

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
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IN THE MATTER OF: *
DONG YA, LLC AND HONG CHENG, LLC *
Petitioner * BOA Case No. S-847-B
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Lynn Robeson Hannan, Hearing Examiner
Andrea LeWinter, Hearing Examiner

**REPORT AND RECOMMENDATION TO GRANT REQUEST TO WITHDRAW
APPLICATION, REFUND BOARD OF APPEALS FILING FEE, AND
DISMISS CASE WITH PREJUDICE**

A. Background

On October 20, 2023, Dong Ya, LLC and Hong Cheng, LLC (Petitioners) filed the above-captioned petition for a major modification of an existing special exception for an automobile filling station on property located at 15585 and 15595 Old Columbia Pike, Burtonsville, MD 20866. The property was rezoned by Local Map Amendment Application H-134 from the CRN-1.5 C-1.0 R-0.5 H-45 Zone to the CRTF 1.5 C-1.0 R-0.5 H-45 Zone on November 12, 2019.

On October 20, 2023, the Board of Appeals (Board) referred the application to OZAH for a public hearing and a report and recommended decision. Exhibit 3. On February 27, 2024, OZAH issued a notice of the hearing scheduled for April 11, 2024. Staff of the Montgomery County Planning Department (Planning Staff or Staff) issued a report recommending approval of the modification on February 16, 2024. Exhibit 26(a). The Planning Board recommended approval for the reasons contained in the Staff Report. Exhibit 26.

On April 2, 2024, Hearing Examiner Hannan informed the Petitioner that she found that the application did not meet the grandfathering requirements of Section 59-7.7.1 of the 2014 Zoning Ordinance and could not proceed under the 2004 Zoning Ordinance. Exhibit 24. The Petitioner disagreed but filed a request to withdraw the application because the “time needed to resolve the issue is contrary to Petitioner’s interests.” Exhibit 27. The Petitioner states that it will shortly refile an application for a new conditional use that is “substantively identical” to the modification application. *Id.* The Petitioner also requested a full refund of the filing fee for the special exception modification. *Id.*

The Hearing Examiners convened the April 11, 2024, public hearing solely to grant an indefinite postponement of a hearing on the merits to give the Board time to act on the requested withdrawal and refund of filing fees. Only the Petitioner appeared at the public hearing.

The Hearing Examiners contacted Staff of the Montgomery County Planning Department (Planning Staff or Staff) on April 11, 2024 and April 18, 2024 for a recommendation on whether the Planning Department's portion (25%) of the filing fee should be refunded. Exhibits 27(b) and 28. No response was received.

B. Governing Law

Section 59-A-4.25 of the 2004 Zoning Ordinance permits the Board to grant a Petitioner's request to withdraw an application:

When an application for a special exception is withdrawn, notice must be sent to all parties entitled to notice of the filing of the petition. When a case is withdrawn at least 30 days before the initial hearing, the Board may refund a part of the filing fee as authorized in its rules, and the Board may allow the application to be withdrawn without prejudice to the limitations on refile specified in Section 59-A-4.126. When a case is withdrawn 30 days or less from the date of the hearing, withdrawal must be with prejudice.

The Board's Rules of Procedure permit the Board to refund filing fees in the following circumstances (Rule 1.5):

1.5 *Refund of Fees*. On written request, the Board may refund filing fees:

- a. If an application is withdrawn within 48 hours after it is filed or before public notice is issued (90% refunded);
- b. If an application is withdrawn before a public hearing (50% refunded); or
- c. If an action of the County Executive, County Council, or an administrative board or agency resolves or moots the issues pending before the Board, whether or not the Board has held a public hearing (all or a portion refunded).

B. Opinion and Analysis

The Hearing Examiners recommend that the Board grant the Petitioner's request to withdraw the application, as the Petitioner can resolve the legal issue by filing a new conditional use. They also recommend that it be withdrawn with prejudice both because the request came less than 30 days before the scheduled public hearing and the new conditional use application will render the current application moot.

As yet, Planning Staff has not indicated its position on the refund of its portion of the filing fees. Without this, the Hearing Examiners recommend that the Board waive the full amount of the

filing fee (including the Planning Department's fee) under Rule 1.5(c). The Petitioner withdrew its application essentially due to the legal issue raised for the first time by the Hearing Examiner. The Petitioner represents that the new conditional use application will be "substantively identical" to the special exception modification and the issues with respect to the current application will be moot. Given that this should expedite Planning Staff's review of the new conditional use, the Hearing Examiners recommend that the full special exception filing fee be refunded. Otherwise, the Petitioner will have paid twice for review of the similar applications.

C. Recommendation

For the foregoing reasons, the Hearing Examiners recommend that the Board of Appeals *grant* the Petitioner's request to withdraw its application for a major modification of its existing special exception in BOA Case No. S-847-B with prejudice and *grant* the Petitioner's request for a full refund of its filing fee.

Issued this 22nd day of April, 2024.



Lynn Robeson Hannan
Hearing Examiner



Andrea LeWinter
Hearing Examiner

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