

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-5894
APPEAL OF A & L DONUTS, INC.**

OPINION OF THE BOARD

(Hearing held November 5, 2003)
(Effective Date of Opinion: December 19, 2003)

Case No. A-5894 is an administrative appeal filed by A & L Donuts, Inc. (the "Appellant"). The Appellant charges error on the part of the County's Department of Permitting Services ("DPS") in issuing a Notice of Violation dated April 8, 2003, which alleges violations of conditions 3 and 4 of special exception # S-2398 for the for the property located at 13810 Connecticut Avenue, Silver Spring, Maryland (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. Christopher L. Allen, Esquire, represented the Appellant. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Administrative appeal **granted**.

FINDING OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 13810 Connecticut Avenue in Silver Spring, is a C-1 zoned parcel identified as Parcel 1-C consisting of about 42,468 square feet of land. In Board of Appeals Case No. S-2398, the Board granted a special exception for a 24-hour drive-in restaurant on the Property. The approved facility consists of a retail eating and drinking establishment with an exterior sales

window and 35 parking spaces.¹ In its Findings, the Board noted that “the permits have already been issued for the permitted use (exclusive of the drive-thru window).” In its Opinion, effective October 7, 1999, the Board approved the special exception subject to four conditions, including the following:

“3. The petitioner must obtain approval of access permits by Maryland State Highway Administration and Montgomery County Department or (sic) Public Works and Transportation.

4. Petitioner must obtain approval of a site plan by the Planning Board (if site plan is required for this development) prior to issuance of any permits for the site (in addition to permits already issued for the permitted use). The site plan will include a landscape and lighting plan and will address, but not be limited to, the following issues: increased landscaping, better pedestrian circulation, reduction of on-site asphalt, and adequate lighting.”

2. On April 4, 2003, DPS delivered to the Appellant a Notice of Violation alleging that the Appellant had violated Conditions 3 and 4 of the Board’s special exception approval. The notice directs the Appellant to provide a copy of an approved access permit issued by the State Highway Administration in accordance with Condition No. 3, and to submit a site plan in accordance with Condition No. 4. The notice also direct the Appellant to notify the Board about a change in ownership of the Property.²

3. Steven J. Karr, the Appellant’s architect, testified that the special exception was needed only to authorize the use of the existing exterior sales window, which use merely involves “passing doughnuts through a window.” He stated that no building permit was required. A use and occupancy permit for the establishment was issued after the special exception approval.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-43.(e) of the Zoning Ordinance provides that

¹The Opinion noted that an eating and drinking establishment is a permitted use in the C-1 zone; the operation of the exterior sales window, however, required the special exception.

²During the course of the hearing, DPS and the Appellant agreed to withdraw from this appeal the issues relating to the issuance of an SHA access permit and the transfer of ownership of the Property.

any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the violation notice was properly issued.

2. DPS contends that the Appellant is in violation of special exception Condition No. 4 for having failed to submit the site plan described in that condition. DPS argues that Section 59-C-4.341.2 of the Zoning Ordinance requires a site plan for any “development or redevelopment” of any portion of land zoned C-1 where C-1 zoning is in excess of 15 acres at one location.³

The Appellant contends, conversely, that it is not required to submit a site plan for the special exception because it involved only a change in use, i.e., the use of the drive-in sales window, and not the “development or redevelopment” of the Property.

3. The Board finds that in order to decide this case we need not reach the otherwise pithy issue of what constitutes “development or redevelopment” under Section 59-C-4.341.2. Rather, the fundamental issue in this case is whether the Appellant has fulfilled the requirements of Condition No. 4. In examining the language of Condition No. 4, one sees that it is itself conditional. The Appellant’s obligation to obtain site plan approval is subject not only to a finding that site plan approval is necessary, but that the approval occur “prior to the issuance of any permits for the site.”

Moreover, the decision as to whether a site plan would be required was clearly left up to the Planning Board and DPS. This is made clear by the provisions of Section 59-D-3.0 of the Zoning Ordinance, which state that “in the zones identified in Article 59-C as requiring site plan approval, no sediment control permit and no building or use-and-occupancy permit for the construction or use of any building or structure may be issued until a site plan is approved and unless it is in accordance with an approved site plan.”

The Appellant testified, and DPS did not contest, that all necessary permits for the facility have been obtained. Because the final use and occupancy permit was issued for the facility, we must conclude that DPS had already determined that a site plan was not required. DPS has not contended in this case that the issuance of the use and occupancy permit was in error or *ultra vires*. The Appellant quite reasonably relied on that approval as evidence that a site plan was not required under Condition No. 4. DPS may not now, in the guise of a violation notice, attempt to revoke that approval at this late date.

³The Appellant did not contest whether the C-1 zoning exceeds 15 acres at the Property location; we will therefore presume that it does.

The Board therefore concludes that the Appellant is not required to submit a site plan under Condition No. 4 of the special exception approval. Consequently, the Notice of Violation dated April 8, 2003, was issued in error.

6. The appeal in Case A-5894 is **GRANTED**.

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

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.

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

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 19th day of December, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2-A-10(f) of the County Code).

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.