

BOARD OF APPEALS

August 17, 2022

County Administration Building, 100 W. Washington St., Meeting Room 2000, Hagerstown, at 6:00 p.m.

AGENDA

DOCKET NO. AP2022-021: Mt. Aetna Advocacy Group has appealed the Planning Commission's determination of the proposed change to the Black Rock PUD as being constituted as a minor change on property owned by Black Rock Holding II LLC and located at Mt. Aetna Road, Hagerstown, Zoned Planned Unit Development. **CONTINUED FROM THE JULY 20, 2022 HEARING. -DENIED**

DOCKET NO. AP2022-035: An appeal was made by Groves Groundwurx LLC/Grove Pools a variance from the required 8 ft. side yard setback to 7 ft. for constructed partially above ground pool on property owned by Jaemi Sisco and located at 12809 The Terrace, Hagerstown, Zoned Residential Urdan. - **GRANTED**

DOCKET NO. AP2022-036: An appeal was made by DQE Communications LLC for a special exception to establish a communications hub on commercial property currently occupied by other businesses on property owned by Larry Allen and located at 11800-11806 Greencastle Pike, Hagerstown, Zoned Highway Interchange. - **GRANTED**

Pursuant to the Maryland Open Meetings Law, notice is hereby given that the deliberations of the Board of Zoning Appeals are open to the public. Furthermore, the Board, at its discretion, may render a decision as to some or all of the cases at the hearing described above or at a subsequent hearing, the date and time of which will be announced prior to the conclusion of the public hearing. Individuals requiring special accommodations are requested to contact Katie Rathvon at 240-313-2464 Voice, 240-313-2130 Voice/TDD no later than August 8, 2022. Any person desiring a stenographic transcript shall be responsible for supplying a competent stenographer.

The Board of Appeals reserves the right to vary the order in which the cases are called. Please take note of the Amended Rules of Procedure (Adopted July 5, 2006), Public Hearing, Section 4(d) which states:

Applicants shall have ten (10) minutes in which to present their request and may, upon request to and permission of the Board, receive an additional twenty (20) minutes for their presentation. Following the Applicant's case in chief, other individuals may receive three (3) minutes to testify, except in the circumstance where an individual is representing a group, in which case said individual shall be given eight (8) minutes to testify.

Those Applicants requesting the additional twenty (20) minutes shall have their case automatically moved to the end of the docket.

For extraordinary cause, the Board may extend any time period set forth herein, or otherwise modify or suspend these Rules, to uphold the spirit of the Ordinance and to do substantial justice.

Jay Miller, Chairman
Board of Zoning Appeals

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

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MT. AETNA ADVOCACY GROUP * **Appeal No.: AP2022-021**

Appellant *

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OPINION

Mt. Aetna Advocacy Group (hereinafter “Appellant”) files this appeal from the Planning Commission’s determination that the proposed change to the Black Rock PUD was a minor change which could be approved administratively by the Planning Commission. The subject property is located on Mt Aetna Road to the north and east of the existing Black Rock Estates and is the subject of the Black Rock PUD. The Board held a public hearing in this matter on July 20, 2022 and again on August 17, 2022.

This appeal was heard pursuant to Article 25 of the Zoning Ordinance for Washington County and upon proper notice to the parties and general public as required. Appellant was represented by Gregory E. Rapisarda, Esq. and Black Rock Holdings II, LLC was represented by William E. Erskine, Esq.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. Black Rock Holdings II, LLC (hereinafter “Black Rock Holdings”) is the owner and developer of the subject property.
2. The subject property is located on Mt. Aetna Road and identified as the lands adjacent to the existing Black Rock Estates subdivision and extending east towards White Hall Road.

3. On November 19, 2002, the Board of County Commissioners approved a map amendment for the Black Rock Planned Unit Development, including 595 residential dwelling units with a density of 2.7 units per acre.

4. In 2006, an appeal was made to the Board following the Planning Commission's approval of a final development plan for the Black Rock PUD. The Board of Appeals affirmed the Planning Commission's decision.¹

5. In 2022, Black Rock Holding II, LLC requested a map amendment to amend the Black Rock PUD final development plan. The request was for an increase in the number of residential dwelling units to 1,148 with a density of 5.2 units per acre. The Board of County Commissioners denied this request.²

6. Black Rock Holding II, LLC then submitted a request to amend the Black Rock PUD final development plan through the Planning Commission. The request maintained the number of dwelling units at 595. The proposal included construction of 183 units in Phase 1 and 302 units in Phase 2. It also adjusted the maximum height for townhomes to 42 feet and for multi-family structures to 55 feet. In addition, the townhome and multi-family dwellings were shifted in location and 100 single family homes are proposed on 131.9 acres in the northwestern portion of the property. The proposal also includes a smaller stormwater management area and smaller recreational area but increased open space. The Planning Commission determined that the request was a minor change and approved it on April 4, 2022.

7. Appellant timely noted this appeal.

Rationale

Planned Unit Developments or PUDs are floating zones that require a map amendment to be established. The initial process requires submission to the Planning

¹ Case No. AP2006-074.

² Case No. RZ-21-003.

Commission for recommendations to be made to the Board of County Commissioners. It also requires a public hearing where citizens can receive information and comment on the proposed project. Once the public hearing process is complete and all recommendations are made, the Board of County Commissioners votes to approve or deny the requested map amendment. In the instant case, the Black Rock PUD has been approved for twenty (20) years.

The Zoning Ordinance provides a process for making changes to an approved PUD in Section 16A.5:

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It is the intent of this Article that the original establishment of the PUD not be a speculative device. However, it is also the intent that an approved PUD may need to change in response to changing community needs and conditions, and that change must follow an appropriate public review process similar to that which occurred prior to the PUD approval and as set forth herein.

Recognizing that flexibility in the site design is inherent in the PUD process and that the long-term development of such a project may prompt the need for changes in the approved Development Plan for the property, the following procedures are established to accommodate a requested change.

- (a) Upon a request from a developer for a change to the approved PUD Development Plan the Planning Commission shall determine if the requested change is a major or minor change to the Concept Plan reviewed by the Board of County Commissioners as part of the establishment of the PUD District or as part of subsequent changes to the PUD Concept Plan. The establishment and subsequent approved changes to the PUD District by the Board of County Commissioners is considered a tentative approval of density and design features as shown on the Concept Plan. The Planning Commission shall make the determination that a change is major or minor through evaluation of whether or not the change is in accordance with the latest Concept Plan on file as reviewed by the Board of County Commissioners.

1. Minor changes to the approved PUD Development Plan (Preliminary or Final) may be approved by the Planning Commission without the need for an additional public hearing. As a result of the requested change the Planning Commission may establish other requirements deemed necessary to satisfy the purpose of this Article. Cumulative "minor" change requests may result in the determination by the Planning Commission that there has been a major change to the Concept Plan on file and require the developer to follow the process

established for major changes in a PUD Development Plan.

2. Major changes to the approved PUD Development Plan (Preliminary or Final) as determined by the Planning Commission shall also require a change to the Concept Plan and therefore require a new public hearing.

Black Rock Holdings sought approval of changes to approved PUD Development Plan and on April 4, 2022, the Planning Commission determined that the proposed changes were minor changes and approved them. Appellant timely noted this appeal alleging that the Planning Commission erred in determining that the proposed changes were minor changes, and argues that the request should be submitted to a public hearing.

Appellant had considerable support for its appeal in attendance at the hearing on July 20, 2022 and again on August 17, 2022. Appellant's arguments can be synthesized into several main categories, including:

1. The changes to the PUD are major and require a public hearing;
2. The PUD has expired and is invalid;
3. The PUD should not be considered because of the prior denial of a map amendment request by the Board of County Commissioners in February, 2022;
4. The water service and pressure is insufficient to serve additional development; and
5. There is insufficient capacity in the current school district; and
6. The proposed development will substantially increase the traffic issues already existing along the roadways and will drastically increase traffic in the neighborhood.

Jill Baker explained during the hearing that the expiration language used in a letter issued by former Director of Planning and Zoning, Ashley Holloway, was an error. The PUD does not expire and therefore its validity is not in question. In its review of the Zoning Ordinance, the Board does not find a provision for expiration of a PUD. Therefore, the

approved PUD Development Plan was valid and active at the time the proposed changes were requested. Similarly, Ms. Baker explained that the denial of the map amendment request in February 2022 was separate and apart from the request for proposed changes now at issue. That request called for double the number of dwelling units and a substantial increase in the density per acre, resulting in a denial by the Board of County Commissioners.

Much of the supporting testimony from residents and concerned citizens focused on the design elements such as the access through Black Rock Estates, traffic conditions, water service and pressure issues, reduction in property values and school capacity issues. These are legitimate concerns that warrant consideration during the development review process. They would certainly be material in any public hearing regarding changes to the PUD Development Plan. However, they are not relevant to the issue before the Board: whether the proposed changes are minor or major, and thus whether they require a public hearing before the Planning Commission.

Although the Zoning Ordinance makes a clear distinction between processes for minor and major changes, it does not clearly define a minor change or a major change. The Board is left to apply the common meaning and understanding of each term to the facts and circumstances presented herein. Appellants argued that the proposed changes were major in nature based primarily on the increase of units in Phase 2 of the plan, the increase in height for the proposed residential buildings and the relocation of certain dwellings on the property. Appellants' view appears to be an all or nothing approach, requiring a public hearing for *any* change to the Black Rock PUD. This is not what the County Commissioners intended and is not what is provided for in Section 16A.5 of the Zoning Ordinance.

The Board recognizes the importance of Appellants' concerns as it relates to overall site design and the effect on existing homes and neighborhoods. The plain

language of Section 16A.5 seeks to strike a balance between having a definitive plan for the orderly growth of planned developments, and the allowing flexibility to adapt to changing conditions.³ In the instant case, the proposed changes were intended to accommodate a shift in market demand and community trends. As a result, there were proposed changes to certain site elements like access and stormwater management, as well as to overall height and the location of the buildings. There was no proposal to increase the number of dwelling units or to change the overall density of the PUD. In addition, the concept remained the same from the original plan. The changes are subtle, affecting that which they propose to change without altering the final product.

For the reasons stated above, the Board finds that Black Rock Holdings' submission constituted a minor change or changes to the approved PUD Development Plan and therefore, the Planning Commission had the authority to approve said changes without the need for a public hearing. Accordingly, the Appellant's appeal is DENIED, and the decision of the Planning Commission is AFFIRMED, by a vote of 4 to 1.

BOARD OF APPEALS

By: Jay Miller, Chair

Date Issued: September 6, 2022

Notice of Appeal Rights

Any party aggrieved by a final order of the Authority in a contested case, whether such decision is affirmative or negative in form, is entitled to file a petition for judicial review of that order to the Circuit Court for Washington County within thirty (30) days of the date of the order.

³ "It is the intent of this Article that the original establishment of the PUD not be a speculative device. However, it is also the intent that an approved PUD may need to change in response to changing community needs and conditions " "Recognizing that flexibility in the site design is inherent in the PUD process and that the long-term development of such a project may prompt the need for changes in the approved Development Plan for the property, the following procedures are established to accommodate a requested change." Section 16A.5

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

GROVES GROUNDWURX, LLC/
GROVE POOLS
Appellant

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Appeal No.: AP2022-035

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OPINION

Groves Groundwurx, LLC/Grove Pools (hereinafter "Appellant") requests a variance from the required 8-foot side yard setback to 7 feet for a constructed partially above-ground pool at the subject property. The subject property is located at 12809 The Terrace, Hagerstown, Maryland and is zoned Residential, Urban. The Board held a public hearing in this matter on August 17, 2022.

This appeal was heard pursuant to Article 25 of the Zoning Ordinance for Washington County and upon proper notice to the parties and general public as required.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. The subject property is located at 12809 The Terrace, Hagerstown, Maryland and is owned by Jaemi Sisco. The subject property is zoned Agricultural, Rural.
2. Appellant has been authorized by the owner to request this variance as the contractor performing the work.
3. Appellant constructed a partially above-ground pool in the backyard at the subject property. When they pulled measurements for the location, they relied upon the

location of the existing fence.

4. As part of the final inspection, a survey was completed, and Appellant discovered that the location of the pool was 14 inches into the setback area.

5. The pool project is completed and would require significant expense, labor, and time to relocate.

6. Appellant consulted the adjacent neighbor who would be most directly affected by the variance, and he wrote a letter in support of the request.

7. There was no opposition presented to this appeal.

Rationale

The Board has authority to grant a variance upon a showing of practical difficulty or undue hardship. §§ 25.2(c) and 25.56.¹ “Practical Difficulty” may be found by the Board when: (1) strict compliance would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome; and (2) denying the variance would do substantial injustice to the applicant and a lesser relaxation than that applied for would not give substantial relief; and (3) granting the variance would observe the spirit of the Ordinance and secure public safety and welfare. § 25.56(A).

Practical difficulty and undue hardship are the result of a property being unique. “‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties

¹ “When the terms unnecessary hardship (or one of its synonyms) and practical difficulties are framed in the disjunctive (“or”), Maryland courts generally have applied the more restrictive hardship standard to use variances, while applying the less restrictive practical difficulties standard to area variances because use variances are viewed as more drastic departures from zoning requirements.” *Belvoir Farms Homeowners Ass’n, Inc. v. North*, 355 Md. 259, 276 n.10 (1999) (citations omitted).

(such as obstructions) or other similar restrictions." *North v. St. Mary's Cnty.*, 99 Md. App. 502, 514 (1994).)

In the instant case, Appellant is seeking a variance to correct a location mistake made during construction of the owner's pool. Appellant and the owner are faced with obtaining this variance or having to relocate the completed pool to comply with the setback requirements. Such an undertaking would be costly and time consuming and as such, would be unreasonable. The most affected neighbor has already given his consent and relief requested is so minimal as to not be noticeable unless someone were to measure. It is clear from the evidence that strict compliance with the side yard setback requirement would prevent reasonable use of the property and create an unnecessary burden upon the owner and Appellant to move the pool. The Board finds that the circumstances establish practical difficulty and that granting the variance will observe the spirit of the Zoning Ordinance.

Accordingly, the request for a variance from the required 8-foot side yard setback to 7 feet for a constructed partially above-ground pool at the subject property is GRANTED, by a vote of 5-0. The application is granted upon the condition that the proposed use be consistent with the testimony and evidence presented herein.

BOARD OF APPEALS

By: Jay Miller, Chair

Date Issued: August 30, 2022

Notice of Appeal Rights

Any party aggrieved by a final order of the Authority in a contested case, whether such decision is affirmative or negative in form, is entitled to file a petition for judicial review of that order to the Circuit Court for Washington County within thirty (30) days of the date of the order.

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

DQE COMMUNICATIONS, LLC

Appellant

Appeal No.: AP2022-036

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OPINION

DQE Communications, LLC (hereinafter “Appellant”) requests a special exception to establish a communications hub at the subject property. The subject property is located at 11800-11806 Greencastle Pike, Hagerstown, Maryland and is zoned Highway Interchange. The Board held a public hearing in this matter on August 17, 2022.

This appeal was heard pursuant to Article 25 of the Zoning Ordinance for Washington County and upon proper notice to the parties and general public as required.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. The subject property is located at 11800-11806 Greencastle Pike, Hagerstown, Maryland and is owned by Larry Allen. The subject property is zoned Highway Interchange.
2. Appellant has been authorized by the owner to make this special exception request.
3. The subject property consists of a lot located at the southeast corner of the intersection of Greencastle Pike and Business Parkway. It is currently the home to two (2) business, Apex Land Solutions and Simply Stunning Hair Studio.

4. Appellant is in the business of delivering high speed bandwidth through the installation of fiberoptic networks.

5. Appellant proposes to construct a communications hub at the subject property to serve thirty-eight miles of fiber optics to be installed in the surrounding area.

6. The proposed use would result in a prefabricated 12 ½ by 20-foot building containing equipment, a generator for power back-up and heating/air-conditioning. The site would be unmanned but would require field technicians to visit two (2) times per month for regular maintenance and as otherwise needed for repairs.

7. There was no opposition presented to this appeal.

Rationale

The Board has authority to grant a special exception pursuant to Section 25.2(b) of the Zoning Ordinance for Washington County, Maryland. A special exception is defined as “a grant of a specific use that would not be appropriate generally or without restriction; and shall be based upon a finding that the use conforms to the plan and is compatible with the existing neighborhood.” Article 28A. In addition, Section 25.6 sets forth the limitations, guides, and standards in exercise of the board’s duties and provides:

Where in these regulations certain powers are conferred upon the Board or the approval of the Board is required before a permit may be issued, or the Board is called upon to decide certain issues, the Board shall study the specific property involved, as well as the neighborhood, and consider all testimony and data submitted, and shall hear any person desiring to speak for or against the issuance of the permit. However, the application for a permit shall not be approved where the Board finds the proposed building, addition, extension of building or use, sign, use or change of use would adversely affect the public health, safety, security, morals, or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood. In deciding such matters, the Board shall consider any other information germane to the case and shall give consideration to the following, as applicable:

- (a) The number of people residing or working in the immediate area concerned.
- (b) The orderly growth of a community.

- (c) Traffic conditions and facilities
- (d) The effect of such use upon the peaceful enjoyment of people in their homes.
- (e) The conservation of property values.
- (f) The effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the use of surrounding property values.
- (g) The most appropriate use of the land and structure.
- (h) Decision of the courts.
- (i) The purpose of these regulations as set forth herein.
- (j) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches, and the like.

In the instant case, the Board is called upon to consider a proposed communications hub on existing commercial property as a special exception in the Highway Interchange zoning district.

Appellant's representatives testified in detail about their business operation and the proposed use of the subject property. There is no expectation of any notable traffic to the subject property as it is similar to the accessory buildings at a cell tower site. The operation of the equipment does not emit any odors, gas, noise, dust, or other environmental hazards that could affect surrounding properties. The surrounding area consists of numerous commercial and industrial uses and Appellant presented testimony that it is their intention to blend into the surrounding uses. Appellant's fiber optic network will increase bandwidth and provide those it serves with another option for communications support. The proposed use is an integral part of orderly growth, given the importance of high-speed communications and access to social and economic progress.

The proposed use will have minimal footprint, let alone impact on the area in question. It is consistent with the other uses in the zoning district and consistent with the vision for growth in the area. The Board finds that the proposed use at the subject property will have no greater "adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone."

Schultz v. Pritts, 291 Md. 1, 15 (1981). For all these reasons, we conclude that this appeal meets the criteria for a special exception, secures public safety and welfare and upholds the spirit of the Ordinance.

Accordingly, the request for a special exception to establish a communications hub at the subject property is GRANTED, by a vote of 5-0. The requested relief is granted upon the condition that the proposed use be consistent with the testimony and evidence presented herein.

BOARD OF APPEALS

By: Jay Miller, Chair

Date Issued: August 31, 2022

Notice of Appeal Rights

Any party aggrieved by a final order of the Authority in a contested case, whether such decision is affirmative or negative in form, is entitled to file a petition for judicial review of that order to the Circuit Court for Washington County within thirty (30) days of the date of the order.