

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

**APPLICATION TO AUTHORIZE THE ISSUANCE OF
A BUILDING PERMIT IN CONJUNCTION WITH SPECIAL EXCEPTION**

DECISION

Request: Authorization to Issue Building Permit for a Structure within a Proposed Right-of-Way
Applicant: SMO, Inc./Shell Gas Station Crain Highway
Opposition: None
Hearing Date: December 5, 2018
Examiner: Maurene Epps McNeil
Recommendation: Approval with Conditions

NATURE OF REQUEST

(1) The subject request is by an existing Gas Station for authorization to replace an existing canopy over the pumps on R-R (Rural Residential) zoned property within the proposed right-of-way for Crain Highway (MD 3), located on the east side of Crain Highway (MD 3) at its intersection with Annapolis Road (MD 450). It is further identified as 7111 NE Crain Highway, Bowie, MD. The subject property is located approximately 2,000 feet outside of the municipal boundaries of the City of Bowie, Maryland.

(2) The property is owned by the Corporation of Roman Catholic Clergy of Maryland.

(3) No one appeared in opposition to the request.

(4) At the close of the hearing the record was left open to allow Applicant to submit some additional information. The last of the items was provided on February 28, 2019 and the record was closed at that time.

FINDINGS OF FACT

(1) Since 1958 Applicant SMO, Inc., has leased approximately 1.6070 acres (70,000 square feet) of property owned by the Corporation of Roman Catholic Clergy of Maryland. (Exhibit 9; T. 6-7) The property is improved with a Vehicle Repair Facility,

Gas Station, three pump islands with eight fueling stations, a canopy, and a 493-square-foot Food or Beverage Store.

(2) It is surrounded to the north, south and east by undeveloped wooded land in the O-S (Open Space) Zone. Across Crain Highway to the west, are a gas station and U-Haul rental use in the C-M (Commercial Miscellaneous) Zone, undeveloped wooded land in the O-S and R-A (Residential- Agricultural) Zones, and a Baltimore Gas & Electric ("BG& E") Substation in the R-R (Rural Residential) Zone. (Exhibit 16, p. 3)

(3) The property lies within Planning Area 71A, an area governed by the 2006 Master Plan for Bowie and Vicinity and Sectional Map Amendment.

(4) Applicant applied for a permit to replace the canopy, Permit No. 35865-2018-CE which was placed on hold after receipt of comments from the staff with the Maryland-National Capital Park and Planning Commission ("MNCPPC"). (Exhibit 14; T. 8-9) Applicant then filed the instant request.

(5) Mr. Brian Fenwick, Senior Construction Manager for the Wills Group, testified on Applicant's behalf. He noted that a gas station has been operating on site and further expounded about the uses of site:

So, the facility has been operating as a petroleum gasoline facility since the late 50's. The property is accessed from Crain Highway via the three access points noted [on Exhibit 9]. The current facility is a retail gasoline facility, and service bay facility, as well. The site has three ... gasoline dispensers, two dispensers that are located ... directly under the canopy, and then one ... outside of the canopy, as well.

(Exhibit 9; T.8)

(6) Mr. Fenwick explained that the canopy provides safety and security for its customers because it is protection from inclement weather and is also illuminated. (T. 10) Denying the Application would place Applicant at a competitive disadvantage from other Gas Stations in the area since those all have canopies and "[applicant's] customers would not frequent the facility [but would] basically ... seek well-lit, especially at night, weather protected environments." (T. 11)

(7) Mark Ferguson, accepted as an expert in the area of land use planning, testified on Applicant's behalf. He opined that the instant request satisfied all applicable provisions of law, reasoning as follows:

- (1) The District Council shall only approve the request if it finds that:
 - (A) The entire property cannot yield a reasonable return to the owner unless the permit is granted;
 - (B) Reasonable justice and equity are served by issuing the permit;

- (C) The interest of the County is balanced with the interests of the property owner; and
- (D) The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.

The applicant contends that all of the foregoing criteria are met.

- (A) The entire property cannot yield a reasonable return to the owner unless the permit is granted;

As described above, the subject request is made to accommodate the like-for-like replacement of the existing canopy over one of the two sets of gas pumps at the subject property. Beyond the cosmetic improvement, the request to replace the canopy is necessary to maintain the structural integrity of the canopy. Because essentially the entire area of the subject property is impacted by the ultimate right-of-way (at least as indicated on the map in the 2009 Master Plan of Transportation), the canopy (and the pumps underneath them) cannot be relocated outside of the proposed right-of-way; and, without gas pumps a gas station cannot yield a reasonable return to the gas station's operator.

- (B) Reasonable justice and equity are served by issuing the permit;

The applicant contends that reasonable justice and equity would be served by permitting the construction of the proposed improvements; the request is for an in-kind replacement of an existing canopy to insure structural safety, and no area exists to relocate the pumps and canopy to clear the proposed right-of-way area.

- (C) The interest of the County is balanced with the interests of the property owner;

The applicant contends that the interests of the County would be balanced with the interests of the property owner in the following ways:

1. The county will benefit by ensuring the greater safety of the patrons of the existing station.
2. The interests of the property owner will be served by the grant of the subject permit application by allowing the replacement of the existing canopy.

- (D) The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.

The General Plan does not make any improvement-specific transportation recommendations which affect the subject request. Policy TM1.3 does, however, direct that the next update of the Master Plan of Transportation, "reflect the investment priorities of Plan 2035, especially as they relate to prioritizing transportation investment at designated centers and discouraging new infrastructure in Future Water and Sewer Service Areas and Rural and Agricultural Areas." ... The subject property is located in the

Rural and Agricultural Areas of the County as indicated by the General Plan's Growth Policy Map. Towards this end, the road improvements which affect the subject property-the improvement of the F-10 (Crain Highway/MD3) and the extension of the A-23 (Annapolis Road/MD 450) were not included at all on the County's most recent MDOT priorities letter.

With respect to the intent of the Master Plan and the Master Plan of Transportation, there is some lack of clarity, and as indicated above, there are several extant representations of what constitutes the "proposed right-of-way."

As discussed above, the Bowie Master Plan indicates that MD 450 (planned arterial A-23) ends at MD 3. Table 4 of the Master Plan of Transportation, the list of "Street, Road and Highway Facility Recommendations" also indicates that the A-23 ends at Crain Highway, and that the germane recommendation is found in the 2006 Bowie Master Plan.... There is no indication that there was an updated recommendation inherent in the approval of the Master Plan of Transportation (as there is typically throughout the Plan and as there was, for a specific instance, for the A-24 on the very next line of the same table). Nevertheless, Map 15 depicts the realignment of the A-23 and its extension over the subject property on the east side of MD 3 north to the Anne Arundel County border....

Similarly, the "Land Use and Transportation, North of US 50" map in the Bowie Master Plan designates the F-10 freeway as following the alignment of existing MD-3, with no apparent expansion of the existing right-of-way. Table 4 of the Master Plan of Transportation, the list of "Street, Road and Highway Facility Recommendations" indicates the most recent germane recommendation for the F-10 is found in the 2009 Subregion 5 Master Plan, though it is not helpful to the subject question; ... there is again, however, no indication that there was an updated recommendation inherent in the approval of the Master Plan of Transportation. Nevertheless, Map 15 depicts a new interchange of the F-10 with the A-23 in the vicinity of the subject property.

The delineation of the new F-10/A-23 interchange and the realignment and extension of the A-23 arterial matches "Option B" of Alternate 3 – Boulevard Alternate" as shown in the 2010 Final Environmental Impact Statement of the" MD 3 Project Planning Study," ... which was under preparation by SHA contemporaneously with the approval of the Master Plan of Transportation.

Subsequent to the approval of the Master Plan of Transportation, SHA designated a "Selected Alternate" for the proposed interchange. This alternate was a combination of elements of Option B (the alignment of the extended MD 450 east of MD 3) and Option A (the creation of a "trumpet" interchange). The right-of-way for this selected alternate is illustrated on the PGAtlas website as the "Master Plan Right of Way," though there appears to be further alignment discrepancies between the SHA illustration and the PGAtlas graphic.

In summary, the District Council's intent with respect to the proposed rights-of-way in the vicinity of the subject site is difficult to discern. If the 2006 Bowie Master Plan is the instrument of record (as indicated by the text of

the subsequent Master Plan of Transportation), then no special approval is required. If Map 15 in the 2009 Master Plan of Transportation is the instrument of record, then the acquisition of essentially the entirety of the subject property will be required to construct the intended improvements, and the subject request is apposite. If the PGAtlas "Master Plan Right of Way" layer is somehow construed to be the instrument of record, then a similar extent of the subject property will be required, and the approval of the subject request would also be necessary.

As discussed above in reference to the General Plan and the County's Transportation Priorities letter, however, it is clear that – whatever they may be intended to be – the MD 3 and MD 450 upgrades are not immediate. Given that the expansion and realignment is somewhat long-range, allowing an existing commercial user the permission to make like-for-like safety and cosmetic improvements will not impair the integrity of the Master Plan of Transportation, General Plan, and Area Master Plan.

(Exhibit 16, pp. 3-6)

Agency Comment

(1) The Department of Permitting, Inspections and Enforcement ("DPIE") provided the following comment on the request.

This is in response to [the] inquiry requesting a permit to allow building construction (remove and replace gas canopy with footings) within a proposed Master Plan right-of-way designated F-10 (Crain Highway). The subject development is located at 7111 Crain Highway.

The Department ... (DPIE) has investigated this matter and determined that prior to any County approval, the applicant shall provide written confirmation from the Maryland State Highway Administration (SHA) acknowledging the proposed building will be constructed within their right-of-way....

(Exhibit 12)

(2) Subsequent to the hearing Applicant's Counsel submitted an email of correspondence between himself and a representative of SHA indicating that the latter has "no objection to the replacement." (Exhibit 20)

APPLICABLE LAW

(1) Pursuant to Section 27-259 of the Zoning Ordinance, (the District Council must authorize the instant request. This Section provides, in pertinent part, as follows:

(a) **Authorization.**

(1) With the exception of an arena (stadium) proposed to be constructed on land leased or purchased from a public agency, no building or sign permit (except as provided in Part 12 of this Subtitle) may generally be issued for any structure on land located within the right-of-way or acquisition lines of a proposed street, rapid transit route, or rapid transit facility, or proposed relocation or widening of an existing street, rapid transit route, or rapid transit facility, as shown on a Master Plan; however, the Council may authorize the issuance of the building or sign permit in accordance with this Section. For the purposes of this Section, "Master Plan" means the General Plan, the Functional Master Plan of Transportation, or any Adopted and Approved Area Master Plan or, if not yet approved, any such Master Plan adopted by the Planning Board, unless the Plan has been rejected by the Council.

(2) Notwithstanding the definition of a "street" (Section 27-107.01), building permits may be issued without such Council authorization for any structures on:

(A) Land which:

- (i) Was in reservation but is now not in reservation; and
- (ii) Has not been acquired and is not being acquired.

(B) Land which was subdivided after the adoption of a Functional Master Plan of Transportation, Area Master Plan, or the General Plan, but was not reserved or required to be dedicated for a street or rapid transit route or facility shown on the Plan.

(3) A permit may be issued without such Council authorization for the replacement of a legally erected sign if the replacement sign is otherwise in conformance with this Subtitle, is not an intensification of signage for the subject property, and if the proposed transportation facility is not fully funded for construction in the adopted County Capital Improvement Program or the current State Consolidated Transportation Program.

(b) **Application.**

(1) Where a Special Exception, Detailed Site Plan, Specific Design Plan, or Departure is pending, or where application for issuance of a permit has been made and recommended for denial pursuant to Sections 27-254 and 27-255 of this Subtitle, the owner of the land may make a written request to the District Council to authorize the issuance of the permit. In the latter case, the recommendation for denial of the permit shall not have been based on any failure of the applicant to comply with any requirement of this Subtitle (other than Subsection (a) of this Section), Subtitle 24, the Regional District Act, or any condition placed on the property in a zoning case or subdivision plat approval. The request shall be in writing and shall be filed with the Clerk of the Council within thirty (30) days after notice of the denial is given.

(2) Along with the application, the owner shall submit the following:

(A) A statement listing the names and the business and residential addresses of all individuals having at least a five percent (5%) financial interest in the subject property;

(B) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. The same statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors;

(C) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds);

(3) For the purposes of (A), (B), and (C), above, the term "owner" shall include not only the owner of record, but also any contract purchaser.

* * * * *

(g) Criteria for approval.

(1) The District Council shall only approve the request if it finds that:

(A) The entire property cannot yield a reasonable return to the owner unless the permit is granted;

(B) Reasonable justice and equity are served by issuing the permit;

(C) The interest of the County is balanced with the interests of the property owner; and

(D) The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.

(h) Conditions placed on approval.

(1) If the Council authorizes the issuance of the permit, it shall specify the exact location, ground area, height, extent, and character of the structure to be allowed. The Council may also impose reasonable conditions which benefit the County.

* * * * *

CONCLUSIONS OF LAW

(1) The 2009 Master Plan of Transportation (the most recent Plan adopted by the County Council) indicates that most, if not all, of the property leased by Applicant lies within the proposed right-of-way for Crain Highway. As a result, DP&IE has placed a hold on a building permit to replace the canopy, recommending denial thereof unless the instant Application is approved. (Section 27-259(b)(1))

(2) The Application is to allow the like-for-like replacement of the existing canopy and the pumps/dispensers underneath them. Since essentially all of the area leased by Applicant lies within the ultimate right-of-way, Applicant's property cannot yield a reasonable return if the request is not granted. (Section 27-259 (g)(1)(A))

(3) Reasonable justice and equity will be served by allowing Applicant to operate its uses within the right-of-way, especially since there is no time table as to when (or if) the

planned expansion of MD 450 at its intersection with Crain Highway will occur. (Section 27-259(g)(1)(B))

(4) Approval of the Application will balance Applicant and the County's interests – Applicant will be able to continue to keep a business that has operated successfully since the 1950's and the County will not be faced with a vacant lot and possible eyesore. (Section 27-259(g)(1)(C))

(5) The integrity of the applicable Plans will be preserved since the Plans do not specifically address the uses on site, the 2006 Master Plan does not expand the right-of-way in a manner that affects the property, but MAP 15 in the 2009 Master Plan of Transportation does. The limited improvement to the appearance and function of the Gas Station canopy and pumps on site will have no negative affect on these plans but will improve the aesthetics and service provided to the traveling public. (Section 27-259(g)(1)(D))

RECOMMENDATION

(1) It is the recommendation of this Examiner that the Applicant be allowed to construct the requested canopy in accordance with Exhibits 8(a)-(c), subject to the condition that any new improvements constructed within the right-of-way be removed or altered if removal or alteration is required. This condition is usually imposed in these types of cases and is one that benefits the County. (Section 27-259(h))

(2) The exact dimensions and location of the structures within the proposed right-of-way must be shown on Exhibit 9, using the right-of-way dimensions indicated on Map 15 of the 2009 Master Plan of Transportation. A revised Site Plan should be submitted to the Office of the Zoning Hearing Examiner for review and inclusion in the record of the instant Application prior to the issuance of permits.