

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:**  
**KEMP MILL BEER AND WINE**

Applicant

Satyendra Kunwar  
 Paula Constantine  
 David Widner  
 Jay Platko  
 Bharati Kunwar

For the Application

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OZAH Case No. CU 16-13

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Before: Lynn A. Robeson, Hearing Examiner

**HEARING EXAMINER'S REPORT AND DECISION**

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## I. STATEMENT OF THE CASE

Filed on May 18, 2016, Kemp Mill Beer and Wine seeks approval of an application to operate a light vehicle rental facility, outdoors, under Section 59-3.5.12.C. of the Montgomery County Zoning Ordinance.<sup>1</sup> The business lies within an existing shopping center zoned NR-0.75 H-45, or "Neighborhood Retail."<sup>2</sup> With its application, the Applicant filed a "site map with legend" that did not contain all of the information required by the Zoning Ordinance for a conditional use application. Exhibit 16. At the request of Staff, the Applicant filed a revised site plan prepared by a professional engineer. Exhibit 38(b). During the course of review by Staff of the Montgomery County Planning Department (Staff), the Applicant also requested a waiver of the minimum number of parking spaces required. Exhibit 42. OZAH issued a Notice of Motion to Amend the application and a Notice of Public Hearing on September 16, 2016. The Notice of set the hearing for October 17, 2016, and included notice of the Applicant's request for a parking waiver. Exhibit 49.

Staff issued its report recommending approval of the application on September 16, 2016. Exhibit 50. Staff's recommendation included several conditions on the approval (Exhibit 50, p. 2):

- 1) The Applicant may rent out no more than 21 vehicles or pieces of hauling equipment.
- 2) The following vehicles, classified as "Heavy Commercial" in Section 59-1.4.2. of the Zoning Ordinance are prohibited:
  - Greater than 10,000 pounds gross vehicle weight;
  - Rated by the manufacturer with a load capacity of more than one ton;
  - 21 feet long or longer, measured from the extremes of the vehicle, including any object on the vehicle;

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<sup>1</sup> All citations are to the 2014 Montgomery County Zoning Ordinance, as amended.

<sup>2</sup> 0.75 represents the floor area ratio (FAR) permitted on the shopping center property under the 2014 Zoning Ordinance. "H-45" indicates the permitted height.

- More than 8 feet high, with properly inflated tires, measured from the ground to the highest part of the vehicle, including any racks but excluding antennas.
- 3) Vehicles and equipment must be stored in the parking area on the west side of the Shopping Center, or to the rear (north) of the Shopping Center.
  - 4) The vehicle rental parking area in the rear of the Shopping Center must be striped as indicated in the conditional use plan.
  - 5) The signage on the front window of Kemp Mill Beer and Wine Store must be brought into conformance with Section 6.7.9. of the Zoning Ordinance, or the applicant must obtain a sign variance.
  - 6) Vehicles and equipment must not be parked in the main Shopping Center parking lot.
  - 7) Trailers and hitches must be stored in the parking spaces in the rear of the Shopping Center.

The Planning Board recommended approval of the application with the conditions recommended by Staff. Exhibit 51.

OZAH's public hearing proceeded as scheduled on October 17, 2016. Mr. Kunwar, the owner of the U-Haul rental business and the beer and wine store, testified that he adopted the findings and conclusions of the Staff Report as his own testimony, with one exception. T. 5. He believed that the U-Haul rental trucks that are 10-feet high are permitted for a light vehicle rental facility. He disagreed with Staff's conclusion that these were heavy vehicles prohibited by the Zoning Ordinance. He submitted a Certificate of Use and Occupancy for a different U-Haul facility, which he believes supports this argument. T. 7. He has been operating the U-Haul business for approximately 18 years, and this issue had never been raised. T. 8. He also testified that it would be a great financial hardship for him if he is unable to rent the 10-foot trucks, which are his most popular rentals. T. 9. Mrs. Kunwar also testified as to the hardship, and several neighbors supported his position. T. 17-20. Mr. Jay Platko, a representative of U-Haul, testified that he will work with Mr. Kunwar to ensure he meets all applicable Code requirements, including the height of the rental trucks. T. 22. He testified that he had worked with the Department of Permitting Services to obtain a certificate of occupancy for a different light vehicle rental facility. According to Mr. Platko, he believes that DPS measured the height at that time. He is going to check again

the height of the trucks operated by Mr. Kunwar to make sure they do not exceed eight feet in height. T. 24. He also testified that Mr. Kunwar's gross income has dropped dramatically with the limitation on the height of the vehicles. T. 28. Even with the drop, however, Mr. Platko testified that there is a need for the facility in the area, due to the facility's convenient location in a shopping center with other neighborhood-serving retail uses. The nearest facility is 4 to 5 miles away in another direction. T. 28-29.

For the reasons that follow, the Hearing Examiner finds that the testimony and evidence in the record support a finding that the application meets all of the standards of the Zoning Ordinance, with the conditions of approval listed in Part IV of this Report.

## II. FACTUAL BACKGROUND

### A. Subject Property

Kemp Mill Beer and Wine is located at 1339 Lamberton Drive in Silver Spring, approximately 330 feet north of the intersection of University Blvd. (Md. 193) and Arcola Avenue. It is generally east of Georgia Avenue (Md. 97) and north of University Boulevard. A vicinity map from the Staff Report shows the general location of the store (Exhibit 50, p. 3, on the following page.)

Staff advises that the business is located within an existing shopping center with access from the western terminus of Lamberton Drive. The center is comprised of a 6.5-acre parcel, described as Part of Parcel A Kemp Mill Shopping Center. It is irregularly shaped parcel with a generally flat grade. *Id.* at 2. The property can be accessed by vehicles only from Lamberton Drive. There are two points of pedestrian access: (1) one from a sidewalk along Lamberton Drive that connects Arcola Avenue with the walkway in front of the shopping center, or (2) from a paved trail that connects the parking lot to Sligo Creek trail. *Id.*

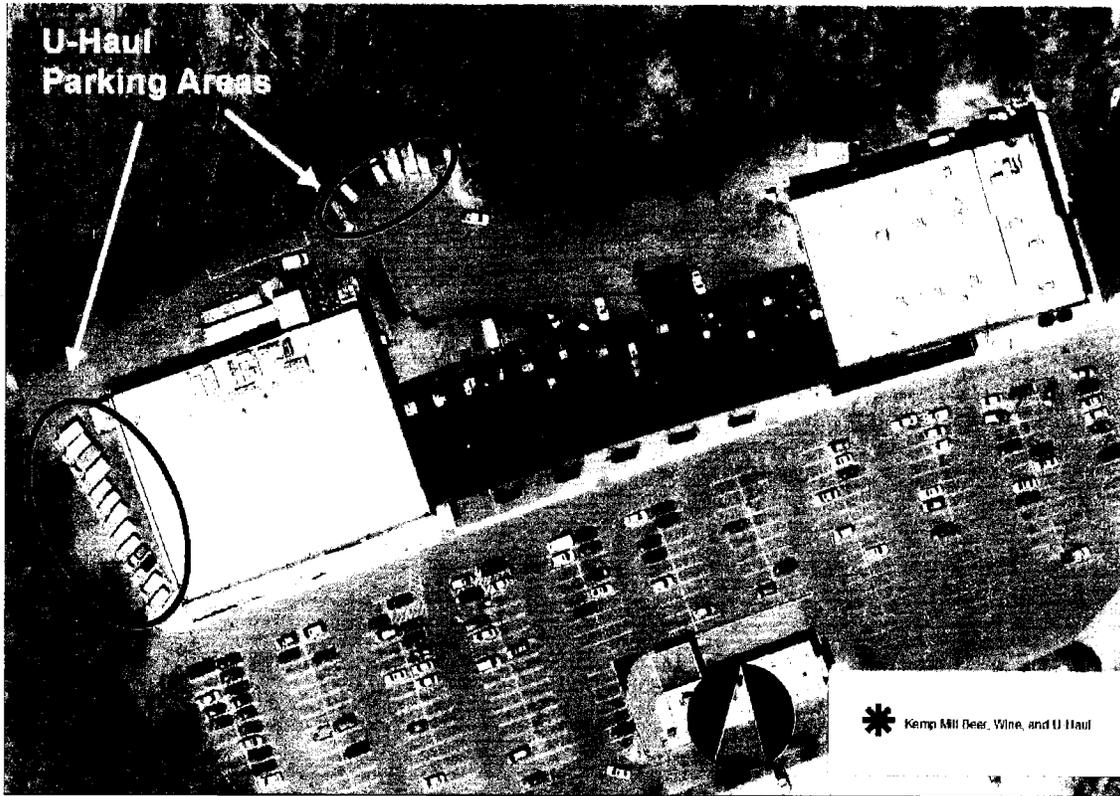


**Map of General Vicinity  
Exhibit 50, p. 3**

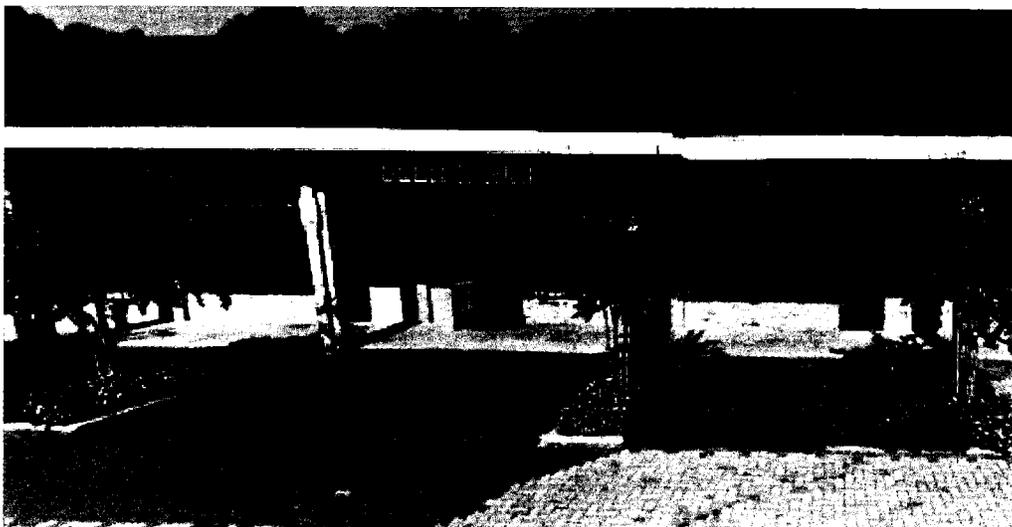
The existing Kemp Mill Shopping Center consists of approximately 59,229 square feet of retail space built in 1970. Before July 15, 2014, the property was zoned C-2.<sup>3</sup> A large surface parking lot covers most of the remainder of the site. *Id.* The Applicant’s business (i.e., the combined beer and wine store and U-Haul rental) occupies 1,300 square feet roughly in the middle of the shopping center. The store front contains a sign advertising the light vehicle rental business. Rental vehicles and equipment are parked on the western and northern sides of the shopping center. The western end of the center houses a large grocery that is closed on Saturdays. The Staff Report includes an aerial photograph of the existing shopping center, showing the approximately location

<sup>3</sup> On July 15, 2014, the District Council adopted Resolution 17-1166, approving District Map Amendment (DMA) G-956. The DMA implemented comprehensive revisions to the Zoning Ordinance that were effective on October 29, 2014. The former C-2 Zone was eliminated from the Zoning Ordinance, and the property was rezoned to the Neighborhood Retail (NR) Zone.

of Kemp Mill Beer and Wine (Exhibit 50, p. 5, below) within the shopping center, as well as the storage locations for rental vehicles and equipment:



Photographs of the store front, included in the Staff Report (Exhibit 50, p. 4) are shown below and on the following page:



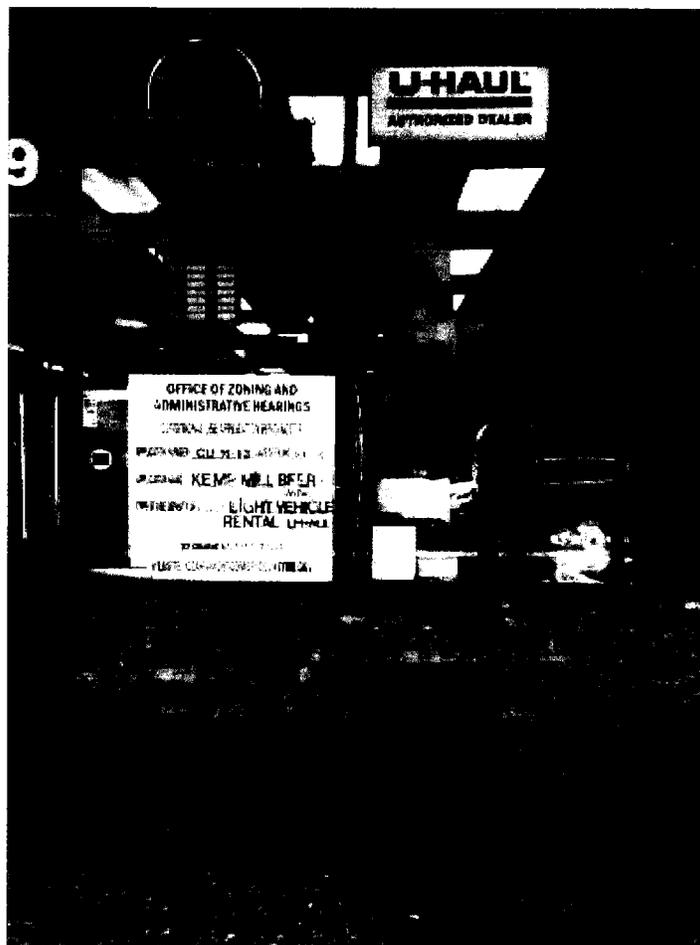
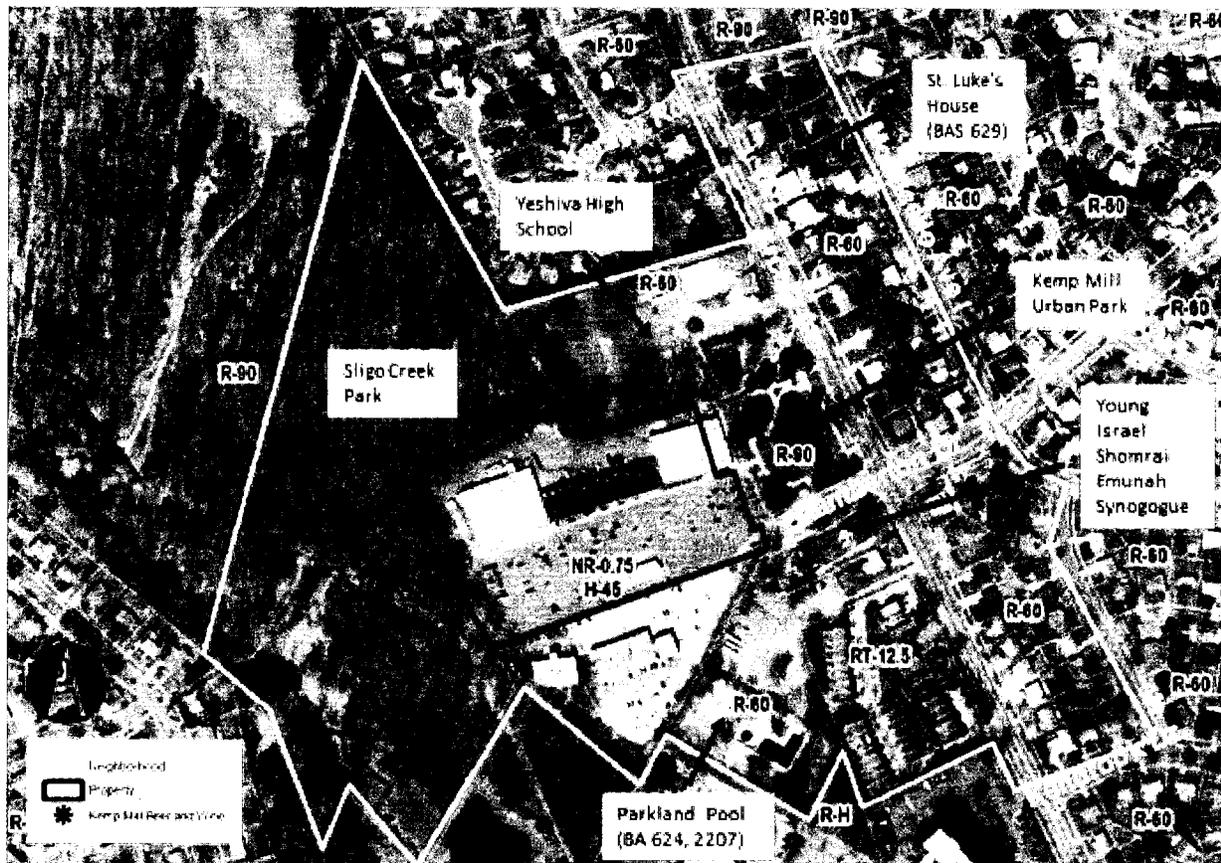


Photo of Storefront Signage  
Exhibit 50, p. 4

### **B. The Surrounding Area**

In conditional use cases, the area that will be most directly impacted by the use is defined in order to evaluate the compatibility of the proposed use with the neighborhood. In this case, Staff defined the surrounding area as bounded by Kersey Road and the northern lot line of Yeshiva High School to the north, Monticello Avenue to the east, Kenbrook Drive and various property lines to the south, and the western lot line of the Sligo Creek Park parcel located adjacent to the Property to the west. An aerial photograph showing the boundaries of the neighborhood, as delineated by Staff, is shown on the next page (Exhibit 50, p. 6).



Staff Delineation of the  
Surrounding Area  
Exhibit 50, p. 6

Staff advises that the character of the neighborhood is diverse and varied:

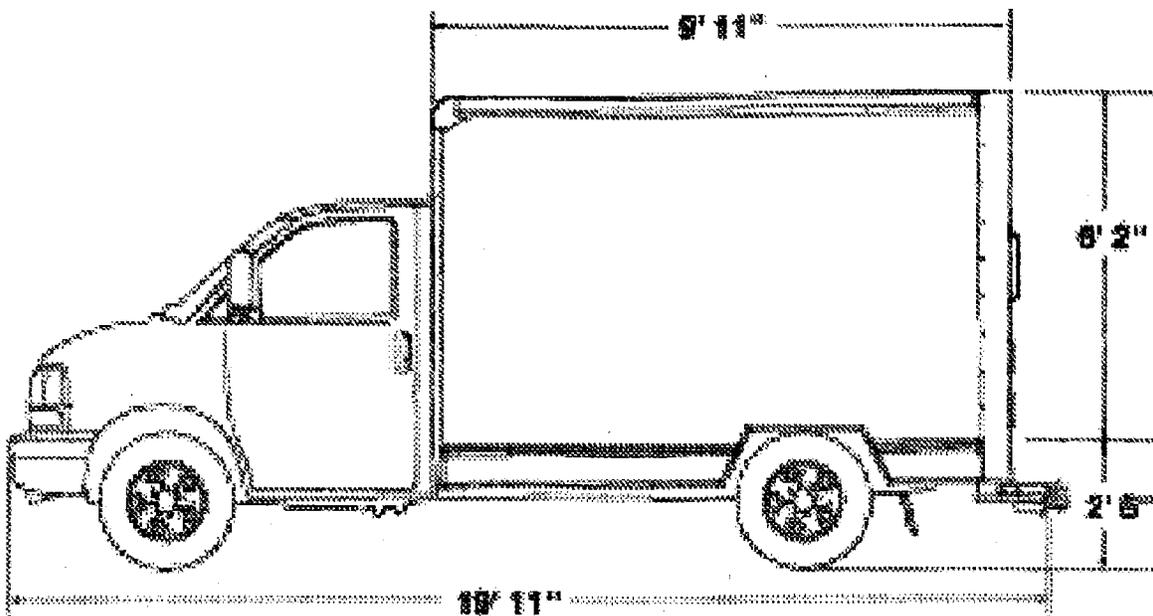
The neighborhood has a diversity of uses including a variety of neighborhood retail stores, restaurants, office buildings, two parks, several institutional uses, detached homes, and townhomes. The Kemp Mill Shopping Center complex is surrounded by the M-NCPPC's Sligo Creek Park to the north and west, the M-NCPPC's Kemp Mill Urban Park to the east, and the Parkland Pool Association and the young Israel Shomrai Emunah Synagogue to the southeast.

The neighborhood includes two other approved conditional use/special exceptions. The Parkland Pool, a community swim club located at 1124 Arcola Avenue, was approved in 1967 (BA 624, 2207), and St. Luke's House, a group home, was approved in 1978 at 1121 Arcola Avenue (BAS 629).

### C. The Proposed Use

The Applicant proposes to continue his existing businesses, which includes both the liquor store (permitted by right) and the U-Haul rental facility. For the rental facility, Mr. Kunwar

proposes to rent 21 U-Haul vehicles, including four cargo vans, one pick-up truck, eight 10-foot trucks and eight trailers. Exhibit 50. Accessory equipment includes furniture pads and hand trucks. Mr. Kunwar testified that all vehicles fall within the Zoning Ordinance category of "light vehicles" because they are under 10,000 lbs. gross vehicle weight (GVW). He submitted diagrams of the vehicles provided by U-Haul. The diagrams include one truck that he currently rents, shown below, which measures more than 8-feet in height. Exhibit 10:



1. *Operations.* Three employees work for both the beer and wine store and the light vehicle rental facility. The hours of operation are 7:00 a.m. to 7:00 p.m., 7 days a week. Upon request, Mr. Kunwar will allow customers to rent vehicles earlier than 7:00 a.m. While the liquor store stays open until 9:00 pm, Mr. Kunwar does not rent vehicles after 7:00 pm because there is only one employee in the store from 7:00 p.m. to 9:00 p.m. Customers who return vehicles after 6:00 p.m. are instructed drop keys in a key box located behind the store and may park in the designated

parking areas. Currently, the Applicant rents approximately 50-60 vehicles a week. The busiest times of the week are Saturday and Sunday mornings.

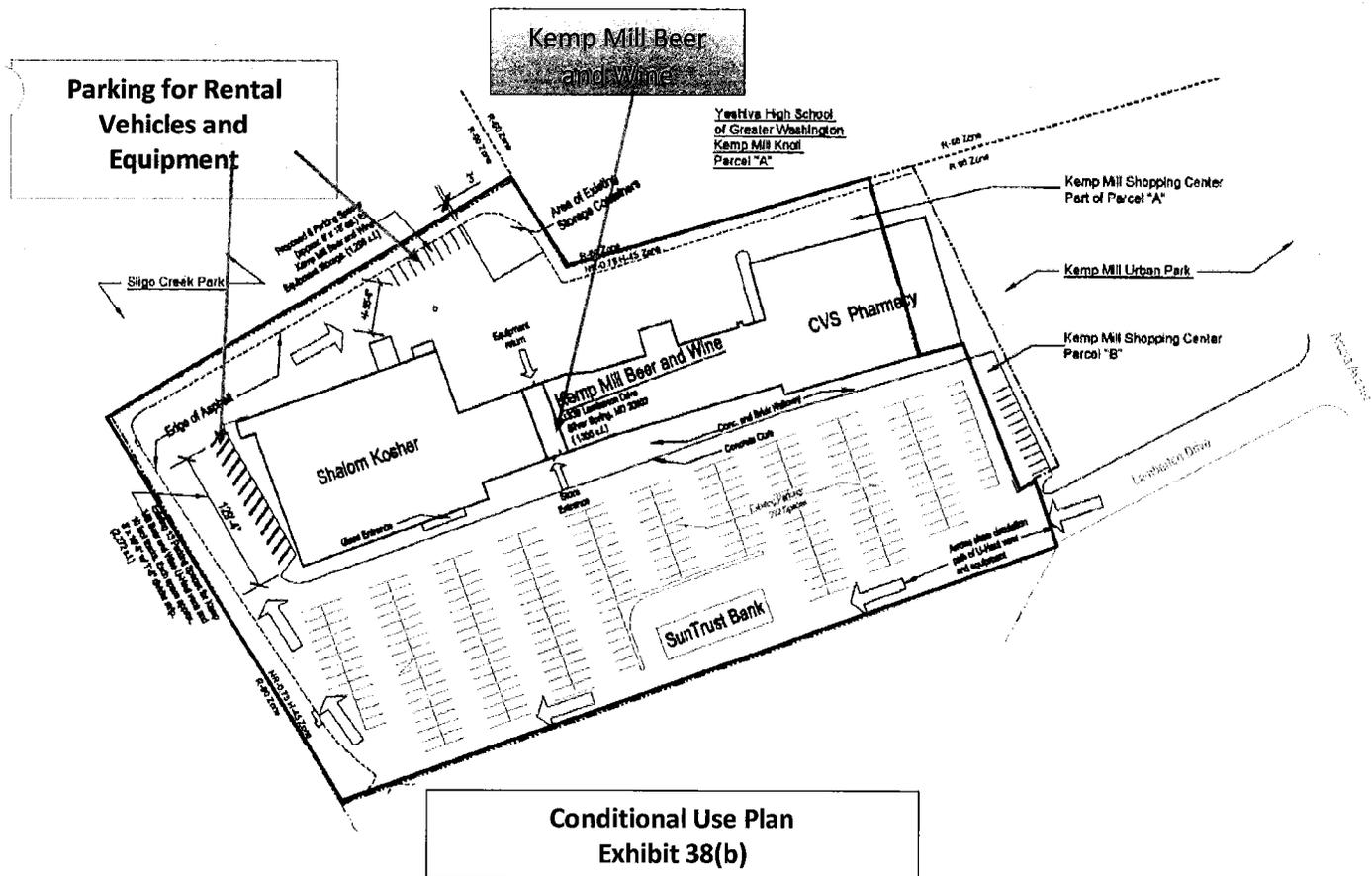
Customers rent vehicles by entering the store to complete the rental contract. A staff member walks the client out the back door and across the drive aisle to reach vehicles in the rear. The staff person may go out the front door and around the corner to reach vehicles parked on the west side of the shopping center. Storage of the vehicles will continue to be along the western and northern sides of the shopping center. At the suggestion of Staff, Mr. Kunwar agreed to stripe the parking spaces to aid circulation and ensure that vehicles are parked in one of the approved locations. The conditional use plan (shown on the following page) shows the store's location within the shopping center, spaces for customer parking, and the location of vehicle/equipment parking.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a particular type of use, as set forth in Article 59-3 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), as set forth in Division 59-7.3 of the Zoning Ordinance. The specific standards applied in this case are those for a light vehicle rental facility in 59-3.5.12.C. of the Zoning Ordinance. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

#### **A. Necessary Findings (Section 59-7.3.1.E)**

The general findings necessary to approve a conditional use are found in Section



59-7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner's findings for each standard, are set forth below:<sup>4</sup> The major topics of discussion are further divided under the following headings:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood
5. Need for a Light Vehicle Rental Facility

***E. Necessary Findings***

***1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:***

- a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;***

<sup>4</sup> Although §59-7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59-7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59-7.3.1.E.1. contains seven subparts, a. through g.

Conclusion: Staff was unable to obtain a record of the original approval for the Shopping Center, which was built in 1970. Exhibit 50, p. 4. It is reasonable to presume that such a large development was constructed with the permits required and in the manner required at the time. Having no evidence to the contrary, the Hearing Examiner finds that this standard has been met.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;***<sup>5</sup>

Conclusion: This subsection normally requires an analysis of the standards of the NR 0.75 H-45 Zone contained in Article 59-4; the use standards for a light vehicle rental facility (outdoors) contained in Article 59-3; and the applicable development standards contained in Article 59-6. The conditional use plan proposed here is not subject to all of the requirements of Articles 59-4 and 59-6 because the property was constructed before the comprehensive changes to the Zoning Ordinance in 2014. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 61, p. 1), that the application satisfies the Zoning Ordinance requirements for the use.

### **1. Substantial Conformance with the Master Plan**

***c. substantially conforms with the recommendations of the applicable master plan;***

Conclusion: The property lies within the geographic area covered by the *2001 Kemp Mill Master Plan* (Master Plan or Plan.) Staff concluded that the use conforms to the Master Plan for several

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<sup>5</sup> The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015). The Hearing Examiner advised the parties of this amendment to the Zoning Ordinance and that the changed language would apply to this case. He also gave the parties an opportunity to comment. Tr. 12/3/15 12-13; Tr. 12/7/15 9. To the recollection of the Hearing Examiner, no party objected to applying the amended Zoning Ordinance language to this case.

reasons. The Plan recognized “that a neighborhood commercial center should serve as a focal point or center for the surrounding residential neighborhoods.” *Plan*, p. 17. In particular, the Master Plan recognized that the Kemp Mill Shopping Center fulfilled this role for the surrounding community (*Plan*, p. 24):

The commercial activities of the Kemp Mill Shopping Center, the public amenities of the Kemp Mill Urban Park, and the adjacent medium and high-density residential development of townhouses and apartments collectively function as a town center.

The Master Plan contains recommendations for development if and when the center redevelops. As the center is not proposing redevelopment, these are inapplicable to this case. Exhibit 50, p. 9.

Staff concluded that the U-Haul rental facility substantially conforms to the Master Plan (Exhibit 50, p. 9):

The proposed U-Haul facility is consistent with the Plan’s vision of a neighborhood commercial center. The vehicles and equipment are of an appropriate size and scale (limited to vans and pick-up trucks by Staff’s recommended conditions of approval) to be used by community members and small businesses. The vehicles and equipment will be stored out of sight, and they will not detract from the neighborhood retail experience of the Shopping Center.

The support for the business demonstrated at the public hearing underscores the fact that the business fulfills a role in the community similar to other retail uses in the existing center. The Hearing Examiner finds that the proposed business substantially conforms to the standards of the Master Plan.

*d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;*

Conclusion: Staff believes that this standard has been met for reasons similar to those supporting compliance with the Master Plan. A light vehicle rental facility is a neighborhood-serving retail use similar to others in the shopping center. Staff points out that the existing shopping center

screens the vehicle storage from view of the outdoor rental vehicles because the side and rear locations are adjacent to parkland. Exhibit 50, p. 14. The Hearing Examiner finds that the application meets this standard.

*e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;*

Conclusion: There are two conditional uses in the defined neighborhood. The Parkland Pool is located just south of the shopping center in the R-60 Zone. St. Luke's house, a group home, is located to the north east on Arcola Avenue. Staff determined that adding a third conditional use in at this location would not adversely affect the residential character of the neighborhood because it is located in a commercial area, and is not a residential use. The Hearing Examiner agrees, and further notes that the commercial use is of a type similar to the other retail uses in the center. As noted above, the use conforms to the recommendations of the Master Plan.

## 2. Adequate Public Services and Facilities

*f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:*

*i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or*

***ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and***

Conclusion: Because a preliminary plan is not required for the application, the Hearing Examiner must find that there are adequate public facilities to serve the use. Staff concluded that there will be no additional burden on schools, police and fire protection, water, sanitary sewer and storm drainage because the Applicant is not adding to the center's existing building area or existing paving. Exhibit 50, p. 15. Therefore, the public infrastructure and agencies currently serving the center (other than the roads) will accommodate the use. Having nothing in the record to the contrary, the Hearing Examiner so finds.

The Hearing Examiner's findings regarding transportation facilities are governed by the Planning Board's Guidelines for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013.

The LATR test projects the impact of trips to be generated by the proposed development during weekday peak periods, taking into account existing development and developments that are approved, but not yet built. Applications that are expected to generate fewer than 30 trips are exempt from LATR review, but must submit a "Traffic Exemption Statement" to demonstrate that the number generated by the proposal will be under 30-trip maximum. *Guidelines*, p. 3.

The Applicant's Traffic Exemption Statement (Exhibit 7) states that, on average, the business generates 3 peak hour trips during the weekday morning peak period and 2 trips in the evening peak period. The morning peak period occurs on weekdays between 6:30 a.m. and 9:30 a.m. The evening period is between 4:00 p.m. and 7:00 p.m. on weekdays. The Statement indicates that most trips occurs between 9:30 a.m. and 12:30 p.m. on weekends. These weekend

trips are not counted for the purpose of LATR because they do not occur during the week days. Based on this evidence, Staff concluded that the vehicle rental facility will generate fewer than 30 trips during the weekday peak periods. Exhibit 50.

TPAR tests the adequacy of transit facilities within a defined area. If transit is deemed inadequate, the applicant is required to pay a tax to fund additional facilities. The tax rate is based on new square footage. *Montgomery County Code*, §52-39. No tax is owed on this application because the Applicant does not propose to add more floor area to the existing shopping center.

Based on this evidence of record, the Hearing Examiner finds that the Applicant is exempt from LATR and TPAR tests.

### **3. No Undue Harm from Non-Inherent Adverse Effects**

*g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:*

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use

or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects are a sufficient basis to deny a conditional use, alone or in combination with inherent effects, if the harm caused by the adverse effects would be “undue.”

Technical Staff listed the following physical and operational characteristics that are necessarily associated with (*i.e.*, inherent in) a light vehicle rental facility (Exhibit 50, p. 15):

- 1) The physical presence of rental vehicles and associated parking facilities;
- 2) Lighting associated with the building; and
- 3) Physical activity and traffic associated with employees and patrons traveling to and from the site.

Staff determined that the use as proposed at this location has no non-inherent impacts on the surrounding area, with the conditions proposed. Exhibit 50, p. 16.

The Hearing Examiner notes that Applicant does not propose any changes to the existing shopping center. The visual impacts of the use (*i.e.*, outdoor parking of vehicles and equipment) are located adjacent to Sligo Creek Park and are screened by the building from most pedestrian and vehicular traffic. The Hearing Examiner agrees with Staff that there are no non-inherent impacts from the use that would adversely affect the neighborhood. Because there are no non-inherent impacts, this standard has been met.

#### **4. Need for a Light Vehicle Rental Facility**

Section 59-7.3.1.E.5 of the Zoning Ordinance requires a finding that there is a need for the facility in the area:

The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

- a. Filling Station;
- b. Light Vehicle Sales and Rental (Outdoor);
- c. Swimming Pool (Community); and

d. the following Recreation and Entertainment Facility use: swimming pool, commercial.

Sales data from U-Haul shows that between January 1, 2016, and March 28, 2016, the Applicant averaged 100 rentals per week. Exhibit 6. The preceding four weeks, the business averaged 46 rentals per week. Exhibit 6.

Staff advises that no other light vehicle rental facilities are located in the defined neighborhood. Exhibit 50, p. 16. Mr. Kunwar asserts that there is a need for the business because no other light vehicle rental facilities open before 9:00 a.m. within a radius of six to seven miles. *Id.* Staff disagrees with Mr. Kunwar's position. Based on internet research, Staff concluded that there are 10 truck rental businesses within the seven-mile radius open before 9:00 a.m. most days. On Saturdays, five out of the ten open before 9:00 a.m. On Sundays, however, Staff reports that only three are open before 9:00 a.m. The closest of the three is located over five miles away. *Id.*

Staff found that there was a need for the facility for the following reasons (Exhibit 50, p. 17):

Although Staff research does not support the Applicant's statement about the similar businesses within the defined seven-mile radius, it appears that the Kemp Mill Beer and Wine store offers vehicle rentals earlier than most of the other similar businesses in the general vicinity on Sundays. Given the nature of this business, Staff finds that a need exists in the general neighborhood for a vehicle rental service that opens early on both weekend days. In addition, the sales data (and the evidence of 46 to 100 rentals per week), along with the petition signed by 100 community members and business owners, provides evidence that the need exists at this location for a light vehicle rental business.

Conclusion: The Hearing Examiner finds that the sales data adequately supports a need for the facility at this location, regardless of whether other facilities open before 9:00 a.m. Staff's conclusion that it is one of the few facilities open early on Sunday further supports a finding of need. Nor is there evidence that prohibiting trucks more than 10 feet high will reduce the need significantly. Mr. Platko, the U-Haul representative, testified that there would be a need for the

facility even with a restriction on the size of the trucks. He believes that the facility's location in the main commercial center for the surrounding area provides a level of convenience that will continue the demand for the facility. T. 27-28.

The support from the community (evidenced by a petition) relied on by Staff, is too anecdotal to be persuasive in determining whether a need exists. The sales data, the early Sunday hours, and the convenient location do provide sufficient evidence to find that a need exists for this facility at the proposed location.

### **B. Development Standards of the Zone (Article 59-4)**

Normally, in order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the current (NRT) zone, contained in Article 59-4 of the Zoning Ordinance. Because the shopping center existed before the current Zoning Ordinance was adopted, the setbacks, density, parking, and other physical features may be grandfathered under §7.7.1.A.1 of the Zoning Ordinance:

#### **1. Structure and Site Design**

A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential, Employment, or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones.

Conclusion: "Site design" is defined in the Zoning Ordinance as "[t]he external elements between and around structures that give shape to patterns of activity, circulation, and form. Site design includes landforms, driveways, parking areas, roads, sidewalks, trails, paths, plantings, walls or fences, water features, recreation areas and facilities, lighting, public art, or other external elements." Thus, existing physical improvements need not meet the requirements of the current Zoning Ordinance.

The Hearing Examiner agrees with Staff that the development standards of the NR Zone do not apply to the proposed use because the existing shopping center is grandfathered under Section 59-7.7.1.A of the current Zoning Ordinance.

**C. Use Standards Specific to an Outdoor Light Vehicle Rental Facility (§7.5.12.C.)**

The specific use standards for approval of a residential care facility are set out in Section 59-7.5.12.C. of the Zoning Ordinance.

**1. Defined**

***Light Vehicle Sales and Rental (Outdoor) means the sales, rental, or leasing of light equipment and vehicles, including vehicles for hauling and moving, outside of a building. Light Vehicle Sales and Rental (Outdoor) includes the repair of vehicles and equipment for sale, rent, or lease as an incidental use if conducted indoors. Light Vehicle Sales and Rental (Outdoor) includes outdoor storage of vehicles for sale, and an accessory car wash for vehicles and equipment for sale, rent, or lease.***

Conclusion: One of major issues in this case is whether the Applicant may rent U-Haul trucks measuring more than 8 feet in height. The U-Haul truck specifications submitted by Mr. Kunwar lists the height of one of the rental vehicles at almost 10 feet. Exhibit 10. Staff concluded that this truck did not meet the definition of "Light Vehicle" in the Zoning Ordinance because the Zoning Ordinance defines "Heavy Vehicles" as:

Commercial Vehicle, Heavy: Any motor vehicle, tandem axle trailer, or semi-trailer used for carrying freight or merchandise, or used in any commercial enterprise that is:

1. greater than 10,000 pounds gross vehicle weight;
2. rated by the manufacturer with a load capacity of more than one ton;
3. 21 feet long or longer, measured from the extremes of the vehicle, including any object on the vehicle; or
4. more than 8 feet high, with properly inflated tires, measured from the ground to the highest part of the vehicle, including any racks but excluding any antennas...

The Zoning Ordinance does not permit the rental of heavy vehicles in the NR Zone. *Zoning Ordinance*, §59-3.1.6.

Mr. Kunwar believes that trucks higher than 8 feet are permitted for a light vehicle rental facility (outdoors.) In support of his position, he submitted a Certificate of Use and Occupancy issued for another U-Haul facility at 14 Randolph Road in Silver Spring, Maryland. Exhibit 22(a). The Certificate contains a handwritten note, "10 ft. truck meets the standard for light commercial vehicle." *Id.* A representative of the Department of Permitting Services (DPS) signed the Certificate. Planning Staff advises that when it contacted DPS, DPS indicated that the notation referred to the length of the truck, rather than the height. Exhibit 50, p. 7.

Without more support in the record for Mr. Kunwar's position (i.e., that light vehicles include 10-foot high trucks), the Hearing Examiner must agree with Staff that vehicles above 8 feet tall are prohibited. The definition of "Heavy Vehicles" contain very clear measurements that aren't subject to different interpretations. The Use and Occupancy Certificate issued by DPS is somewhat ambiguous because it does not specify whether the notation refers to the truck's height or length. For this reason, the Hearing Examiner imposes the condition of approval recommended by Staff prohibiting trucks that meet the definition of "heavy vehicle."

## **2. Use Standards**

***a. Where Light Vehicle Sales and Rental (Outdoor) is allowed as a limited use, and the subject lot abuts or confronts a property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use, it must satisfy the following standards:***

***i. Access to the site from a street with a residential classification is prohibited.***

***ii. Vehicles must be stored or parked only on a hard surface that is constructed of material resistant to erosion, is adequately treated to prevent dust emission, and is surrounded by a raised curb. The parking and storage area must be set back 15 feet from any right-of-way, 15 feet from any lot line abutting land in an***

***Agricultural, Rural Residential, or Residential Detached zone, and 3 feet from any other lot line.***

***iii. There must be a minimum of 20 feet between access driveways, and all driveways must be perpendicular to the curb or street line.***

***iv. When such use occupies a corner lot, an access driveway is prohibited within 20 feet from the intersection of the rights-of-way and cannot exceed 30 feet in width.***

***v. Product displays, parked vehicles, and other obstructions, which would adversely affect visibility at intersections or to driveways, are prohibited.***

***vi. In the CRT zone, site plan approval is required under Section 7.3.4.***

Conclusion: Technical Staff reports (Exhibit 50, p. 12):

Light Vehicle Sales and Rental is a conditional use allowed in the NR Zone. The use standards under Section 3.5.C.2 apply only if "the subject lot abuts or confronts a property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use." Some of the lots that abut the subject property are in a Residential Detached zone, but they are not vacant or improved with an agricultural or residential use, so the use standards do not apply to this Application.

Staff correctly points out that some of the residentially zoned property adjacent to the north and west of the shopping center is devoted to recreational, rather than residential, use. While technically, the land is vacant, the Hearing Examiner agrees that the limited use standards should not apply because it is devoted to park use. The purpose of the protection for residentially-zoned vacant parcels is to protect the residential uses that may be developed there. When the residentially-zoned vacant parcel is devoted to a recreational use, this purpose is not applicable.

The balance of the residentially-zoned properties adjacent to the use are either institutional (i.e., Yeshiva High School) or recreational (i.e., Parkland Pool and Kemp Mill Urban Park). As neither is improved with a residential use, the Hearing Examiner finds that the limited use standards are not applicable to this application.

**c. Where Light Vehicle Sales and Rental (Outdoor) is allowed as a conditional use, it may be permitted by the Hearing Examiner under all applicable limited use standards, and Section 7.3.1, Conditional Use.**

Conclusion: For the same reasons stated above, the Hearing Examiner finds that the limited use standards of §59-7.5.12.C.2 do not apply to this proposed use. The application must meet just the findings necessary for approval under §59-7.3.1.E, already addressed in Part III.A of this report.

#### **D. General Development Standards (Article 59-6)**

Article 59-6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs.

Technical Staff found that, because the Applicant does not propose any changes to the existing improvements (which are grandfathered), only two division of Article 59-6 apply to the proposed use. These include Division 6.2 Parking, Queuing and Loading and Division 6.7 Signs. Staff found (Exhibit 50, p. 13):

Because the Application does not propose any modifications to the existing building or the installation of any new outdoor lighting fixtures, Division 6.1 Site Access, Division 6.3 Open Space and Recreation, and Division 6.4 General Landscaping and Outdoor Lighting do not apply. The Property does not abut another property in an Agricultural, Rural Residential, or Residential zone that is vacant or improved with an agricultural or residential use, so the screening requirements in Division 6.5 do not apply. Division 6.6 Outdoor Storage does not apply to the outdoor sale, lease, or rental of motor vehicles and equipment as part of a properly allowed use.

##### **1. Parking Requirements**

Because Staff could not find the original approval of the shopping center, they were unable to determine the number of spaces initially approved for the center. Given that unusual situation, Staff applied the requirements of the new Zoning Ordinance to the existing uses on the site, including the light vehicle rental facility. Exhibit 50, p. 13. The Hearing Examiner agrees with this approach, as the basic question is whether parking is adequate, whether under the old or new

Codes.

Staff calculated that 325 spaces are required for all uses currently existing within the center.<sup>6</sup> The site plan (Exhibit 38(b)) shows that there are 279 spaces in both parcels of the shopping center. For the existing uses, 325 spaces are required. A chart prepared by Staff demonstrates how it calculated the required number of parking spaces (Exhibit 50, p. 13):

**Parking Required for the Kemp Mill Shopping Center and the office building on adjacent Parcel B**

<b>Use</b>	<b>Metric</b>	<b>Gross floor area</b>	<b>Number of spaces required</b>
Retail	5 spaces per 1,000 SF of Gross Leasable Area	57,760 sf	288
Office	2.25 spaces per 1,000 SF of Gross Leasable Area	8,600 sf	22
Restaurant	4 spaces per 1,000 SF for Patron Use	3,700 sf	15
		<b>279 spaces provided</b>	<b>325 spaces required</b>

**Parking Required for Proposed Use**

<b>Use</b>	<b>Metric</b>	<b>Square Footage</b>	<b>Number of spaces required</b>
Light Vehicle Rental	2.5 spaces per 1,000 sf of gross leasable area	1,300	4

Due to Staff's conclusion, the Applicant applied for a waiver of the minimum number of parking spaces, as permitted under §59-6.2.10 of the Zoning Ordinance. That section states:

The deciding body may waive any requirement of Division 6.2...if the alternative design satisfies Section 6.2.1. Any request for a waiver of the vehicle parking space requirement under Section 6.2.4.B requires application notice under Section 7.5.2.D.

The Applicant requests a waiver of the 4 spaces attributable to the rental facility. Staff

<sup>6</sup> Staff calculated the required parking based on the square footage of retail, office, and restaurant uses within the center. That information was provided by the management of the shopping center. Exhibit 50, p. 13.

supported the waiver for the following reasons (Exhibit 50, p. 13):

Staff supports a waiver of the four required spaces under Section 6.2.10 because the existing parking lot meets the intent of Division 6.2 to provide adequate parking in a safe and efficient manner. The Applicant indicates that the Shopping Center parking lot is relatively empty during the weekends, when the vehicle rental business is busiest, so the existing parking lot can accommodate the parking spaces required for the proposed use. Staff notes that some of the establishments in the Shopping Center, including the nearby grocery store, are closed on Saturdays.

Conclusion: Waiver of the minimum number of parking spaces may be approved under §59-6.2.10 of the Code if they meet the intent of the parking regulations. This intent is expressed in §6.2.1, which states:

The intent of the vehicle and bicycle parking, queuing, and loading requirements is to ensure that adequate parking is provided in a safe and efficient manner.

From the evidence before her, the Hearing Examiner finds that a waiver of 4 parking spaces will not affect the safety and efficiency of parking in the shopping center. The evidence demonstrates that the busiest time for the rental facility occurs when one of the biggest stores in the center (i.e., the grocery store) is closed. She has no evidence to contradict Staff's conclusion that other business in the center are closed on Saturday as well. For these reasons, the Hearing Examiner finds that a waiver of 4 of the required parking spaces will not affect the safety and efficiency of parking at the center.

## **2. Signage**

Division 59-6.7.9 of the Zoning Ordinance regulates signs in Employment Zones such as the NR Zone. Section 6.7.9.A.2.a states:

One sign is allowed for each customer entrance. A customer entrance includes, but is not limited to, a direct outside entrance to a shop or store, and a direct outside entrance to an enclosed mall or shopping center.

Staff advises that the Applicant currently has four signs on the front window of the store. As a result, Staff recommended a condition of approval requiring the Application to comply with

§59-6.7.9.A.2 or obtain a sign variance:

The signage on the front window of the Kemp Mill Beer and Wine Store must be brought into conformance with Section 6.7.9. of the Zoning Ordinance, or the applicant must obtain a sign variance.

Conclusion: Staff did not address whether the signs may be exempt from this requirement. Section 59-6.7.C.1 exempts signs that cannot be seen from neighboring properties from the requirements in §59-6.7.9.A.2:

C. The following signs do not require a permit and are exempt from the size, placement, and number requirements of Division 6.7, but must satisfy the prohibitions in Section 6.7.4, Prohibited Signs:

1. A sign that is not visible beyond the property lines of the property where the sign is located.

If the sign is not visible from the property line, which is a possibility here, it would be exempt from the requirement that only one sign be placed at each customer entrance. Unfortunately, from this record, the Hearing Examiner cannot determine this issue. The photographs in the Staff Report and the site plan suggest that the store frontage is not visible from the north or west. It may not be visible from the eastern property line. There remains, however, a stronger possibility that it would be visible from the southern property line of the shopping center, which adjoins a parking lot for another commercial center.

Because there is a possibility that the sign may not be visible from any property line, the Hearing Examiner rewords the condition recommended by Staff as follows:

If not exempt from the requirements of Division 59-6.7 of the Zoning Ordinance, the signage on the front window of the Kemp Mill Beer and Wine store must be brought into conformance with Section 59-6.7.9. of the Zoning Ordinance, or the applicant must obtain a sign variance.

#### **IV. Conclusion and Decision**

As set forth above, the application meets all the standards for approval in the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Kemp Mill Beer and Wine (CU 16-13) for a conditional use under Section 59-3.5.12.C. of the Zoning Ordinance to operate an outdoor light vehicle rental facility at 1339 Lamberton Drive, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by its testimony and evidence identified in this Report and Decision.
2. All operations and physical improvements shall conform to the approved conditional use plan (Exhibit 38(b)).
3. The Applicant may rent out no more than 21 vehicles or pieces of hauling equipment.
4. The following vehicles, classified as "Heavy Commercial" in Section 59-1.4.2. of the Zoning Ordinance are prohibited:
  - a. Greater than 10,000 pounds gross vehicle weight;
  - b. Rated by the manufacturer with a load capacity of more than one ton;
  - c. 21 feet long or longer, measured from the extremes of the vehicle, including any object on the vehicle;
  - d. More than 8 feet high, with properly inflated tires, measured from the ground to the highest part of the vehicle, including any racks but excluding antennas.
5. Vehicles and equipment must be stored in the parking area on the west side of the Shopping Center, or to the rear (north) of the Shopping Center.
6. The vehicle rental parking area in the rear of the Shopping Center must be striped as indicated in the conditional use plan.
7. If not exempt from the requirements of Division 59-6.7 of the Zoning Ordinance, the signage on the front window of the Kemp Mill Beer and Wine store must be brought into conformance with Section 59-6.7.9. of the Zoning Ordinance, or the applicant must obtain a sign variance.
8. Vehicles and equipment must not be parked in the main parking lot for the shopping center.
9. Trailers and hitches must be stored in the parking spaces in the rear of the shopping center.

10. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Issued this 10th day of November, 2016.



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Lynn A. Robeson  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59-7.3.1.F.1.c.

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

#### COPIES TO:

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