

June 13, 2022

Re: Appeal by Tiger Fuel Company - Supplemental Materials from Property Owner
in Support of Zoning Administrator's Determination

Members of the Board of Zoning Appeals,

Our firm represents RBD Bent Creek, LLC, the Owner of the property located at 1150 5th St. SW (the "Property"), and the subject of an appeal by Tiger Fuel Company that will be heard at your meeting on June 16, 2022 (the "Appeal"). We offer this letter as further support for the conclusion in Mr. Broadhead's letter to Tiger Fuel Company (the "Appellant") of May 4, 2022 (the "Determination").

The Owner proposes to develop the Property with a gas station, convenience store, and deli market (the "Proposed Use") which is a by-right use in the Highway Corridor ("HW") zoning district, and has submitted a site development plan to the City that is currently under review by City staff (the "Site Plan"). Upon learning of the submittal of the Site Plan, and receipt of the Determination, the Appellant filed the Appeal, contending that Mr. Broadhead applied the wrong setback regulation to the Proposed Use. For all of the reasons stated herein, we contend that the Determination was correct and therefore must be upheld, and thus the appeal should be denied.

We note that the Appellant Tiger Fuel Company is the owner of the Exxon Gas Station and Market located at 1154 5th Street SW, just across 5th Street Station Parkway from the subject Property. Given the close proximity of the Appellant's property to the subject Property, and that the Appellant's use of its property for a gas station, convenience store and deli market is the exact same use that is proposed for the Property, we question whether the purpose of the Appeal is really about the applicable setback regulation for the Property, or if in fact the Appeal is actually an attempt by the Appellant to stifle business competition proposed next door to its property. If it is the latter, and the subject of the Appeal is merely pretextual, we contend that the Appeal should be denied for that reason alone, for the Board of Zoning Appeals ("the Board") is an inappropriate venue for the Appellant to challenge its business competitors, and an inappropriate use of the City's public resources, including the time of the members who generously volunteer their time to serve on the Board. Nevertheless, we will address the substantive issues of the Appeal as well.

Pursuant to section 34-129(1)¹ of the City Zoning Ordinance, the decision on the Appeal shall be based on the Board's judgment of whether the Determination was correct. The Owner contends that the Determination is correct, and that the Appeal should therefore be denied. Section 34-129(1) further provides that the Board "shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision."

¹ Copies of all referenced provisions of the City of Charlottesville Zoning Ordinance and the Virginia State Code are attached in the Appendix.

In addition, the Virginia Supreme Court has repeatedly noted that a Zoning Administrator's interpretation of the Zoning Ordinance they are charged with enforcing is "entitled to great weight" (*Bd. Of Sup'rs of Fairfax Cty. v. Robertson*, 266 Va. 525, 538 (2003), citing *Masterson v. Board of Zoning Appeals* 233 Va. 37, 44, 353 S.E. 2d 727 (1987) ("consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight"). See also *Rountree Corp. v. City of Richmond*, 188 Va. 701, 712, 51 S.E.2d 256, 261 (1949) ("construction long placed upon statutes without protest from officials charged with their enforcement is entitled to great weight"). In other words, during its consideration of the Appeal, the Board should give "great weight" to the Determination in determining whether it is correct.

The question of whether the HW setback regulations contained in Section 34-738 of the Ordinance (the "HW Regulations") or the Gas Station specific setback regulations contained in Section 34-931 (the "Gas Station Regulations") are the applicable regulations is subject to the provisions of section 34-6 (b)(2), which provides:

If any regulation or standard specified in this chapter **as being applicable to any use**, structure, activity or undertaking conflicts with any other regulation or standard set forth herein, **then the more restrictive or higher standard shall govern** (*emphasis added*).

We note that the Determination specifically refers to Section 34-6(b)(1), which provides:

If the standards specified in this chapter are in conflict with the requirements of any other lawfully adopted rules, regulations or laws, then the more restrictive or higher standards shall govern.

We believe that although both subsections (b)(1) and (b)(2) support the Determination, subsection (b)(2) provides even greater support since it specifically refers to the regulations or standards that are "applicable to any **use**." As noted in more detail herein, the Gas Station Regulations comprise a subsection of "Division 6 – Additional Standards for Specific **Uses**" (*emphasis added*).

For guidance on what it means for a regulation to be "more restrictive" or of a "higher standard," Virginia State Code Section 15.2-2315 provides express guidance. It refers to regulations with higher standards as those that, for example, "require a greater width or size of yards, courts or other open spaces, require a lower height of building or less number of stories, require a greater percentage of lot to be left unoccupied or impose ***other higher standards***..." (*emphasis added*). In other words, "higher standards" are those requirements that among other things, require larger setbacks and a larger percentage of a lot to be left unoccupied. This State Code section provides that the regulations that provide higher standards shall govern in the case of conflicting standards.

Therefore, because the Gas Station Regulations are applicable to a **use** (a gas station) as opposed to a particular zoning district, and because they are both a more restrictive standard and a higher standard, given their location within the Division 6 "Additional Standards" section, they must govern instead of the less restrictive, and lower standards of the HW Regulations.

Additional reasons why the Gas Station Regulations are both more restrictive standards and higher standards are as follows:

1. The Gas Station Regulations are More Numerous

- The Gas Station Regulations contain 15 individual regulations (subsections (a) through (o)) that all apply to any proposed gas station, regardless of the zoning district it is located in. Subsection (h) of the Gas Station Regulations, which lists the setback regulations specific to gas stations, is merely one of those 15 subsections.
 - The HW Regulations contain just 4 regulations (subsections (a) through (d)).

2. The Gas Station Regulations are More Broad

- The Gas Station Regulations regulate all components of a gas station, not just the building
 - the HW Regulations only apply to buildings

3. The Gas Station Regulations are More Specific

- The Gas Station Regulations are contained in Division 6 of Article VIII of the Zoning Ordinance. The heading of Division 6 expressly notes that its regulations are specific to certain uses included therein – “DIVISION 6 – ADDITIONAL REGULATIONS FOR **SPECIFIC USES**” (*emphasis added*). The inclusion of the words “additional” and “specific” irrefutably demonstrates that the City believes them to be more specific to the gas station use than the general requirements applicable to the HW zoning district generally that are contained in the HW Regulations.
- The purpose of the regulations specific to gas stations involves the unique components of a gas station that do not exist with other commercial uses, such as the fuel pump islands, the canopies above them, and the existence of a flammable liquid near motor vehicles and the general public. These components have the potential to be dangerous if not appropriately sited. To address these unique elements and their safety requirements, it follows logically for the Zoning Ordinance to contain additional specific regulations that apply to gas stations in all zoning districts to ensure these components are always appropriately sited regardless of the applicable zoning district. For example:
 - subsection (a)(i) through (a)(iv): regulates the width and maximum radius of driveways (to ensure large fuel tanker trucks can safely navigate the entrance)
 - subsection (c): regulates how far pump islands must be from sidewalks (to protect the safety of pedestrians)
 - subsection (g): establishes a minimum lot size based on the number of fuel pumps (to ensure adequate spacing around the pumps)

- subsection (k): requires a special side yard on corner lots with specific restrictions on the height of landscaping (to preserve sight distance)
- Because these gas station-specific components do not exist with other uses, they are not included in the specific zoning district regulations, including the HW Regulations.
- The Gas Station Regulations are more specific because they apply to every single gas station proposed, regardless of what zoning district it would be located in.
- Applicable case law from the Virginia Supreme Court provides that if conflicts between statutes cannot be resolved, the more specific statute will be deemed controlling. *Virginia Department of Health v. Kepa, Inc.*, 289 Va. 131, 142 (2015). “[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.”

4. The Gas Station Regulations Impose a Higher Standard

- The Gas Station Regulations require a greater size yard (setback) at 40 feet than the HW Regulations which only require a 5-foot setback, and no more than a 30-foot setback. In addition, the Gas Station Regulations require a special “corner yard” that is not required by the HW Regulations. Both individually and combined, these regulations require a greater percentage of the lot to be left unoccupied compared to the HW Regulations.
- Based on Virginia Code Section 15.2-2315, the larger yard size, the required corner yard, and the requirement for a greater percentage of the lot to be left unoccupied required by the Gas Station Regulations makes those “higher standards” that govern instead of the smaller general yard requirements and absence of any corner yard of the HW Regulations.
- Similarly, as noted previously, City Zoning Ordinance Section 34-6(b)(2) also provides that the “more restrictive or higher standard shall govern.”

5. Application of the Gas Station Regulations Avoids an Absurd Result.

- As noted above, the Gas Station Regulations were adopted to address the unique components of a gas station and the potential safety issues involved with the use. Why would the gas station-specific setback regulations in subsection (h) even exist if they were not intended to be applied to a gas station?
 - As noted previously, section 34-129(1) of the Zoning Ordinance requires that the Board “shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision.”

- Again, the purpose and intent of the Gas Station Regulations was to address the unique elements of a gas station and the particular safety issues involved with the use. In considering this purpose and intent, it would be illogical for the Board to determine that they were not intended to actually apply to gas stations.
- Similarly, when the Board considers the purpose and intent of the Gas Station Regulations, it would be illogical for the Board to contend that the other 14 subsections of the Gas Station Regulations do apply to gas stations, but the gas station-specific setback regulations in subsection (h) do not apply.
- Failure to apply the gas station-specific setback regulations in subsection (h) to a gas station would result in an absurd result, by effectively nullifying subsection (h) and making it useless, contrary to the purpose and intent of the Gas Station Regulations, which are expressly noted as “Additional Standards for Specific Uses.”
 - As the Virginia Supreme Court noted in *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 522, S.E.2d 861 (1999), “[t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.”
 - Finding that the setback regulations in subsection (h) do not apply to the Proposed Use would make that regulation useless.

For all of these reasons, we contend that the Gas Station Regulations are more restrictive, and impose a higher standard than the HW Regulations, that application of them to the Site Plan would avoid an absurd result, and that Determination was therefor correct. As such, the Appeal must be denied.

We appreciate the opportunity to provide these additional materials to the Board in advance of the Board hearing.

Sincerely,

Valerie W. Long

Valerie W. Long

cc: RBD Bent Creek, LLC

Enclosure: Appendix

APPENDIX

Copies of Referenced Local Ordinances and State Code Provisions

Note: relevant portions of provisions underlined by the author for emphasis

1. City of Charlottesville Zoning Ordinance Section 34-129 (1)

Sec. 34-129. General powers.

The board of zoning appeals, in appropriate cases and subject to appropriate conditions and safeguards, shall have the following powers and duties:

- (1) *Administrative appeals.* To hear and decide appeals from any order, requirement, decision or determination made by the zoning administrator or an administrative officer in the administration or enforcement of this chapter or of any ordinance adopted pursuant hereto. The decision on such appeal shall be based on the board's judgment of whether the administrator or officer was correct. The board shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision.

2. City of Charlottesville Zoning Ordinance Section 34-6 (b)(2)

Sec. 34-6. Interpretation of district boundaries; rules of construction.

(b) The following rules shall apply in the interpretation of the city's zoning district regulations and standards:

- (1) If the standards specified in this chapter are in conflict with the requirements of any other lawfully adopted rules, regulations or laws, then the more restrictive or higher standards shall govern.
- (2) If any regulation or standard specified in this chapter as being applicable to any use, structure, activity or undertaking conflicts with any other regulation or standard set forth herein, then the more restrictive or higher standard shall govern.
- (3) This chapter is intended to be inclusive, permitting only such uses, structures and activities as are specifically named herein. Uses, structures and activities not expressly provided for within the provisions of this chapter shall be deemed prohibited uses, structures and activities.

3. Virginia State Code Section 15.2-2315

§ 15.2-2315. Conflict with statutes, local ordinances or regulations.

Whenever the regulations made under authority of this article require a greater width or size of yards, courts or other open spaces, require a lower height of building or less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are

required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this article shall govern. Whenever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, require a lower height of building or a less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are required by the regulations made under authority of this article, the provisions of such statute or local ordinance or regulation shall govern.

Code 1950, §§ 15-842, 15-968.12; 1962, c. 407, § 15.1-498; 1997, c. 587.