

BEFORE THE TOWN OF DENTON BOARD OF APPEALS

**IN RE: BLT CANTINA, LLC
APPLICATION FOR VARIANCES
FROM THE ZONING CODES**

Case No. BOA-17-002

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MINUTES, FINDINGS OF FACT, CONCLUSIONS AND DECISION

The Board of Appeals held a Public Hearing on Tuesday, June 12, 2017, at 6:30 p.m., at the Denton Town Office to consider an application for variances for BLT Cantina, LLC (hereinafter, the “Applicant”), from the strict application of the Town of Denton Zoning Code (Chapter 128-01, et seq.).

Board Members present were Chairman, Troy Livingstone, Florence Doherty, and Brian Tyler. Board Member Jennifer Shull was absent. Also present was Counsel for the Board, Chris Drummond, Town Administrator, Donald H. Mulrine, Jr., and Administrative Aide, Donna Todd. The Applicant’s Representatives, Joe DePascale, Tom Austin, and John Petit along with their Attorney, Brynja Booth, were present. Members of the public were also present.

PROCEDURAL HISTORY

On May 1, 2017, the Applicant filed an application with the Board of Appeals seeking six (6) variances from the strict application of the Town’s Zoning Code. The variances were sought for an increase in signage, sign area, sign height, and decrease of signage setback. In particular, the Applicant sought the following relief:

1. A variance to allow one additional freestanding sign, consisting of a pylon sign and a monument sign.

2. A variance to increase the maximum freestanding pylon sign area to 179 square feet.
3. A variance to increase the maximum monument sign area to 32 square feet.
4. A variance to increase the pylon sign height to 60 feet.
5. A variance to reduce the monument setback distance to 8.9 feet from the right-of-way.
6. A variance to increase the number of wall signs to a total of four (4) wall signs.

The application was advertised in the Times Record for two consecutive weeks, a sign was posted on the property, and all property owners within 200 feet of the property received written notification of the Public Hearing.

Mr. Drummond noted for the record two errors in the public notice advertisement for the maximum allowed freestanding signage height of 60 feet should be 30 feet, and the variance sought for the freestanding sign is to allow 60 feet. Mr. Drummond determined the public notice requirements were satisfied because fair notice was provided to the public. Mr. Drummond noted for the record there were no objections from the public or applicant to proceed with the Public Hearing for the improper notice with the typographical errors in the public notice advertisement.

SUMMARY OF PROCEEDINGS

Chairman Livingstone opened the Public Hearing and introduced the Board Members. The Applicant and Witnesses, Thomas C. Austin, Joe DePascale, and John Petit were sworn in by the Chairman.

Brynja Booth, Attorney for the Applicant, provided a brief summary for the sign variance requests relative to the Taco Bell site plan for property located on Legion Road, Caroline County

Tax Map 105, Parcel 2479-2. The Applicant is requesting variances from the strict application of the sign requirements set forth in the Denton Town Code Chapter 128, Attachment 9:3, as follows:

1. The Applicant is requesting a total of two freestanding signs, consisting of a pylon sign and a monument sign. Under the Denton Zoning Ordinance, only one freestanding sign is permitted.
2. The Applicant is requesting a maximum freestanding sign area of 179 square feet for the pylon sign. Under the Denton Zoning Ordinance, the maximum freestanding sign area is 30 square feet.
3. The Applicant is requesting a maximum freestanding sign area of 32 square feet for the monument sign. Under the Denton Zoning Ordinance, the maximum freestanding sign area is 30 square feet.
4. The Applicant is requesting that the freestanding pylon sign height be permitted at 60 feet. Initially the request was for 50 feet. Under the Denton Zoning Ordinance, the maximum freestanding sign height is 30 feet.
5. The Applicant is requesting a setback of 8.9 feet from the right-of-way. Under the Denton Zoning Ordinance, a setback of 25 feet is required.
6. The Applicant is requesting a minimum of four wall signs. Under the Denton Zoning Ordinance, one wall sign is permitted.

Under Section 128-126 (J) of the Denton Zoning Ordinance, the Board of Appeals has the authority to grant sign specific variances provided the Applicant satisfies the variance criteria.

BLT Cantina, LLC, filed an application for sign variances with the Board of Appeals on April 28, 2017. Six copies of the letter dated April 27, 2017, from the property owner, Provident State Bank, were submitted granting their consent to the application. Six copies of the Taco Bell site plan were submitted dated April 28, 2017. Six copies of the deed for the property owned by Provident State Bank were submitted, dated February 17, 2004, Caroline County, Maryland Land

Records, Liber 527, Folio 883. Two letters from Brynja Booth dated May 2, 2017, and May 17, 2017, were submitted to supplement the variance application. A letter from the Transportation Resource Group, Inc., dated June 8, 2017, was submitted and summarized the field tests. The Applicant provided evidence that the property was posted and the adjacent property owners were notified by certified mail and first-class mail.

TESTIMONY AND EVIDENCE

Ms. Booth called her first witness, Joe DePascale. Mr. DePascale is the Development Manager for the Summerwood Corporation. Mr. DePascale described the unique features of this site. The site is not located directly on a major highway but on an internal road, and it's a separate parcel that floats inside a larger parcel owned by others. The Applicant is in the QSR, Quick Serve Restaurant fast food business, and easy access is important to the success of the QSR business. The pylon freestanding sign is necessary to direct the traffic on Shore Highway. The monument sign is important to direct the traffic on Legion Road to the shared driveway with Dunkin Donuts. There would be very little visibility from Shore Highway without the 60 foot pylon freestanding sign. The 60 foot height is necessary for traffic to prepare safely to move in the proper traffic lanes. The Applicant did not cause the visibility issue from Shore Highway. McDonald's, Burger King, and other area fast food businesses were granted variances for the height of their freestanding signs.

Ms. Booth had obtained copies of the prior fast food variance cases and distributed copies to the Board of Appeals. Exhibit #1 is a copy of the McDonald's sign variance, Exhibit #2 is a copy of the CATO's sign variance, Exhibit #3 is a copy of the Pizza Hut's sign variance, and Exhibit #4 is a copy of the Burger King's sign variance.

Mr. Drummond requested information from the Applicant's Counsel regarding the 1986 Denton Zoning Ordinance, Sign Regulations, when the fast food businesses were granted sign variances.

Ms. Booth did not confirm the 1986 Zoning Ordinance sign regulations, but confirmed each of these fast food restaurants were granted variances.

Mr. DePascale confirmed that the Board of Appeals would be allowing a sign variance that is consistent with the other sign variances granted in the area, granting the sign variances will not be injurious to other neighboring property owners, and the six sign variances are the minimum necessary to afford relief.

Mr. DePascale is requesting four wall signs due to the future development of the adjacent parcels and to have visibility on all four sides of the building.

Mr. Drummond inquired if directional signage could replace the proposed monument sign on Legion Road and would directional signage be sufficient.

Per Mr. DePascale, the Applicant does not typically utilize directional signage and the monument sign is the typical signage.

Mr. DePascale did not know if the State Highway Administration (SHA) signs will be available until Taco Bell is located on the site and is not familiar with the SHA signage regulations.

All signs will be illuminated when the restaurant is open for business.

Mr. DePascale was present at the field test on May 17, 2017, for the freestanding pylon sign. His observations were no visibility at 30 feet and 50 feet proceeding northbound due to the shopping center. At 60 feet, there was partial visibility northbound.

Although Mr. DePascale found other Denton parcels along Shore Highway with great visibility, this parcel was the best location for the restaurant due to the easy access.

Ms. Booth called her second witness, John Petit. Mr. Petit is a licensed engineer in Maryland, Delaware, Pennsylvania, and New Jersey. Mr. Petit prepared the development plan for this site. The 90-degree angle of the pylon sign was necessary for the Shore Highway northbound traffic and the monument sign was necessary for the Legion Road traffic. There is no direct access to this site from Legion Road. It is accessed through a shared easement with Dunkin Donuts. These signs are consistent with other signs in the vicinity. The location of the alignment of the driveway with the Dunkin Donuts' driveway requires a decrease in the setback for a monument sign. The 8.9 feet is measured from the right-of-way, not the car way. It should be at least 30 feet from the car way of Legion Road. The proposed location of the monument sign is the only practical location for the entrance that is off of Legion Road.

Ms. Booth distributed amended copies of the site plan with the 60 foot sign to the Board.

Don Mulrine, Town Administrator/Planning Director/Public Works Director, stated the subdivision of the parcel and entrance was designed several years ago with the proposed development of the Brodie parcels. Mr. Mulrine provided a brief overview of the proposed development plan that was not completed or approved by the Town. There will be limited access from Legion Road to the site until SHA approves the design for a second access from Shore Highway.

Mr. Petit confirmed the monument sign will be placed from the right-of-way and the distance will not change when Legion Road is developed with a third lane.

Mr. Drummond inquired if the applicant has considered requesting relief from the Planning Commission for the parking since more than half of their business is drive thru

business. This would allow more landscaping and possibly another location for the monument sign.

Mr. Petit confirmed this is the only location for the monument sign due to the alignment of the driveway with the Dunkin Donuts driveway. This would cause an offset to the existing driveway to shift the proposed driveway north to create another location for the monument sign.

Mr. Petit testified that the four wall signs are necessary because all four sides of the building are adjacent to open areas.

Ms. Booth called her third witness, Tom Austin. Tom Austin is the President of TRG, specializing in traffic engineering. Mr. Austin was the driver of the vehicle for the field test to establish the height for the pylon sign. The field test includes simulating a driver on Shore Highway on the northbound lane. A crane was delivered to the site to raise the sign at different heights to establish the necessary height for the motorists to exit safely to the site. While driving on Shore Highway/MD 404, a video recording was made of the sign heights of 30 feet, 50 feet, and 60 feet. The 30 foot sign was visible at approximately 300 feet, the 50 foot sign was visible at approximately 1,500 feet, and the 60 foot sign was visible at approximately 1,900 feet. It was not possible to obtain a photograph of the sign from Shore Highway because the view was blocked by the shopping center. The photographs were taken from Legion Road. A 50 foot sign was not continuously visible. Only at 60 feet did the sign become visible for a safe exit to Legion Road. The sign legibility distance for a sign based on SHA Traffic Control Devices Design Manual is 40 feet/inch. The 48 inch Taco Bell logo will be legible from approximately 1,900 feet and is consistent with the 60 foot sign.

Mr. DePascale explained due to the curve on Shore Highway and the Shopping Center required a 60 foot sign for motorists to make a safe exit to Legion Road. Other surrounding

parcels do have frontage on Shore Highway for their signage. The angle of the pylon sign will make it visible from Shore Highway northbound. The pylon sign will not be visible southbound until the trees are removed.

Ms. Booth summarized her legal opinion for granting the sign variances. Section 128-126 (J) allows the Board up to a 20% adjustment for signs. Section 128-126 (J-3) allows the Board to reasonably modify the provisions of the 20% adjustment based on special or unusual conditions of the site of the building conditioned upon satisfying the variance criteria in Section 128-163 (K-2).

Mr. Drummond agreed with Ms. Booth's position on her legal opinion that the Board is not limited to granting a variance of 20%. The Board has discretion to allow up to 20% without satisfying the variance criteria. If you exceed the 20% allowance, the Applicant has to satisfy the variance criteria.

Ms. Booth referred to a Supreme Court Case, Gilbert Case, all sign ordinances that weren't amended after 2016; if you are regulating by the type of use, are unconstitutional as a violation of the first amendment.

Ms. Booth provided the following responses in bold italic below to the standards for granting variances.

Mr. DePascale amended the variance request to two wall building signs, the monument sign reduced to 30 square feet which meets the Sign Ordinance sign area regulations, and a reduction of the building setback for the monument sign.

STANDARDS FOR GRANTING VARIANCES

The Board is obliged to apply the testimony and evidence received during the hearing to the following zoning standards:

1. Zoning Variances

§128-163 (K)

(2) Standards for granting a variance:

- a) Strict enforcement of this Chapter 128, Zoning would produce unnecessary and undue hardship as distinguished from variations sought by applicants for purposes or reasons of convenience, profit, or caprice. *The property is not located on Shore Highway/Route 404 or on Legion Road. One parcel surrounded by other parcels with no direct street access. It is necessary to attract customers from Shore Highway for a take-out restaurant. It is necessary to have a sign of sufficient height and size for motorists to safely exit from Shore Highway. A monument sign is necessary for Legion Road traffic due to the site constraints. The monument sign is set back 30 feet from the travel way of Legion Road. A 60 foot, 179 square foot pylon sign is necessary for Shore Highway traffic to exit safely. The wall signs will ensure visibility on all sides of the building. The Board did grant sign height and area variances to other fast food restaurants in the area when the maximum sign height was 25 feet.*
- b) Such hardship is the result of special conditions and/or circumstances, not generally shared by other properties in the same zoning district or vicinity, and which are peculiar to the land, structure or building involved. Such conditions and/or circumstances may include but are not limited to the following: exceptional narrowness or shallowness or both, or irregular shape or topography of the property; unusual and limiting features of the building; or the effective frustration or prevention of reception of satellite programming due to the presence of a physical object or objects which obscure the "line of sight" when such object or objects cannot be equally removed. *The property is unique because it does not have direct access off Shore Highway or Legion Road. It is surrounded with other vacant properties. Fast food restaurants need to attract customers from the highway in order to be viable. There is a line of sight issue for the Shore Highway traffic. The setback is due to the shape of the lot and the access points. The variances are unique and tailored to the site constraints.*
- c) Such special conditions or circumstances must not be the result of any action or

actions of the applicant. *The Applicant did not create the lot and did not create the lack of visibility from Shore Highway.*

- d) Granting of the variance must be in harmony with the general purpose and intent of this Chapter 128, Zoning and must not be injurious to adjacent property, the character of the neighborhood or the public welfare. *No comments or objections were received from the public. Public notification requirements were satisfied. Applicant does not believe granting the request is injurious to adjacent properties. From a safety issue, it is harmonious with the neighborhood.*
- e) Granting the variance shall not allow a use expressly or by implication prohibited in the zoning district involved. *N/A*
- f) The condition, situation, or intended use of the property concerned is not of so general or recurring a nature as to make practicable a general amendment to the ordinance. *Restaurants are unique, and their signage is unique to the site. It is not practicable to make a general amendment to the ordinance and allow every restaurant to have a 60 foot sign. Fast food restaurants need visible signs to safely direct traffic.*
- g) The variance granted must be the minimum necessary to afford relief. *The professional engineering analysis demonstrates the sign variances are the minimum necessary to afford relief. The 60 foot sign does not allow continuous visibility. SHA Traffic Manual designates the size and height of signs to safely exit the highway. The monument sign is necessary for Legion Road traffic and the setback is limited by the site conditions.*
- h) In granting a variance, the Board of Appeals may prescribe appropriate conditions in conformity with this Ordinance. Violation of such conditions, when made a part of the terms under which the variance is granted, shall be deemed a violation of this Ordinance.
- i) The applicant for a variance shall have the burden of proof on all points material to the application which shall include the burden of presenting credible evidence as to each material issue and the burden of persuasion on each material issue. The Board of Appeals may disregard evidence, even if unconverted by an opposing party, if the Board finds such evidence not to be credible.

DELIBERATIONS

During and following the receipt of all testimony and evidence, the Board deliberated in Open Session.

Member Doherty asked for clarification of the location of the site. An aerial photograph was provided to the Board by the Applicant for reference to the location of the property.

Member Doherty does not agree the building needs four wall signs or this is the minimum necessary to afford relief.

Member Doherty referred to the traffic report for the pylon sign. The report indicates that the pylon sign will only be visible travelling north, and this is an important factor. Originally, the request was for a 50 foot sign and amended to a 60 foot sign. The traffic report states the sign is blocked by the shopping center, but the pictures do not show or prove this statement. There is no evidence in the traffic report to validate the additional 30 feet height for the pylon sign. The Board is allowed to grant an additional 20% height for a variance request. Visibility and the size of the lettering on the sign is an important factor. Member Doherty does not agree 179 square feet for the pylon sign is the minimum necessary to afford relief.

Ms. Booth does not interpret the Zoning Ordinance for sign regulations to limit the Board to grant only a 20% increase for signage.

Mr. Drummond agreed with Ms. Booth that the Sign Ordinance is not a model of clarity.

Chairman Livingstone is concerned with the 8.9 foot setback for the monument sign for safety reasons for traffic on Legion Road.

Member Tyler questioned the Applicant regarding the State Highway business signs.

Member Doherty stated the Applicant did not create the parcel, but did make the choice to purchase the parcel.

Chairman Livingstone referred to the amended site plan for clarification of the access easement and confirmed the proposed monument sign location was necessary.

Chairman Livingstone provided a copy of the SHA guidelines for signage, and confirmed the 60 foot pylon sign was consistent with the SHA guidelines.

Member Doherty stated the future development of the area may require an amendment to the sign ordinance for visibility from Shore Highway.

Ms. Booth's Applicant would not be able to forecast the future development of the area, and the Board has the authority to grant sign variances.

Member Doherty could not justify the 32 square foot monument sign and four wall signs are the minimum necessary to afford relief.

Member Doherty stated restaurants are a permitted use in this area. The Town encourages businesses. It is unclear to make the requirements more variable for the site due to undue hardship and request four wall signs on the building and a 32 square foot monument sign. This site does have visibility issues. If there is an area that requires variances for the business area to be more productive, an amendment to the sign ordinance may be considered to improve the clarity of the rules. Granting the height variance for the pylon sign may affect the residential neighborhood in the area. It will not affect the immediate business area. It is unclear that relocating the pylon sign to the west side closest to Shore Highway of the parcel will allow more visibility. The property does share similarities with Walmart. The Applicant chose the property for the fast food restaurant. It was unclear from the pictures that a 60 foot sign was the minimum height necessary to afford relief.

Chairman Livingstone validated the 179 square feet pylon sign, that is 60 feet in height, is the minimum height necessary based on the field tests and SHA traffic guidelines for signage to

ensure motorists are able to safely exit. This area is zoned Regional Highway Commercial (RHC), and these types of signs are allowed for businesses.

Member Doherty does agree a second wall sign on the west side of the building could be allowed.

Chairman Livingstone confirmed the monument sign setback variance request is necessary for safety reasons.

FINDINGS AND DECISIONS

Sign Variance Request #1 – Upon motion made by Member Doherty, seconded by Member Tyler, and passed unanimously, the Board approved two freestanding signs, consisting of one pylon sign and one monument sign which meets the criteria for granting a variance based on safety reasons for exiting Shore Highway/Rt. 404, a visible access to the entrance on Legion Road, and the deliberations of the Board. The decision is based on the findings of fact of the testimony and report for the field tests, no general amendment is necessary, this is the minimum necessary to afford relief, Applicant has met the burden of proof for the safety issues, in general harmony with the area, and would not cause a reduction in the property values.

Sign Variance Request #2 - Upon motion made by Member Doherty, seconded by Member Tyler, and passed unanimously, the Board approved one 179 square foot freestanding pylon sign which meets the criteria for granting a variance based on safety reasons for exiting Shore Highway/Rt. 404, legibility of the lettering by SHA Traffic Guidelines, and the deliberations of the Board. The decision is based on the findings of fact of the testimony and report for the field tests, proposed sign area is consistent with SHA Traffic Guidelines, no general amendment is necessary, this is the minimum necessary to afford relief, Applicant has

met the burden of proof for the safety issues, in general harmony with the area, and would not cause a reduction in the property values.

Sign Variance Request #3 – The Applicant withdrew the request for the monument freestanding sign area of 32 square feet. The Sign Ordinance allows a sign area of 30 square feet.

Sign Variance Request #4 - Upon motion made by Member Doherty, seconded by Member Tyler, and passed unanimously, the Board approved one 60 foot freestanding pylon sign which meets the criteria for granting a variance based on safety reasons for exiting Shore Highway/Rt. 404, legibility of the lettering by SHA Traffic Guidelines, and the deliberations of the Board. The decision is based on the findings of fact of the testimony and report for the field tests, no general amendment is necessary, this is the minimum necessary to afford relief, Applicant has met the burden of proof for the safety issues, in general harmony with the area, and would not cause a reduction in the property values.

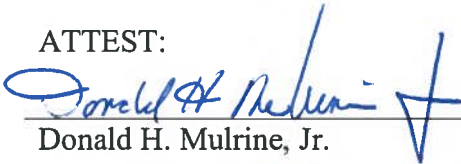
Sign Variance Request #5 - Upon motion made by Member Doherty, seconded by Member Tyler, and passed unanimously, the Board approved one 30 square foot freestanding monument sign to be located within the required setback of no less than 10 feet from the front property line which meets the criteria for granting a variance based on safety reasons for exiting off Legion Road, impracticability of parking requirements, and the deliberations of the Board. The decision is based on the findings of fact of the testimony, no general amendment is necessary, this is the minimum necessary to afford relief, Applicant has met the burden of proof for the safety issues, in general harmony with the area, and would not cause a reduction in the property values.

Sign Variance Request #6 - Upon motion made by Member Doherty, seconded by Member Tyler, and passed unanimously, the Board approved two flat wall building signs which meets the criteria for granting a variance and the deliberations of the Board. The decision is based on the findings of fact of the testimony, no general amendment is necessary, this is the minimum necessary to afford relief, Applicant has met the burden of proof for the safety issues, in general harmony with the area, and would not cause a reduction in the property values.

No other business items.

The meeting adjourned at 8:55 p.m.

ATTEST:




Donald H. Mulrine, Jr.


7-11-2017

Date

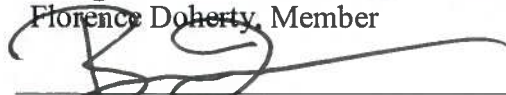
DENTON BOARD OF APPEALS:



Troy Livingstone, Chairman



Florence Doherty, Member



Brian Tyler, Member