

Case No.: SE/VSE-4772  
(Sunoco Gas Station and  
Car Wash)

Applicant: Clearview 6308, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS ORDERED, that Special Exception and Variance 4772 application, a request to add a car wash to an existing gas station with a food and beverage store, in the C-S-C (Commercial Shopping Center) Zone, on Allentown Road, in Councilmanic District 8, is hereby DENIED.

A. Introduction

Before Council for final action is an application request to add a car wash to an existing gas station and food and beverage store. The existing gas station was approved in 1966 by Special Exception (SE)1452 and has 2 access driveways. Planning Board approved a revision to the site plan in 1990 to raze and replace the gas pumps and to add a food and beverage store. Today, the gas station, food and beverage store, and car wash require approvals by special exception. Because the car wash is a major revision to SE-1452, the application is reviewed as a new application.

When reviewed as a new application, access driveways of the existing gas station must comply with PGCC § 27-358(a)(5), which require driveways to be 1) 30 feet wide unless a lesser width is allowed for a one-way driveway by the Maryland State Highway Administration or the County Department of Permitting, Inspections, and Enforcement (DPIE), and 2) 12-foot setback from the side or rear lot line of any adjoining lot.

Because the existing driveways do not comply with PGCC § 27-358(a)(5), Planning Board approved the application subject to Applicant's reconstruction or replacement of the access

driveways, unless a lesser width for a one-way access was allowed by DPIE. The Board also approved the application subject to reconstruction or replacement of the access driveways to satisfy the minimum 12-foot setback from any adjoining side lot lines. Applicant declined to accept the Board's conditions concerning the access driveways. Less than 2 weeks before the Examiner considered the application, Applicant filed an amended application requesting 3 variances from PGCC § 27-358(a)(5), which the Examiner granted.

For reasons set forth below, the application and companion cases<sup>1</sup> will be denied because Applicant failed, on each variance, to provide evidence to satisfy its burden of proof that the property is "unique" compared to neighboring properties such that PGCC § 27-358(a)(5) affects the property disproportionately and, whether a "practical difficulty" results from that uniqueness.

#### B. Factual and Procedural History

In August 2017, Planning Department accepted the application for review. Ex.1.

On June 13, 2018, Technical Staff of the Planning Department, issued its report. Staff recommended approval of the application, subject to conditions. Ex. 19(a).

Subsequently in June 2018, Planning Board adopted Staff's recommendation to approve the application, subject to conditions. Concerning the driveways, the Board's recommendation of approval was subject to Conditions 1.g. and 1.h., which provided as follows:

Condition 1. g. required revision of the site plan to:

Indicate reconstruction or replacement of the access driveways to demonstrate a minimum width of 30 feet, unless a lesser width for one-way access is allowed by the applicable operating agency, in accordance with the County Road Ordinance and the Prince George's County Department of Public Works and Transportation specifications and standards. Ex. 19(a), p. 18.

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<sup>1</sup> Companion cases include Variance 4772, Alternative Compliance 17018, and Departure from Parking and Loading Standards 438.

Condition 1. h. required revision of the site plan to:

Indicate reconstruction or replacement of the access driveways to demonstrate that the location is a minimum of 12 feet from the adjoining side lot lines and define the access driveways with curbing. Ex. 19(a), p. 18.

The application file was transmitted to the Examiner for an evidentiary hearing. Ex. 22(b). In November and December 2018, one week before the Examiner's evidentiary hearing, Applicant filed an amended application and statement of justification. Ex. 27(b) and 27(c). Applicant alleged no variances were needed from PGCC § 27-358(a)(5) because the Code is silent on measurement of width of driveways.<sup>2</sup> Nonetheless, Applicant conceded the site plan in the record indicated that the 2 driveways were less than 30 feet, and 1 of the driveways, adjoining the Pepco property, was less than 12 feet from the side lot line—necessitating the need for 3 variances from PGCC § 27-358(a)(5). Ex. 27(c).

On December 12, 2018, the Examiner held a hearing on the application. At the hearing, Applicant indicated it would not accept Conditions 1.g. and 1.h. of the Board's recommendation, but instead requested 3 variances from PGCC § 27-358(a)(5). (12/12/2018, Tr., p. 40), Ex. 27(b) and 27(c), Examiner's Decision, p. 8.

On February 26, 2019, the Examiner recommended approval of the application, subject to conditions. To advance the application, the Examiner granted Applicant's request for 3 variances from PGCC § 27-358(a)(5), which negated Conditions 1.g. and 1.h. of the Board's recommendation. Examiner's Decision, 2/26/2019.

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<sup>2</sup> Applicant's contention that no variances were necessary is without merit. Planning Board and the Examiner made factual and legal determinations that both access driveways did not conform to PGCC § 27-358(a)(5). *See also* Ex. 19(a) (DPIE Memo, 10/12/2017, wherein DPIE stated existing driveways are to be upgraded to meet current DPW&T Specifications and Standards and/or relocate the Pepco entrance to be fully on and in front of the parcel).

On March 25, 2019, Council elected to make the final decision on the application. Zoning Agenda, 6/10/2019.

On April 29, 2019, Council held a hearing and considered the application. Zoning Agenda, 6/10/2019.

On June 10, 2019, Council directed staff to prepare an order of denial on Applicant's request for variances. Zoning Agenda, 6/10/2019.

C. Gas Station

A gas station, in part, may be permitted subject to the following:

- (5) Access driveways shall be not less than thirty (30) feet wide unless a lesser width is allowed for a one-way driveway by the Maryland State Highway Administration or the County Department of Permitting, Inspections, and Enforcement, whichever is applicable, and shall be constructed in compliance with the minimum standards required by the County Road Ordinance or Maryland State Highway Administration regulations, whichever is applicable. In the case of a corner lot, a driveway may begin at a point not less than twenty (20) feet from the point of curvature (PC) of the curb return or the point of curvature of the edge of paving at an intersection without curb and gutter. A driveway may begin or end at a point not less than twelve (12) feet from the side or rear lot line of any adjoining lot. PGCC § 27-358(a)(5).

D. Subject Property

The property is a 0.695-acre parcel of land, which is improved with a Sunoco Gas Station and a food and beverage store. The site is configured with four gasoline pump dispensers, one canopy, three underground storage tanks, one freestanding sign, and fourteen surface parking spaces. The site has two direct vehicular access driveways to MD 337 or Allentown Road. The property is surrounded by a Church, Carpet Store, Pepco Utility Switching Station, and other Commercial Mixed Uses—including other gas stations. Ex. 19(a), pp. 4-5, Slide 6, Ex. 27(c), p. 2, (12/12/2018, Tr.).

None of the access driveways comply with PGCC § 27-358(a)(5). Access driveway closest to Perge Carpet & Flooring is 27.3-feet wide. Access driveway closest to Pepco is 26.5-feet wide and it is also less than 12 feet from the adjoining side lot line of the Pepco property. Examiner's Decision, p. 8, Ex. 27(c), p. 14, (12/12/2018, Tr.).

#### E. Variance Requests

Applicant contends, among other things, that 1) both driveways present an extraordinary situation or condition because the 27.3-foot driveway is preexisting from when the existing gas station was constructed and the 26.5-foot wide driveway is encumbered by an ingress-egress easement, which justifies a variance from the side yard setback requirement, 2) strict compliance with PGCC § 27-358(a)(5), would result in a peculiar and unusual practical difficulty because the site condition was inherited and to require an adjustment or rebuilding would result in tremendous cost and circulation problems for the site, 3) adjustment of the driveways will cause an undue financial hardship, great inconvenience and great upheaval of the property, and 4) if the variances are not granted, it would have no reasonable recourse regarding width of the driveways and side lot line setback. Ex. 27(c), pp. 14-16.

#### F. Examiner's Findings on Variances

The Examiner's findings on each variance were limited to the following:

(13) Each variance can be granted since: the lot is unusually shaped; and a portion of one of the access driveways, in use for decades, is legally on the adjoining property owned by PEPCO – an extraordinary situation or condition. Section 27-230(a)(1). If the Zoning Ordinance were strictly applied, it would result in unusual, practical difficulties for the applicant since Applicant would have to demolish the existing entrances (and perhaps more of the site); increase the limit of disturbance for stormwater management purposes; and remove the driveway currently paved over the easement and reconstruct it on Applicant's land which would change the interior traffic circulation and could lead to an adverse impact on such a small site. Section 27-230(a)(2)). Granting the variances will not substantially impair the

intent of the General Plan or Sector Plan since: the former recommends that context-sensitive infill development and the addition of a small Car Wash satisfies that goal; and, the latter may have addressed a future goal of residential mixed use but retained the C-S-C zoning of the site - adding a commercial use to the site would not therefore, substantially impair the Sector Plan. (Section 27-230(a)(3)).

Examiner's Decision, pp. 19-20.

G. Applicable Law

A variance is a use of property that “is prohibited and presumed to be in conflict with [an] ordinance.” The burden rests on the applicant to overcome the presumption that the proposed use is in conflict with the ordinance. *Dan's Mountain Wind Force, LLC v. Allegany Cty.*, 236 Md. App. 483, 491-92, 182 A.3d 252, 256-57 (2018) (*quoting North v. St. Mary's Cty.*, 99 Md. App. 502, 510, 638 A.2d 1175 (1994)). “[T]he general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.” *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995)).

Under the County Code, a variance may only be granted when:

- (1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;
- (2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and
- (3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan. PGCC § 27-230.

Courts apply Maryland's common law regarding variances in interpreting local ordinances.

Maryland courts recognize a two-part test to determine whether a variance should be granted.

*Dan's Mountain Wind Force, LLC*, 236 Md. App. at 491-96, 182 A.3d at 256-59 citing *Cromwell*, 102 Md. App. 691, 651 A.2d 424 (1995). The first requirement, uniqueness, looks at whether:

the property whereupon structures are to be placed (or uses conducted) is—in and of itself—unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property.

*Id.* at 492. The analysis itself requires, as an initial matter, an examination of the property's unusual characteristics relative to other properties in the area, then an analysis of the “nexus,” *i.e.*, the connection, between the unusual characteristic and the application of the zoning law. *Id.* at 494.

The unusual characteristic(s) must be “related to the land.” *Id.* at 496. In other words, the property's uniqueness must be “inherent” in the property itself:

Uniqueness of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, *i.e.*, its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions.

*North*, 99 Md. App. at 514. But since every property is unique in the sense that it's not identical to any other, the “nexus” requirement asks “whether the property is unique in the way that this particular aspect of the zoning code applies to it.” *Dan's Mountain*, 236 Md. App. at 496.

The uniqueness requirement protects against situations in which a variance might “act as a precedent” for other properties in the area, because if the effects of the zoning law operate similarly to the way in which they operate on a separate applicant property, the uniqueness requirement is likely not satisfied thus; overwhelming the zoning restrictions on the entire area. *Dan's Mountain*, 236 Md. App. at 495.

If the property is not unique, the inquiry ends. If the Applicant successfully proves that the property in question is unique, then the reviewing body moves to the second requirement—practical difficulty or unnecessary hardship—and examines:

Whether practical difficulty and/or [unnecessary] hardship, resulting from the disproportionate impact of the ordinance caused by the property’s uniqueness, exists.

This two-step process must be repeated for each variance request. *Id.* Applicant’s variance requests are “area variances” (not use variances), which are reviewed under a “practical difficulty” standard. *Montgomery Cnty. v. Rotwein*, 169 Md. App. 716, 728-29, 906 A.2d 959, 966 (2006).

Three factors may be considered in deciding practical difficulty:

- 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 ordinance will be observed and public safety and welfare secured.

*Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt. Cty.*, 407 Md. 53, 83, 962 A.2d 404, 421 (2008).

#### H. Conclusion

- Uniqueness

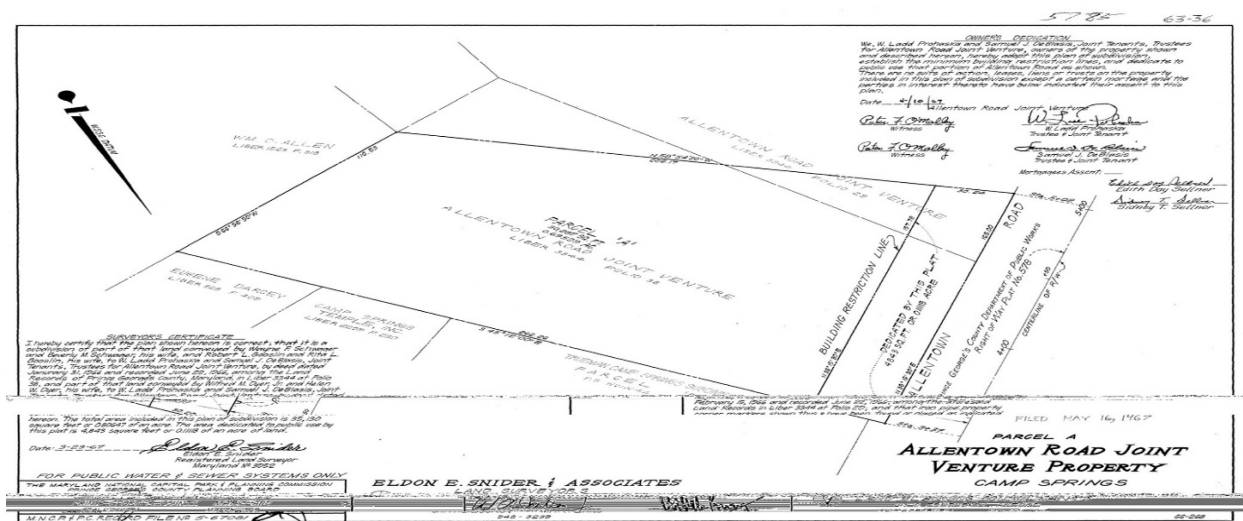
As a threshold matter, the record lacks evidence or analysis that the property, in and of itself, is unique and unusual in a manner different from the nature of surrounding properties such



that the uniqueness and peculiarity of the property causes PGCC § 27-358(a)(5) to impact disproportionately upon the property.

The property is accompanied by 3 other gas stations on Allentown Road—Royal Farms, Valero, and Exxon, which are also subject to PGCC § 27-358(a)(5). The property is also surrounded by a 7-11 and other commercial businesses in the area. (12/12/2018, Tr., pp. 12-20), Ex. 19(a), Slides 6-9, Ex. 34(a-f). But Applicant provided no evidence or analysis to the Examiner that, as to each variance, the property is unique and unusual in a manner different from the nature of surrounding properties. Consequently, the Examiner's findings and conclusions, on each variance, were erroneous because neither was predicated upon any evidence or initial analysis that the property is unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the property causes PGCC § 27-358(a)(5) to impact disproportionately upon the property. Ex. 27(c), Ex. 32, (12/12/2018, Tr.).

Moreover, the record does not support the Examiner's finding that the property is "unusually shaped." The record plat (below), depicts the property as mostly rectangular—not "unusually shaped," exceptionally narrow, or shallow. PGCC § 27-230.



Other photographic evidence (below) depicts the property as a large parcel—without unusual characteristics relative to—at least the Carpet Store and Pepco Building. Ex. 19(a), Slide 12. Moreover, there is no evidence in the record that this property is unique and unusual in a manner different from the 3 other gas stations on Allentown Road, which are also subject to PGCC § 27-358(a)(5). Ex. 19(a), Slide 6, (12/12/2018, Tr.). The access driveways (below) are separated by a large portion of land, which would allow for reconstruction/relocation to comply with PGCC § 27-358(a)(5). Ex. 19(a) (DPIE Memo, 10/12/2017, wherein DPIE stated existing driveways are to be upgraded to meet current DPW&T Specifications and Standards and/or relocate the Pepco entrance to be fully on and in front of the parcel).



Applicant's contention that the property is unique because it is preexisting with improvements or variances are merely to validate an existing condition on the property is unpersuasive. Ex. 27(c), (12/12/2018, Tr.). First, in the zoning context, the "unique" aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. *Cromwell*, 102 Md. App. at 694-95.<sup>3</sup> Second, this application is a revision to SE-1452, such that the filing and approval of a new application is required. PGCC § 27-323. Third, assuming *arguendo*, the property *could* be considered unique because of improvements, Applicant failed to provide any evidence of an initial examination of the property's uniqueness, relative to other properties in the area. Therefore, Applicant has failed to satisfy the "nexus" requirement whether the property is unique in the way that PGCC § 27-358(a)(5) applies to it. *Dan's Mountain*, 236 Md. App. at 496.

- Practical Difficulty

Because Applicant failed to satisfy its burden of proof that the property is "unique" compared to neighboring properties such that PGCC § 27-358(a)(5) affects the property disproportionately—the inquiry ends. It was error of law for the Examiner to determine the question of practical difficulty. *Dan's Mountain Wind Force, LLC*, 236 Md. App. at 491-96, 182 A.3d at 256-59 *citing* *Cromwell*, 102 Md. App. 691, 651 A.2d 424.

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<sup>3</sup> See also *Cromwell*, 102 Md. App. at 702 ("Thus a special exception is not truly an exception to the zoning regulations at all") and ("a special exception may not be used as a substitute for a variance in order to avoid the . . . burden of proving . . . hardship")(quoting *Lindquist v. Board of Adjustment*, 490 So.2d 16, 18 (Ala. Civ. App. 1986)).

For reasons set forth above, the application and companion cases<sup>4</sup> will be denied because Applicant failed, on each variance, to provide evidence to satisfy its burden of proof that the property is “unique” compared to neighboring properties such that PGCC § 27-358(a)(5) affects the property disproportionately and, whether a “practical difficulty” results from that uniqueness.

ORDERED this 17th day of June, 2019, by the following vote:

In Favor: Council Members Anderson-Walker, Davis, Dernoga, Franklin, Glaros, Harrison, Hawkins, Ivey, Streeter, Taveras, and Turner.

Opposed:

Abstained:

Absent:

Vote: 11-0.

COUNTY COUNCIL OF PRINCE GEORGE’S  
COUNTY, MARYLAND, SITTING AS THE  
DISTRICT COUNCIL FOR THAT PART OF THE  
MARYLAND-WASHINGTON REGIONAL  
DISTRICT IN PRINCE GEORGE’S COUNTY,  
MARYLAND

By: \_\_\_\_\_  
Todd M. Turner, Chair

ATTEST:

\_\_\_\_\_  
Donna J. Brown  
Acting Clerk of the Council

\_\_\_\_\_  
<sup>4</sup> Companion cases include Variance 4772, Alternative Compliance 17018, and Departure from Parking and Loading Standards 438.