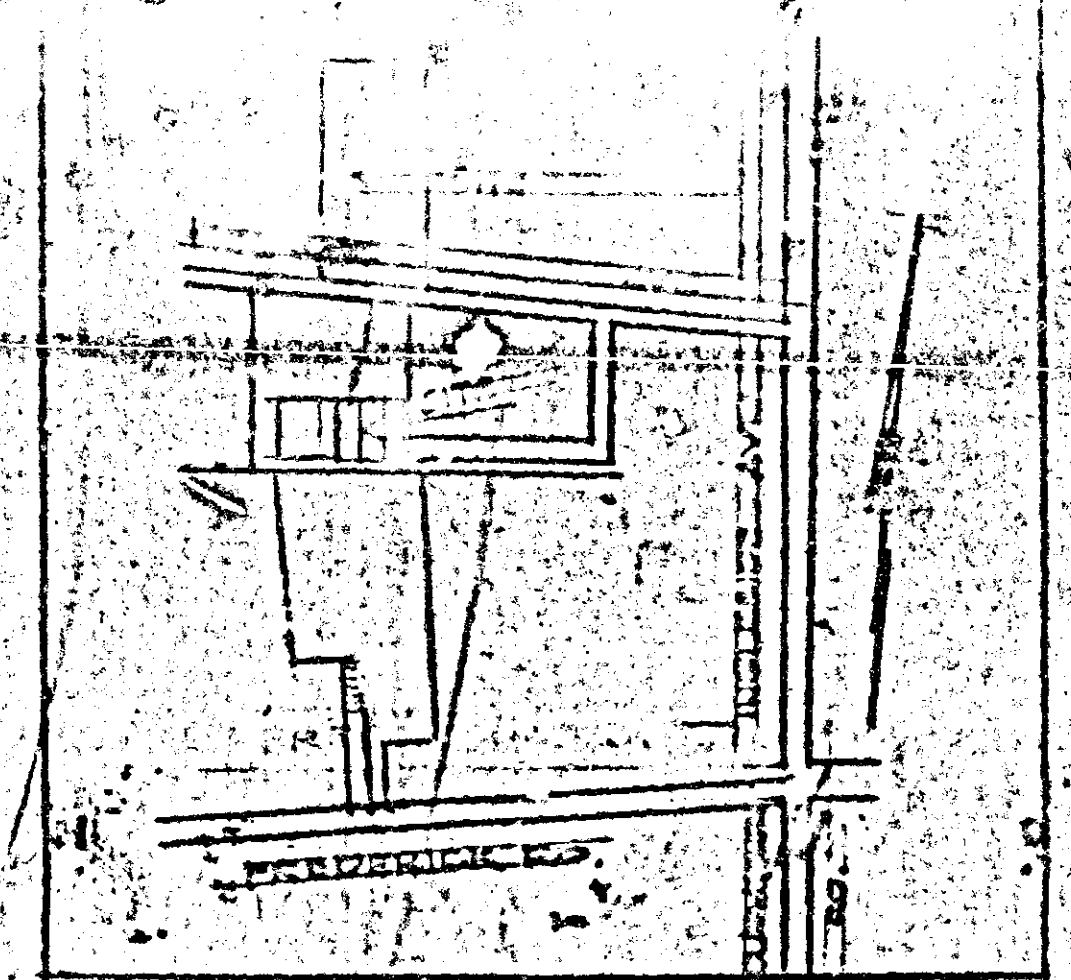
PLAT OF PETITION FOR ON SITE PARKING VARIANCE

FOR	
CATION	PLATA
PROPOSED 60'x60' BLOCK BLDG. ADDITION	
MORSBERGER PROPERTY	
MELROSE AVE.	
BLOCK & TAX MAP 101	PARCE 1023
1 ST. DISTRICT	BALTO. CO.
SCALE: 1"=20'	DATE: 11-1-88
DATE: 6-4-89	

OWNER: JEFFREY D. MORSBERGER
713 FREDERICK AVE.
BALTO. MD 21228
301-747-8801

ENGINEERS: LOUIS A. SPITTEL
1920 WOODSTOCK RD
WOODSTOCK MD. 21169
301-425-2090

PETITIONERS
Exh 4
SHEET 01



BENCH MARK DESCRIPTION DATE AND NO. OF
BOLT IN DRAMING CONC WALK EAST SIDE
OF BRIDGE 1968
DESCRIPTION DATE
+ CUT IN CONC SIDEWALK E SIDE OF
BRIDGE 1968
BOLT IN CONC SIDEWALK E SIDE OF BRIDGE 1968

- [illegible]

- [illegible]

SITE DEVELOPMENT PLAN

CATON PLAZA CENTER ADDITION

PROPOSED COLONY BLOCK BLOCK ADDITION

AND ADDITIONAL PARKING **ACT 742 239'S**

HORNBINGER PROPERTY

MELROSE AVE.

BLOCK 8 TAX MAP 101 PARCEL 102341917

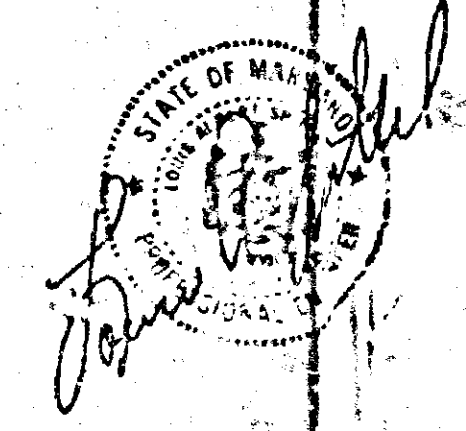
1 ST. DISTRICT BALZO. CO. MD.

SCALE: 1"= 20' DATE: 11-1-88

Peltner's Ex #2.

OWNER: JEFFREY R. ROBERT C. MORSEBERGER
713. FREDERICK AVE
BALTO. MD 21228
901-747-9801

ENGINEERS: LOUIS A. SPITTEL
1920 WOODSTOCK RD
WOODSTOCK MD. 21103
301-465-1890



RECEIVED
COUNTY CLERK'S OFFICE

MAY 22 PM 3:45

FILED MAY 21 1990

LEROY Y. HAILE, INC.
Appellant
IN THE MATTER OF THE
APPLICATION OF TOWSON COMMONS
LIMITED PARTNERSHIP
vs.
TOWSON COMMONS LIMITED
PARTNERSHIP,
Appellee
CIRCUIT COURT
FOR BALTIMORE COUNTY
Case No. 90CG1513
79/313

OPINION OF COURT

This matter comes before the court on the appeal by Leroy Y. Haile, Incorporated from the decision of the Board of Appeals dated March the 23rd, 1990 granting three zoning variances, specifically a variance of the Pennsylvania Avenue setback requirement, a variance from the York Road setback requirement, and a variance from the amenity open space requirement of the Zoning Code. The Board of Appeals heard five days of testimony regarding these variances. After hearing that testimony the Board issued a written opinion extensively detailing their decision.

Upon an appeal to this court this court's function is to determine whether that decision was arbitrary, capricious, without substantial justification or illegal. This court does not decide conflicts in testimony. This court does not

True Copy Test
Suzanne A. Smith, Clerk
Personnel Clerk

substitute its judgment for the judgment of the Board of Appeals. It's difficult for me to review the record in this case and understand how there can be a legitimate question about the substantial evidence being presented to the Board. The variances granted in this case involve a 15 foot variance regarding the Pennsylvania Avenue setback, a six foot variance regarding the York Road setback, a modest variance regarding the amenity open space requirement. In short, the variance granted in this case are certainly minimal and modest. They are area variances, not use variances. There is extensive evidence in the record showing extreme practical difficulty of the developer if these variances are not granted. There is extensive evidence in the record to show that the three variances granted were based not upon mere economic loss of profit, with the emphasis being on the word mere, but upon other substantial evidence.

Parenthetically, it is difficult for this Court to accept the statement made by Appellant's counsel regarding the motivation for the Appellant's spending of thousands of dollars to protest these minimal variances. Regardless of what the motivation of the Appellant is for the filing and the prosecuting of these appeals, both to the Board of Appeals and to this court and who knows where else, it is this Court's view that this case is not difficult to decide based on the extensive record created by the Board of Appeals.

2

The Board's decision is not arbitrary. The Board's decision is not capricious. The Board's decision is with substantial justification. And the Board's decision is legal. This court therefore orders that the decision of the Board of Appeals be affirmed, and I am issuing that opinion as of this minute. The appeal of the appellant is therefore denied. Costs to be paid by the appellant. That concludes the matter.

4/17/90
Date

DANA M. LEVITZ, JUDGE

Copies to: Rudolph E. DeMeo, Esq.
Cynthia M. Bahn, Esq.

3

CIRCUIT COURT FOR BALTIMORE COUNTY
CIVIL GENERAL

DOCKET 79 PAGE 313 CASE NO. 90CG1513 CATEGORY APPEAL

LEROY Y. HAILE, INC.
Appellant
IN THE MATTER OF
THE APPLICATION OF
TOWSON COMMONS LIMITED PARTNERSHIP
FOR A SPECIAL HEARING AND VARIANCES
ON PROPERTY LOCATED ON THE WEST SIDE
YORK ROAD BETWEEN SOUTH SIDE OF
PENNSYLVANIA AVENUE AND THE NORTH
SIDE OF CHESAPEAKE AVENUE
9th ELECTION DISTRICT
4th COUNCILMANIC DISTRICT

TOWSON COMMONS LIMITED PARTNERSHIP
Appellee

ATTORNEYS

Rudolph E. DeMeo
Mignini, Raab & Lidinsky
3410 White Ave (14) 426-3000

John H. Zink, III,
Cynthia M. Bahn
Venable, Baetjer & Howard
210 Allegheny Ave, PO Box 5517
(04) 823-4111
TOWSON COMMONS LTD PERSP

5-18-90 True test copy of
docket entries sent to
Board of Appeals - DSF

- (1) Apr 20, 1990 - Protestant's (LEROY Y. HAILE, INC) Order for Appeal from the Order of the Board of Appeals of Baltimore County fd.
 - (2) Apr 23, 1990 - Certificate of Notice fd.
 - (3) Apr 26, 1990 - App of John H. Zink, III and Cynthia M. Bahn for the Appellee, TOWSON COMMONS LIMITED PARTNERSHIP and Sema Day Motion for Expedited Appeal and Emergency Hearing w/ Exhibits fd.
 - (4) Apr 26, 1990 - Correspondence to Judge Hinkel fd.
 - (5) April 27, 1990 - Appellant's LEROY Y. HAILE, INC. Petition of Appeal fd.
 - (6) April 27, 1990 - Consent Order of Court that the Motion for Expedited Appeal and Emergency hearing is Granted fd. (JWH)
 - (7) May 9, 1990 - Appellee's TOWSON COMMONS LIMITED PARTNERSHIP Answer fd.
 - (8) May 9, 1990 - Appellee's TOWSON COMMONS LIMITED PARTNERSHIP Memorandum fd.
 - (9) May 9, 1990 - Appellant's LEROY Y. HAILE, INC. Memorandum fd.
 - (10) May 10, 1990 Transcript of Record fd.
 - (11) May 10, 1990 Notice of Filing of Record fd.
 - (12) May 15, 1990 - Appellant's HAILE Reply Memorandum of Law fd.
 - (13) May 15, 1990 - Appellee's Answering/Reply Memorandum fd.
- May 17, 1990. Hon. Dana M. Levitz. Hearing had. Decision of the Board Affirmed. Costs to be paid by the Appellant.

DOCKET 79 PAGE 313 CASE NO. 90CG1513

IN THE MATTER OF
THE APPLICATION OF
TOWSON COMMONS LIMITED PARTNERSHIP
FOR A SPECIAL HEARING AND VARIANCES
ON PROPERTY LOCATED ON THE WEST SIDE
YORK ROAD BETWEEN SOUTH SIDE OF
PENNSYLVANIA AVENUE AND THE NORTH
SIDE OF CHESAPEAKE AVENUE
9th ELECTION DISTRICT
4th COUNCILMANIC DISTRICT

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE COUNTY
* Case No.: 90-CG-1513
* Docket: 79
* Folio: 313

REPLY MEMORANDUM OF LAW OF APPELLANT LEROY Y. HAILE, INC.

Leroy Y. Haile, Inc., the Appellant, by its attorneys, Rudolph E. DeMeo and Mignini, Raab & Lidinsky, pursuant to Rule B12. of the Maryland Rules, and pursuant to this Court's April 26, 1990 Consent Order expediting the time for filing of Memoranda of Law and for the other procedural steps in this Appeal, respectfully presents this Reply Memorandum of Law.

Summary of Reply Argument

The Appellee's Memorandum, filed May 9, 1990, hereinafter cited as "TCLP 1st Mem.", fails to refute the two central points made in the Appellant's Memorandum, filed May 9, 1990, hereinafter cited as "LH1 1st Mem.", 15, 40. We shall present the three basic errors of law contained in Appellee's Memorandum. We shall also point out two important places in Appellee's Memorandum where Appellee either overlooked material record evidence or misinterpreted the Appellant's position.

The numbers following either memorandum citation refer to pages.

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Reply Argument

I. Appellee's Legal Position is Premised on Three Basic Errors of Law.

First, the Appellee misinterprets the applicable standard of review of the County Board of Appeals' Opinion and Order. The Appellee's statement that "the decision of the Board must be upheld on review if it is not based on an error of law and if it is supported by 'fairly debatable' evidence" (Emphasis supplied), is imprecise and, therefore, misleading. TCLP 1st Mem. 7-8. The precise standard of review, stated by Chief Judge Murphy of the Court of Appeals, is that an order of an administrative agency must be upheld on review, if it is not premised upon an error of law and if the agency's conclusions "reasonably may be based upon the facts proven" (Emphasis supplied). AD + Soil, Inc. v. County Comm'rs, 307 Md. 307, 338, 513 A.2d 893, 909 (1986). The second requirement of this standard of review supports reversal of an administrative decision for arbitrariness or capriciousness. Mayor & Aldermen, Etc. v. Annapolis Waterfront, 284 Md. 383, 396 A.2d 1080, 1087 (1979).

The Appellee fails to acknowledge in its Memorandum that, when reviewing an administrative decision for arbitrariness or capriciousness, a court must make two determinations: (1) whether the material question before the agency - not the evidence - was fairly debatable, i.e., whether the determination of the material issues involved testimony and documentary evidence from which a reasonable person could come to different conclusions. Annapolis Waterfront, SUPRA, 396 A.2d at 1087-1088; and (2) whether the

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findings of the Board were supported by substantial evidence, i.e., whether the Board's factual findings are supported by sufficient facts on the record so that a reasonable mind, based upon the facts proven, reasonably could have reached the same factual conclusions that the Board reached. Annapolis Waterfront, SUPRA, 396 A.2d at 1087-1089. Accordingly, the Appellee's imprecise statement of the standard of review overlooks the "substantial evidence test" that must be applied in this case.

Second, Appellee's Memorandum overlooks and, consequently, misapplies the analysis demonstrated by the Court of Appeals in Loyola Federal Savings & Loan Ass'n v. Buschman, 227 Md. 243, 176 A.2d 355, 359 (1961). The Court, in Loyola Federal, 176 A.2d at 357-358, presents an analysis based on the three elements of B.C.Z.R. Section 307, the predecessor to B.C.Z.R. Section 307.1. Appellee's Memorandum fails to indicate any cause-effect relation between any particular characteristics of the subject real property itself and the prevention of Appellee from building the project without the requested setback and amenity open space variances. Accordingly, unlike the facts proven in Loyola Federal, SUPRA, 176 A.2d at 359, Appellee cannot point to proven facts in the record that support the legal conclusion that there is a "practical difficulty" in complying with the B.C.Z.R. requirements, within the meaning of B.C.Z.R. Section 307.1 and the Loyola Federal opinion. LH1 1st Mem. 29-30.

Appellee's Memorandum fails to analyze the pertinent spirit and intent of the B.C.Z.R. setback and amenity open space requirements - analysis required by the second element of B.C.Z.R.

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Section 307.1. That pertinent spirit and intent for the setback requirements is comprised of the preservation of light and air, safety, pleasantness and ease of pedestrian movement and the preservation of the public's option for future road widening. That spirit and intent for the amenity open space requirement is comprised of a control to limit over-development, to relieve the pressure caused by the crowded nature and use of the development site, to function as the foil providing the civilized relief from the density in town centers like the C.T. District in which the subject project is located, and to implement the established principle in planning that when you plan a city, "it's not just density. It's density plus amenity." (T., 5th, 296-299); LH1 1st Mem. 33-35, 37-39.

Appellee's Memorandum fails to analyze the Appellants' witnesses' testimony that supports the legal conclusion that the public general welfare will be substantially injured if the three subject variances are granted - analysis required by the third element of B.C.Z.R. Section 307.1. The record does not contain any rebuttal of Appellant's witnesses' testimony regarding this issue, except for unsupported conclusory assertions. (T. 1st, 136-137; T. 3rd, a.m., 74). LH1 1st Mem. 13-14, 35.

Third, Appellee misinterprets the self-created hardship principle of Maryland zoning law. Nowhere in the opinions of the Maryland Court of Appeals does the Court limit the "practical difficulty" or "unreasonable hardship" standards either to use variance cases or to area variance cases. Loyola Federal, SUPRA, 176 A.2d at 359; AD + Soil, Inc. SUPRA, 513 A.2d at 909-910.

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