

BOARD OF APPEALS

July 20, 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.- **APPEAL CONTINUED TO THE AUGUST 17, 2022 HEARING.- DENIED DURING THE AUGUST 17, 2022 HEARING.**

DOCKET NO. AP2022-032: An appeal was made New Heights Industrial Park LLC for a special exception for explosive manufacturing/storage for production of ammunition primers and variance from the required setback/buffer of this use to not be less than 1,000 ft. from any residential district/existing residential use on separate lot and or any residential portion of a mixed-use district to 785 ft. from existing residential use on separate lot located at 18531 Showalter Road on property located at 18450 Showalter Road Bays 1 & 2, Hagerstown, Zoned Industrial General.- **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 July 11, 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**

**NEW HEIGHTS INDUSTRIAL
PARK, LLC**

Appellant

Appeal No.: AP2022-032

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OPINION

New Heights Industrial Park, LLC (hereinafter “Appellant”) requests a special exception to establish an explosive manufacturing/storage operation for production of ammunition primers at the subject property. Appellant also requests a variance from the minimum required setback/buffer of this use of 1,000 feet from any residential district/existing residential use on a separate lot and/or any residential portion of a mixed-use district to 785 feet at the subject property. The subject property is located at 18450 Showalter Road, Bays 1 & 2, Hagerstown, Maryland and is zoned Industrial, General. The Board held a public hearing in this matter on July 20, 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 counsel, Zachary J. Kieffer, 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. The subject property is located at 18450 Showalter Road, Bays 1 & 2, Hagerstown, Maryland and is owned by Appellant. The subject property is zoned

Industrial, General.

2. The subject property consists of approximately 41 acres, housing a 900,00 square-foot industrial park that used to be occupied by the Fairchild Aircraft Manufacturing Company. The subject property is currently home to several industrial and commercial uses, as well as the Hagerstown Aviation Museum.

3. Bays 1 and 2 of the subject property are currently leased to First Breach, Inc., which manufactures ammunition components.

4. First Breach manufactures non-explosive ammunition components and does not utilize or store gunpowder. They have two (2) shifts for their twenty (20) employees, Monday through Friday from 8:00 a.m. to 4:00 p.m. and 4:00 p.m. to 12:00 a.m.

5. First Breach has been approved and licensed by the Bureau of Alcohol, Tobacco, and Firearms to manufacture ammunition and ammunition components. They employ a fire and explosive consultant as a safety precaution for its manufacturing operation.

6. First Breach proposes to add primer manufacturing to its existing manufacture of ammunition components. The process requires the use of chemicals that are inert when wet and become active upon drying and compaction.

7. The subject property would be improved to include blast walls and a sealed and secure interior room for storage of the completed primers.

8. If permitted to expand to manufacturing primers, First Breach would add approximately thirty (30) employees between the two work shifts.

9. The closest residence or residential use to the subject property is located 785 feet across Showalter Road on property that is zoned Highway Interchange. The residence itself is believed to predate the inception of the Zoning Ordinance.

10. There was no opposition presented to this appeal.

Rationale

Appellant has requested both a special exception and variance relief related to its proposed use of the subject property. Because the variance is only necessary if the special exception is granted, the Board shall initially consider Appellant's special exception request.

Special Exception

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 the instant case, Appellant is seeking the Board's approval to add the manufacture and storage of primers to the existing ammunition component manufacturing operation of First Breach. The special exception is necessary because primers are considered an explosive device pursuant to the Ordinance. Representatives from First Breach provided detailed testimony about the primer manufacturing process and about storage and safety. There was no evidence that material changes would be made to the buildings or structures at the subject property. Aside from the slight increase in traffic from additional employees during each shift, there will be no significant increase in traffic to the subject property. The manufacturing operation is contained inside 2 bays which were previously used for manufacturing aircraft, thus there will not be odors, noise, dust, or gas produced from the operation.

The primary consideration for the Board is whether the proposed use creates an inherent danger or risk to public welfare. Appellant's presentation, through the First Breach representatives, thoroughly explained each step of the process of making primers. While it is considered an explosive, the primer is only active once fully completed. First

Breach representatives testified that the chemicals used in loading the primer are inert when wet and are safe to store. They only become active when dry and mixed, which will happen at the end of the manufacturing process. Moreover, once completed and sealed, the primer is wrapped in plastic and stored in a secure room inside the facility. They further explained that they would not attempt to expand if there was any real chance that it would pose a risk to their existing manufacturing operation. The proposed expansion does not include the use or storage of gunpowder and does not contemplate the full assembly of ammunition. Although there is some risk inherent to the use of chemicals for the primers, it is mitigated by First Breach's safety measures, the nature of the manufacturing process and the location of the business in the industrial park which results in minimal impact on the surrounding 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.

Variance

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

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).

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

Section 14.2(a) of the Ordinance requires a minimum of 1,000 feet distance from any approved special exception use and any existing residential use on a separate lot. At 18531 Showalter Road, Hagerstown, Maryland, there is a house that has been converted into apartments. The property is zoned Highway Interchange, and the apartments would not be principally permitted, but for their existence as a non-conforming use. The apartments are 785 from the subject property and proposed explosive manufacturing and storage operation.

As noted, Appellant and First Breach have taken significant steps to mitigate any impact of the manufacturing operation on the surrounding area. The proposed use is a logical and reasonable expansion of First Breach’s existing business and would otherwise be prohibited if strict compliance with the setbacks were required. The alternative would be for First Breach to seek alternative locations for its primer manufacturing operation. This would likely create substantial hardship given the synergy and logistical efficiency associated with locating all of their operations at the subject property. Furthermore, the subject property is ideal for the existing operation and the proposed expansion for primers. It is in a traditionally industrial area, bounded by the airport and other

commercial and highway interchange uses. The Board finds that practical difficulty exists and that that Appellant has satisfied the variance criteria.

Accordingly, the request for a special exception to establish an explosive manufacturing/storage operation for production of ammunition primers at the subject property is GRANTED, by a vote of 5-0. The request for a variance to reduce the minimum required setback/buffer of this use of 1,000 feet from any residential district/existing residential use on a separate lot and/or any residential portion of a mixed-use district to 785 feet at the subject property are GRANTED, by a vote of 5-0. Both the special exception and the variance relief are 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 15, 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.