BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. A-5928
APPEAL OF JOAN BROTHERTON

OPINION OF THE BOARD

(Hearing held November 5, 2003)
(Effective Date of Opinion: December 18, 2003)

Case No. A-5928 is an administrative appeal filed by Joan Brotherton (the "Appellant") from the July 31, 2003 decision of the Sign Review Board (the "SRB") of the County's Department of Permitting Services ("DPS") approving, with conditions, a variance for a canopy sign to be located at 15430 Old Columbia Pike, Burtonsville, Maryland 20866 (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on November 5, 2003. Martin Hutt, Esquire, represented the Appellant. Assistant County Attorney Malcolm Spicer represented DPS. Frank Weiss, Joan Brotherton, and Bob Johnson testified on behalf of the Appellant. Roger Waterstreet testified on behalf of DPS.

Decision of the Board: Requested variance **denied.**

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 15430 Old Columbia Pike in Burtonsville, is zoned C-2. It is improved with a one-story building that is 97 feet wide and about 103 feet deep and is set back about 70 feet from the Old Columbia Pike frontage. Approximately 20 parking spaces are located in front of the building. There are

no lights located in the parking lot. A sidewalk about 10-12 feet wide runs along the frontage of the building.

2. The Appellant and Bob Johnson are the lessees of about one-third of the building, from which they operate a "Rita's" franchise establishment serving "water ice" or snow cones, shakes, and "other cool stuff." Service is provided at an outdoor walk-up window only - customers do not enter the building. The establishment operates from March through October and closes daily by 10:00 p.m. The Appellant testified that her clientele is primarily children and families and that most business occurs between the hours of 7:00 p.m. and 10:00 p.m.

3. The Appellant proposes to install on the front of the leased portion of the building a red and white striped awning measuring 35 feet wide, three feet high, and three feet deep. The awning will include two domes, each four feet wide, four feet deep and five feet high, which will contain the "Rita's" logo. The awning will be made of translucent material and will be internally illuminated. No signage will be located on the awning portion.

4. The Appellant also proposes to install at a location six feet from the Old Columbia Pike frontage a freestanding identification sign that will be 8 feet wide and 8 feet high mounted on poles 16 feet, 6 inches tall.

5. Mr. Weiss testified that the specifications for the awning and signs, including the internal illumination of the awning, are typical of the national "Rita's" franchise. He stated that the area of illumination will cover only the 10-12 foot wide "queuing deck," or sidewalk, and that it will not create any off-site glare. In addition, bollards will be installed around the queuing deck. The primary purpose of the illumination is to light the queuing deck for customers to be able to see the product sign and for safety. He stated that the lights for the awning go on at dusk and are turned off by a timer approximately 30-45 minutes after closing time. He stated that the franchise has opened stores without an illuminated awning and have experienced 10% less business than stores with illuminated awnings. On cross-examination, Mr. Weiss stated that safety is not the sole purpose for illuminating the awning, and that safety could be accomplished by the use of other types of lighting.

6. The Appellant and Mr. Johnson testified that the illuminated awning will provide safety by shining light into the parking area. On cross-examination, however, Mr. Johnson stated that the awning lights will only extend light about 1-2 feet beyond the bollards.

7. The area surrounding the Property is made up of commercial properties. Within the Appellant's building is a Papa John's pizza delivery establishment and a vacant space. A printing plant and Free State gasoline station are located to the west of the Property. To the north is a strip center with a liquor store and dry cleaners. To the south is a grassy area, then a strip center

with a restaurant and Goodyear tire store. To the east are several other commercial businesses.

8. Mr. Waterstreet, who reviews sign permits for DPS, testified that DPS denied a sign permit application submitted by the Property owner because DPS determined that the proposed sign is a "canopy sign" with 225 square feet of illuminated surface area. Because the building frontage measures 32 linear feet, the maximum sign area permitted for the Property is 64 square feet in accordance with Section 59-F-4.2(b)(3)(B).

9. The Appellant applied to the Sign Review Board for a variance to permit a 225 square foot illuminated canopy sign in lieu of the required maximum 64 square feet of sign area. In its decision dated July 31, 2003 (Case No. 223368) the SRB approved a variance with the following conditions:

1. Monument pole sign located closer to center of parking lot as shown in Exhibit "A" approved. Also shown on Exhibit "B."

2. Rita's Ice signage approved pending illumination of 4' domes only. Awning needs to be opaqued. Illumination proposal for additional lighting will need to be approved after review.

10. The Appellant timely filed this appeal to the Board of Appeals.

CONCLUSIONS OF LAW

1. Section 59-F-10.2(d) of the Montgomery County Code provides that "any final decision by the Sign Review Board may be appealed by any aggrieved party to the Board of Appeals within 30 days of the decision." Section 59-F-10.3(b) provides that "the Board of Appeals must hear and decide an appeal de novo." When an appeal from a quasi-judicial body is heard "de novo," the matter is to be tried anew as if it had not been heard before and as if no decision had been previously rendered. In effect, the Board is exercising what amounts to original jurisdiction. For all intents and purposes, it is the first hearing of the case. Pollard's Towing, Inc. v. Berman's Body Frame & Mech., Inc., 137 Md. App. 277, 768 A.2d 131 (2001); Boehm v. Anne Arundel County, 54 Md. App. 497, 459 A.2d 590 (1985); Lohrmann v. Arundel Corp., 65 Md. App. 309, 500 A.2d 344 (1985); Hill v. Baltimore County, 86 Md. App. 642, 587 A.2d 1155 (1991).

2. Consequently, the Board must consider the Appellant's application anew and in light of the criteria for a sign variance set forth in Section 59-F-10.2(b)(2)(C). The burden is on the Appellant to show by a preponderance of evidence that the criteria have been met.

3. Preliminarily, the Appellant raises two arguments that the proposed canopy sign does not require a variance. First, she contends that the awning portion of the proposed sign should not be considered part of the "canopy sign," because only the dome portions contain signage. Secondly, the Appellant contends that, even if the entire awning is considered the canopy sign, the proposed sign falls within an exception to the sign area restrictions because its purpose is "primarily" for service and safety. On both counts, and for the following reasons, we disagree.

A "canopy sign" is "a sign which forms an integral part of a permanent or semi-permanent shelter for sidewalks, driveways, windows, doors, seating areas, or other customer convenience areas, like awnings or umbrellas." Section 59-F-2. The maximum permitted area of a canopy sign in a commercial zone is "2 square feet for each linear foot of building frontage not to exceed 200 square feet for each category." Generally, "sign area" is determined in accordance with Section 59-F-3.1 as follows:

> "The sign area is the entire portion of the sign that can be enclosed within a single, continuous rectangle. The area includes the extreme limits of the letters, figures, designs, *and illumination*, together with any material or color forming an integral part of the background of the display or used to differentiate the sign from the backdrop or structure against which it is placed."

With regard to illuminated canopy signs, "the sign area of an illuminated canopy sign is calculated as the total illuminated surface area that can be seen at any one time from one vantage point outside the property lines of the property where the sign is located. This does not include lighting, internal to the canopy, which has the sole purpose of lighting the customer area for service or safety." Section 59-F-4.2(b)(3)(B).

The Board finds that, when read together, the clear intent of these regulations is that when a canopy is internally illuminated, even if only part of it contains signage, the entire canopy structure is to be considered in calculating the sign area. The ordinance presumes that the illuminated area is part of and integral to the product identification purpose of the sign. This presumption is rebutted only if it is shown that the illumination is for the sole purpose of lighting the customer area for service or safety reasons.

In this case, it is clear that the red and white striped awning portion of the canopy is a part of and integral to the brand identification of the Rita's Ice franchise. It is also evident that service and safety are not the sole reasons for illuminating the canopy. While the Appellant's witnesses suggested that the safety of their customers was a "primary" concern, they admitted that it was not the "sole" purpose of lighting the canopy - rather, an illuminated canopy also helps to uniquely identify the Rita's franchise.

The language of the ordinance is clear and unambiguous, and we will give its words their ordinary and commonly understood meanings. The word "sole" in this context means "being the only one; belonging exclusively or otherwise

limited to one." *Webster's Ninth New Collegiate Dictionary*, 1983. Consequently, because product identification is one of the purposes of lighting the awning, the proposed canopy sign does not fall into the exception of Section 59-F-4.2(b)(3)(B).

4. Based upon the Appellant's binding testimony and the evidence of record, the Board finds that variance as requested must be denied. The requested variance does not comply with Section 59-F-10.2(b)(2)(C)(1), which provides that a variance may be granted only if the Board finds that:

> *1. The strict application of the sign regulation results in a particular or unusual practical difficulty, exceptional or undue hardship, or significant economic burden upon an applicant.*

In this case, the strict application of the area restriction for illuminated canopy signs contained in Section 59-F-4.2(b)(3)(B) would require the Appellant to either (a) reduce the size of the illuminated canopy sign, or (b) not illuminate the surface area of the canopy. The Appellant has failed to show that the second option will result in either a particular or unusual practical difficulty, exceptional or undue hardship, or significant economic burden. The Appellant argues that her circumstances are unique because she operates an outdoor walk-up business whose clientele is primarily children and families who frequent the establishment in the evenings, requiring illumination of the customer area. While this may be true, it does not logically follow that the *interior* of the awning must be lit. It is self-evident, and the Appellant's witnesses concede, that alternative external lighting could be installed to, for example, the bottom of the awning, that would amply light the customer area without the necessity of illuminating the interior of the canopy.

The other basis offered by the Appellant for the illumination of the awning is that it is part of the unique design of the "Rita's Ice" franchise. While the Rita's design may be unique, it is not unusual that franchised businesses seek to identify themselves in different or unusual ways. Simply because a franchise chooses to distinguish itself from its competitors through the design of its signage, however, is not a sufficient reason to grant a variance. If this were so, sign variances would become the norm and businesses would in effect dictate the sign standards. This is not only contrary to the intent of the Ordinance; it would render it meaningless.

Finally, the Appellant points to the testimony of Mr. Weiss, that similar stores without an illuminated awning have experienced 10% less business than stores with illuminated awnings, as evidence that the Appellant will suffer a significant economic burden if forced to comply with the sign area restrictions. We do not find this argument to be compelling. Mr. Weiss's assertion is not supported by any data or studies. It has not been shown that any loss of business at other stores is directly related to the lack of lighting within the

canopies. And, even so, a 10% business loss does not rise to the level of a "significant" economic burden.[1]

Consequently, the Appellant's variance request doe not meet the requirements of paragraph (1) of Section 59-F-10.2(b)(2)(C); the Board need not consider the other requirements of that Section for the grant of a sign variance. Accordingly, the requested variance to permit a 225 square foot illuminated canopy sign in lieu of the required 64 square feet of sign area is **DENIED**.

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Allison Ishihara Fultz, seconded by Donna L. Barron, with Angelo M. Caputo and Donald H. Spence Jr., Chairman in agreement, the Board adopted the foregoing Resolution. Board member Louise L. Mayer was necessarily absent and did not participate in this Resolution.

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Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

[1]The Appellant did not argue that the illumination of the sign was necessary in order to provide adequate visibility. This argument would have likely failed, given that the SRB had approved a large freestanding identification sign in front of the Property.

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 18th day of December, 2003.

_____
Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.