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BOARD OF APPEALS  
OF THE CITY OF ANNAPOLIS

145 GORMAN STREET, 3<sup>RD</sup> FLOOR  
ANNAPOLIS, MARYLAND 21401  
TELEPHONE (410)263-7961

ORDER

948 Bay Ridge Avenue

(Board of Appeals Case No. SE 2010-014)

On July 5, 2011, the Board of Appeals issued an Opinion and Order approving the special exception application of the Applicant, GFS Realty, LLC ("GFS"), filed pursuant to Chapter 21.26 of the City Code. The approval was appealed by an aggrieved party by Petition for Judicial Review filed in the Circuit Court for Anne Arundel County. After oral arguments on the Petition for Judicial Review, the Circuit Court for Anne Arundel County issued a Memorandum Opinion with an Order remanding the matter to the Board of Appeals for further proceedings. A remand hearing before the Board of Appeals is scheduled on May 15, 2013.

The special exception approved by the Board of Appeals, and which is now before the Board of Appeals on remand from the Circuit Court, concerns an application for permission to place a gas fueling station on the property leased by GFS from the owner of the property, Bayridge, Inc.

The Board of Appeals is aware that GFS, on or about April 15, 2013, filed a Complaint for Declaratory Judgment and Breach of Contract against Bayridge<sup>1</sup> in the Circuit Court for Anne Arundel County alleging, among other things, breach of lease.

In paragraph 33 of the Complaint, GFS alleges that it wrote to Bayridge, in connection with the planned construction of the gas station on the leased premises, that GFS "will continue our efforts to place a gas fueling station in the location with our demised premises as previously submitted to the City of Annapolis, and if we are successful in obtaining the requisite permits, will commence Construction (at our sole cost and expense), as we are of the opinion that the lease as presently written allows us to do so without seeking any consents or approvals from the Landlord."

In paragraph 77 of the Complaint, GFS alleges that GFS and Bayridge "disagree with regard to interpretation of the lease" in several respects, including Section 3 of the lease, which concerns use of the property on which the gas fueling station is proposed to be constructed." (Section 3 of the Lease<sup>2</sup> states that "Tenant is granted the right to occupy and use the Premises for any lawful purpose, subject to the terms of the Permitted Exceptions.").

In paragraph 89 of the Complaint, GFS alleges that Bayridge intends to issue a notice of default of the lease to GFS if GFS constructs a gas fueling station on the leased premises, even though GFS may proceed under the lease without the consent of Bayridge.

In paragraph 92 of the Complaint, GFS alleges that, because of the actions of Bayridge, GFS has been deprived of its use and enjoyment of the leased premises and GFS may not build the gas fueling station because

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<sup>1</sup> Exhibit 1.

<sup>2</sup> Exhibit 2.

of Bayridge's notice of default or threatened notice of default.

In its request to the Circuit Court for relief, GFS asks that the Circuit Court determine and adjudicate the rights and liabilities of GFS and Bayridge with respect to the Lease, and in particular, declare that GFS has the right "to construct buildings and other structures on the Premises without consent of Landlord and without increased insurance requirements," and that "the Lease does not govern: (a) the rate of development on the Premises; (b) whether or not development should occur at all; or (c) the placement of any development that Tenant undertakes."

The interpretation of the lease between GFS and Bayridge, including whether the lease allows GFS to construct a gas fueling station on Bayridge's property without the consent of Bayridge, is now before the Circuit Court. Relief sought by declaratory judgment necessarily involves an ongoing controversy. GFS is alleging that a controversy exists over the interpretation of the lease and is seeking to have the Circuit Court interpret the lease as not requiring that GFS must have the consent of Bayridge in order to proceed with construction of the gas fueling station, assuming final adjudication of the special exception application by the Board of Appeals in its favor. At the same time, in the administrative proceeding before the Board of Appeals, GFS maintains the same position with regard to interpretation of the lease.

It is the opinion of the Board of Appeals that the filing of the Complaint in the Circuit Court for a declaratory judgment on the interpretation of the very lease provision that the Board of Appeals would have to interpret in the remand hearing in order to make a determination on the special exception application affords jurisdiction over the matter to the Circuit Court.<sup>3</sup> Without a declaration from the Circuit Court regarding the rights and liabilities of GFS and Bayridge regarding the lease and the use of the property that is involved in the special exception application, the Board of Appeals cannot proceed. To do so would create a situation where the Board of Appeals would have to make legal conclusions and findings of fact as to whether paragraph 3 of the lease between GFS and Bayridge does or does not permit GFS to use the leased premises for approved construction of a gas fueling station as it alleges in the Complaint and whether GFS does or does not need the consent of Bayridge to proceed with construction if approved by grant of a special exception.<sup>4</sup> These legal conclusions and factual determinations are now exclusively within the jurisdiction of the Circuit Court.

The Board of Appeals, under these circumstances, will postpone the remand hearing on May 15, 2013 and make a further determination regarding the conduct of remand proceedings after final adjudication of the Complaint in the Circuit Court, and it is so ordered this 15<sup>th</sup> day of May, 2013.

  
Christian E. Zazzali, Chairman

<sup>3</sup> This issue of the interpretation of the lease with regard to the use of the property on which the gas fueling station is proposed to be constructed was not before the Board of Appeals when the Board of Appeals originally approved the special exception application.

<sup>4</sup> The Board of Appeals notes that this Order is limited to the specific facts of this case where a special exception applicant is a tenant whose landlord disputes that the leased premises may be used for the specific use that is sought by the tenant in a special exception application.