

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
STARBUCKS CORPORATION
 Applicant

Bradford Lee Fox
 Lisa Sunderland
 Michael Lenhart
 Ed Steere

For the Application

Stacey Silber, Esquire
 Attorney for the Applicant

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OZAH Case No. 17-06

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER’S REPORT AND DECISION

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I. STATEMENT OF THE CASE

Accepted for filing on October 10, 2016, Starbucks Corporation (Starbucks or Applicant) applied for a conditional use to operate a drive-thru restaurant under Section 59-3.5.14.E. of the 2014 Zoning Ordinance and the development standards of the C-2 Zone under the 2004 Zoning Ordinance.¹ The property is located at 15600 Old Columbia Pike, Burtonsville, MD. The property consists of a pad site of approximately 9,988 square feet in the Burtonsville Towne Square Shopping Center. The shopping center parcel is described as Parcel B, Burtonsville Shopping Center subdivision, consisting of approximately 26.25 acres in the CRT (Commercial Residential Town) 1.5 C-1.0 R-1.25 H-70 Zone.

On November 2, 2016, Starbucks filed a Motion to Determine Applicable Development and Zoning Standards. Exhibit 26. The Applicant sought a determination of whether the development standards of the C-2 Zone (under the 2004 Zoning Ordinance) or the development standards of the CRT Zone (under the 2014 Zoning Ordinance) applied to the physical improvements on the site. The proposed building and existing parking and drive-thru lane do not meet several of the requirements of the 2014 Zoning Ordinance, listed by Starbucks as follows (Exhibit 26):²

1. Section 59-4.1.7.B.2.b: This section prohibits locating a drive aisle within the “build-to” area of a lot. The Applicant proposes to locate the drive aisle within the build-to area.
2. Section 59-4.5.3.C.3: This section requires that (1) 70% of the building façade be located within the build-to area of the property, and (2) that the building be no more than 20 feet from the right-of-way. The proposed drive-thru restaurant does not meet these requirements.

¹Burtonsville Town Square, LLC was the original applicant in the case. As stated herein, Starbucks substituted itself as the Applicant after Burtonsville Town Square sold the shopping center. Exhibit 53.

² Unless otherwise noted, all citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, as amended.

3. Section 59-4.5.3.C.3: This Section requires that surface parking be located behind the front building line of the drive-thru restaurant.

According to the Motion, the property was zoned C-2 (under the 2004 Zoning Ordinance) when Planning Board approved a preliminary plan in 2006 for the shopping center. In 2013, after adoption of the Burtonsville Crossing Neighborhood Master Plan, the property was rezoned to the CRT Zone. The CRT Zone contained a provision permitting development with an approved preliminary plan to continue under the prior zoning. *2004 Zoning Ordinance*, §59-C-15.9(d). Thus, immediately before the current Zoning Ordinance was adopted, the owner of the shopping center could have continued development in accordance with the standards of the C-2 Zone. Exhibit 26.

The 2014 Zoning Ordinance did not explicitly incorporate the option to develop the property under the C-2 Zone. The applicable grandfathering provisions of the 2014 Ordinance provide (§59-7.7.1):

A. Existing Structure, Site Design, or Use on October 30, 2014

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.

* * *

B. Application Approved or Filed for Approval before October 30, 2014

1. Application in Progress before October 30, 2014

Any development plan, schematic development plan, diagrammatic plan, concept plan, project plan, sketch plan, preliminary plan, record plat, site plan, special exception, variance, or building permit filed or approved before October 30, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014, unless an applicant elects to be reviewed under the property's current zoning. Any complete Local Map Amendment application submitted to the Hearing Examiner by May 1, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014. If the District Council

approves such an application after October 30, 2014 for a zone that is not retained in Chapter 59, then the zoning will automatically convert to the equivalent zone as translated under DMA G-956 when the Local Map Amendment is approved. The approval of any of these applications or amendments to these applications under Section 7.7.1.B.1 will allow the applicant to proceed through any other required application or step in the process within the time allowed by law or plan approval, under the standards and procedures of the Zoning Ordinance in effect on October 29, 2014. The gross tract area of an application allowed under Section 7.7.1.B.1 may not be increased.

Starbucks argued that the drive-thru lane was exempt from the 2014 Zoning Ordinance standards because it had already been constructed (although the building had not) and therefore constituted “existing site design” grandfathered under §59-7.7.1.A.1.³ It also argued that the conditional use was a “step in the process” following the preliminary plan that could be grandfathered under §59-7.7.1.B.1.

OZAH issued Notice of the Motion to all those entitled to notice of the public hearing. Exhibit 32. The Hearing Examiner also requested comments from the Department of Permitting Services (DPS) and the Montgomery County Planning Department. Exhibit 34. Staff of the Planning Department (Staff or Technical Staff) submitted its comments on December 19, 2016, advising that the application should be reviewed under the use standards of the 2014 Zoning Ordinance (§§59-3.5.14.E. and 59-7.3.1.E.1 of the 2014 Zoning Ordinance) and the development standards of the C-2 Zone that existed in the 2004 Zoning Ordinance. Exhibit 39. DPS submitted its comments on December 23, 2016, advising that it believed the application should be reviewed under both the use standards and development standards of the C-2 Zone in the 2004 Zoning Ordinance. Exhibit 41.

³ “Site design” is defined in the 2014 Zoning Ordinance as, “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.” *2014 Zoning Ordinance*, §1.4.2.

The Hearing Examiner issued her Order Determining Applicable Development and Zoning Standards on December 28, 2016. Exhibit 43. She found that the use standards of the 2014 Zoning Ordinance and the development standards of the C-2 Zone (under the prior Zoning Ordinance) should apply to the application. She concluded that the parking area, curb, and drive-thru lane met the definition of “existing site design” used in §59-7.7.1.A. While the building itself was not grandfathered, the existing pad site necessarily determined the location of the building façade. Therefore, under the unique circumstances of this case, the building itself was grandfathered under the development standards of the C-2 Zone as well. Exhibit 43.

At the same time it issued the Order Determining Applicable Development and Zoning Standards, OZAH issued a Notice of Hearing for February 3, 2017. Exhibit 47. The Applicant submitted its pre-hearing statement on January 4, 2017, and Staff of the Montgomery County Planning Department (Staff or Technical Staff) issued its report recommending approval on December 30, 2016. Staff’s recommendation was subject to three conditions:

- 1) Operation of the drive-thru use is limited to that shown on the applicant’s site plans dated October 7, 2016.
- 2) Permitted hours of operation are seven days a week from 5:30 a.m. to 11:00 p.m.
- 3) The applicant shall conform to relevant conditions set forth in Preliminary Plan No. 12004109, or as such preliminary plan may be amended pursuant to Chapter 59 of the Montgomery County Code (Zoning Ordinance).

Staff later supplemented its report with an analysis on whether the physical improvements to the site met the standards of the C-2 Zone under the 2004 Zoning Ordinance. Exhibit 51. The Planning Board also recommended approval of the conditional use, subject to the conditions recommended by Staff. Exhibit 59.

The public hearing proceeded on February 3, 2017, as scheduled. Four witnesses testified on behalf of the Applicant: Mr. Bradford Fox, an expert in civil engineering and land development,

Ms. Lisa Sunderland, with SCM Consulting, on site operations, Mr. Michael Lenhart, an expert in transportation planning and traffic engineering, and Mr. Ed Steere, an expert in market analysis. Their testimony is summarized in this report where relevant. The record was held open until February 13, 2017, to permit the Applicant to update the Applicant's name on the conditional use plan, landscape plan, and lighting plan, if needed. Starbucks submitted a revised conditional site plan cover sheet, correcting the name of the Applicant, on February 10, 2017, and the record closed on February 13, 2017.

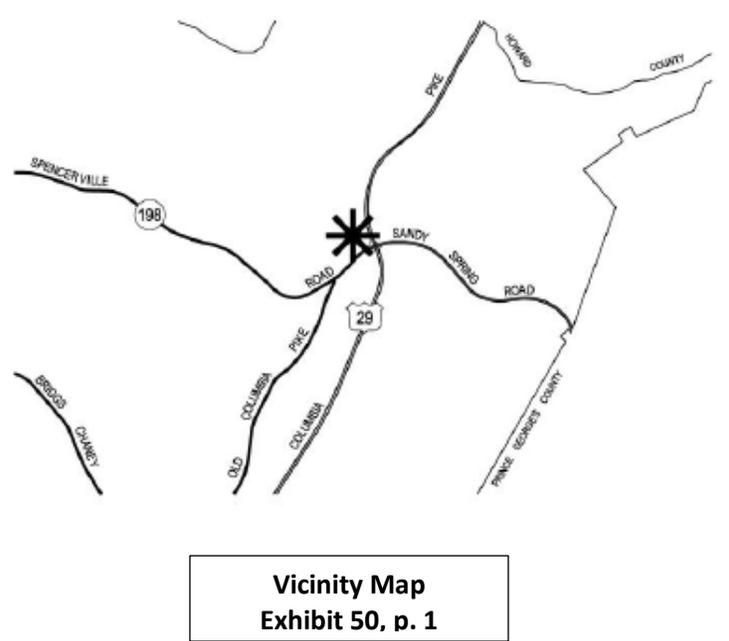
For the reasons that follow, the Hearing Examiner finds that the physical improvements to the site will meet the requirements of the C-2 Zone in the 2004 Zoning Ordinance, that the operations will meet the use standards in Section 3.5.14.E. of the 2014 Zoning Ordinance, and that the conditional use application meets the general findings required under Section 59-7.3.1.E of the 2014 Zoning Ordinance.

II. FACTUAL BACKGROUND

A. The Subject Property

The property is a pad site comprising approximately 9,988 square feet within a parking area on the eastern edge of the Burtonsville Town Square Shopping Center. The shopping center is located in the northwest quadrant of the intersection of Old Columbia Pike and Maryland Rte. 198 in Burtonsville. A vicinity map from the Staff Report shows the shopping center's general location (Exhibit 50, p. 1, on the following page.)

The Burtonsville Town Square shopping center contains approximately 123,000 square feet of existing retail development on 27.21 acres. Exhibit 31. The pad site is located just southeast of the entrance to the center from Old Columbia Pike. T. 10-11. The property is the northernmost



**Vicinity Map
Exhibit 50, p. 1**

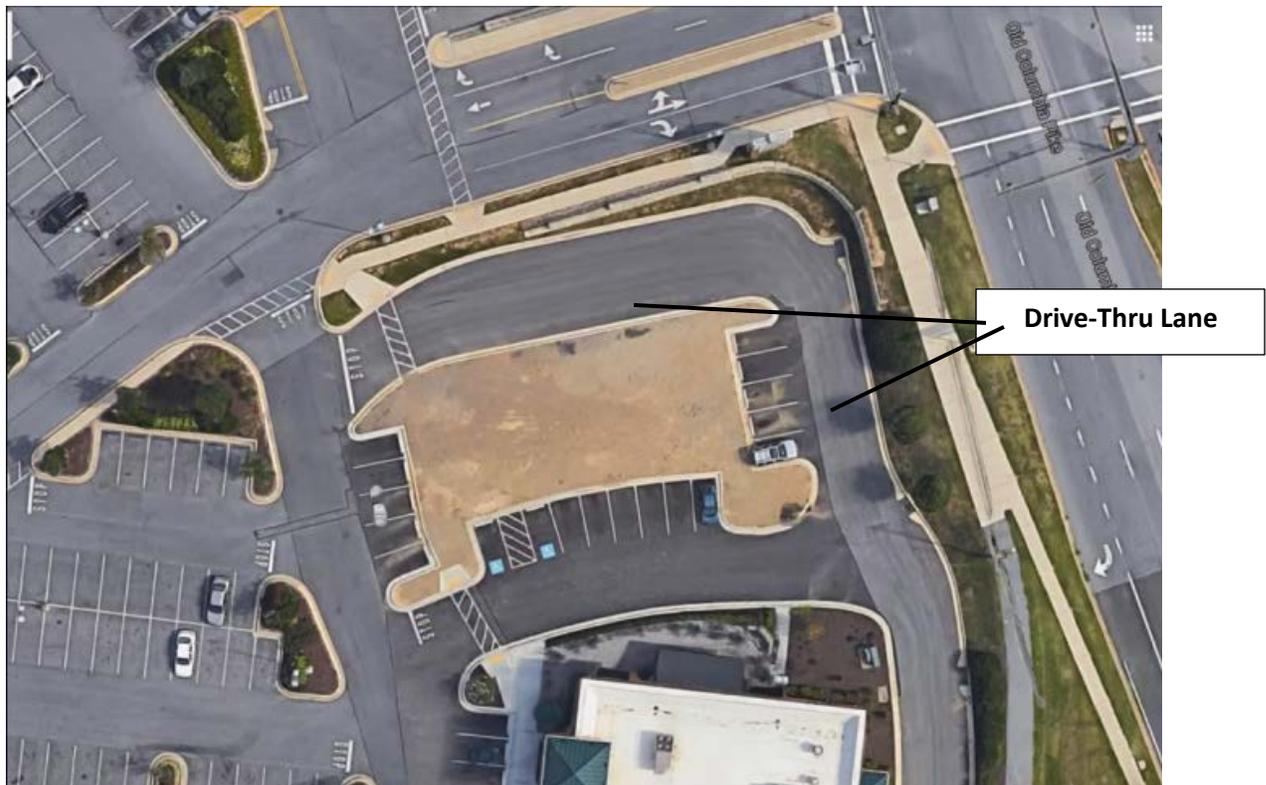
pad site around the eastern perimeter of the shopping center. The pad site immediately to the south is occupied by the Green Turtle, a free-standing restaurant without a drive-thru. Roy Rogers, another drive-thru restaurant, is immediately south of the Green Turtle. The access from Old Columbia Pike forms an internal drive aisle, or “spine road,” that runs between the two entrances to the shopping center. T. 51. A large parking field lies between the spine road and the three pad sites. Environmental requirements for the shopping center were addressed during approval of the preliminary plan. Exhibit 50, p. 12. An aerial photograph, from the Staff Report, shows the location of the pad site within the shopping center (Exhibit 50, p. 4, on the following page). A more detailed view of the pad site itself is shown in the aerial photo (Exhibit 51) from the Staff’s Power Point Presentation to the Planning Board, also on the following page.

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly



Aerial View of Shopping Center (above)
Exhibit 50, p. 4.



Aerial View of Pad Site
Exhibit 51

impacted by the proposed use). Technical Staff defined the area as all land within a radius of 2,000 feet of the pad site. Staff characterizes the area as follows:

The neighborhood primarily consists of suburban and highway-oriented commercial uses including, retail, restaurants, offices, and neighborhood services. There are no known pending or proposed project approvals in the neighborhood vicinity.

The Applicant defines the surrounding area more narrowly to include the northeast, southeast, and southwest quadrants of the intersection of Old Columbia Pike and Md. Rte. 198. Exhibit 6, p. 3. Mr. Fox testified that he drew these boundaries based on the Burtonsville Crossroads Neighborhood Plan (Master Plan or Plan.) These areas comprise the “Village Center Business 29” neighborhood designated in the master plan. Starbucks characterizes this area as “predominantly commercial uses with associated surface parking.” *Id.*, p. 11. Technical Staff’s delineation is shown in the following aerial photograph from the Staff Report (*Id.*):



The Hearing Examiner finds that Staff's definition of the "surrounding area" is overbroad. The impact of the Starbucks on properties to the northwest is tenuous, particularly as most of the trips are pass-by trips from vehicles already on the roadway. She finds that the area of direct impact is best defined by the Applicant. The neighborhood is characterized by commercial uses and associated parking.

C. Proposed Use

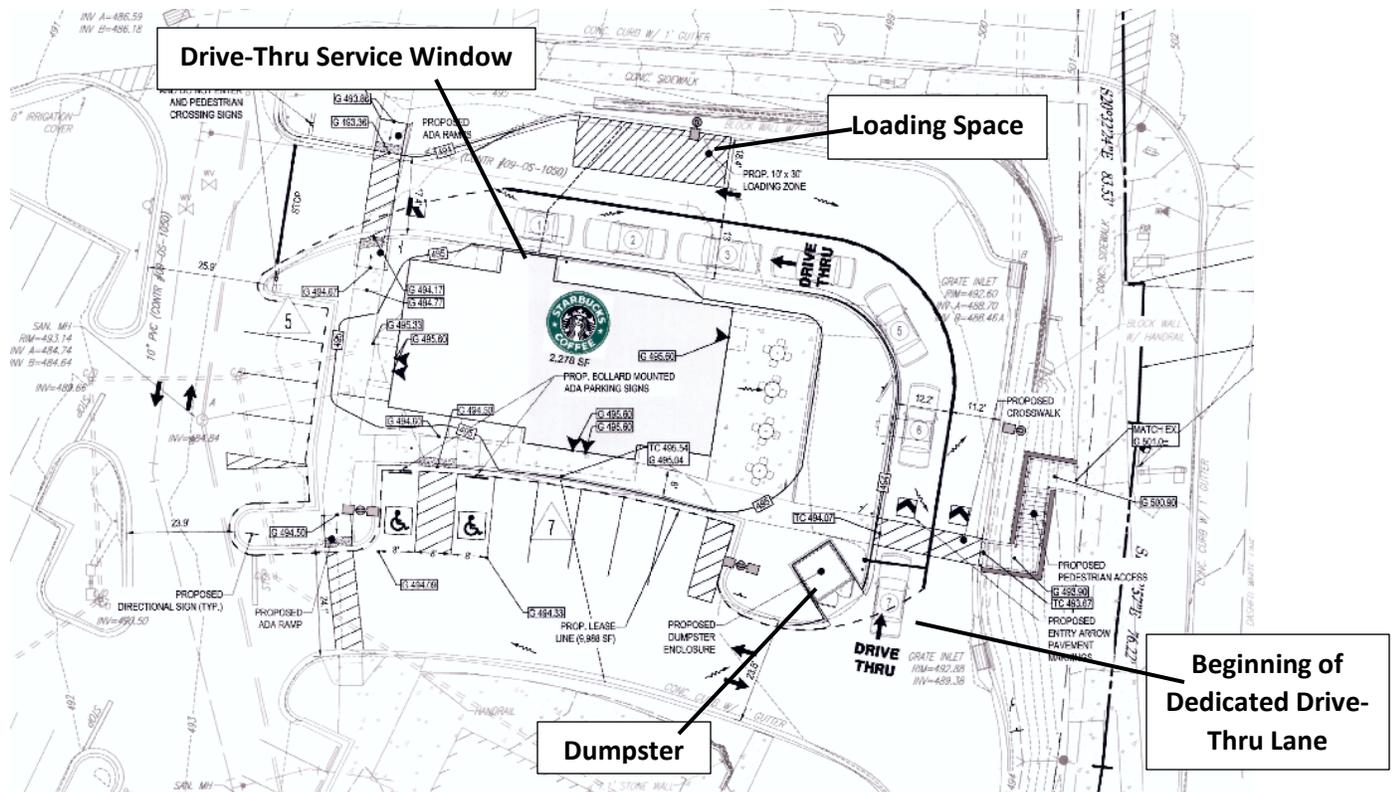
Starbucks has an existing drive-thru restaurant on the opposite side of Md. Route 29 in an older shopping center. Ms. Lisa Sunderland, of SCM Solutions, a firm that develops and sometimes manages Starbucks' stores, testified that the new site will enable Starbucks to implement a more efficient drive-thru design than at its current location. The existing store is a converted bank building that is in line with the shopping center. Having an independent pad site gives more flexibility to arrange a site layout that will speed services to drive-thru customers. T. 38.

The proposed restaurant will have approximately 2,278 square feet, including the drive-thru service area. The interior eating area will have 40 indoor seats and there will be 15 outdoor seats. T. 39. Below is an architectural elevation shows Starbucks' concept for restaurant (Exhibit 14):



1. Conditional Use Site Plan

The conditional use site plan shows the layout of restaurant, drive-thru, and associated parking. The store's main entrance faces south to a parking area on the interior of the shopping center. The dedicated drive-thru lane contains spaces for seven vehicles. It begins at the southeast corner of the pad site, where an order box is located. A dumpster is located just west of the order box, adjacent to the building. A loading space for food deliveries is on the northern site boundary, opposite the drive-thru lane. Mr. Fox, Starbucks' expert in civil engineering, testified that the 2004 Zoning Ordinance requires a total of 36 parking spaces. Twelve of these are located within the pad site. He testified that the Starbucks' lease permits it to utilize any of the parking spaces within the shopping center without restriction. Therefore, the remaining spaces will be available in the parking area adjacent to the pad site. T. 20-21. An excerpt from the conditional use plan (Exhibit 13(d)) showing the site layout is reproduced below:



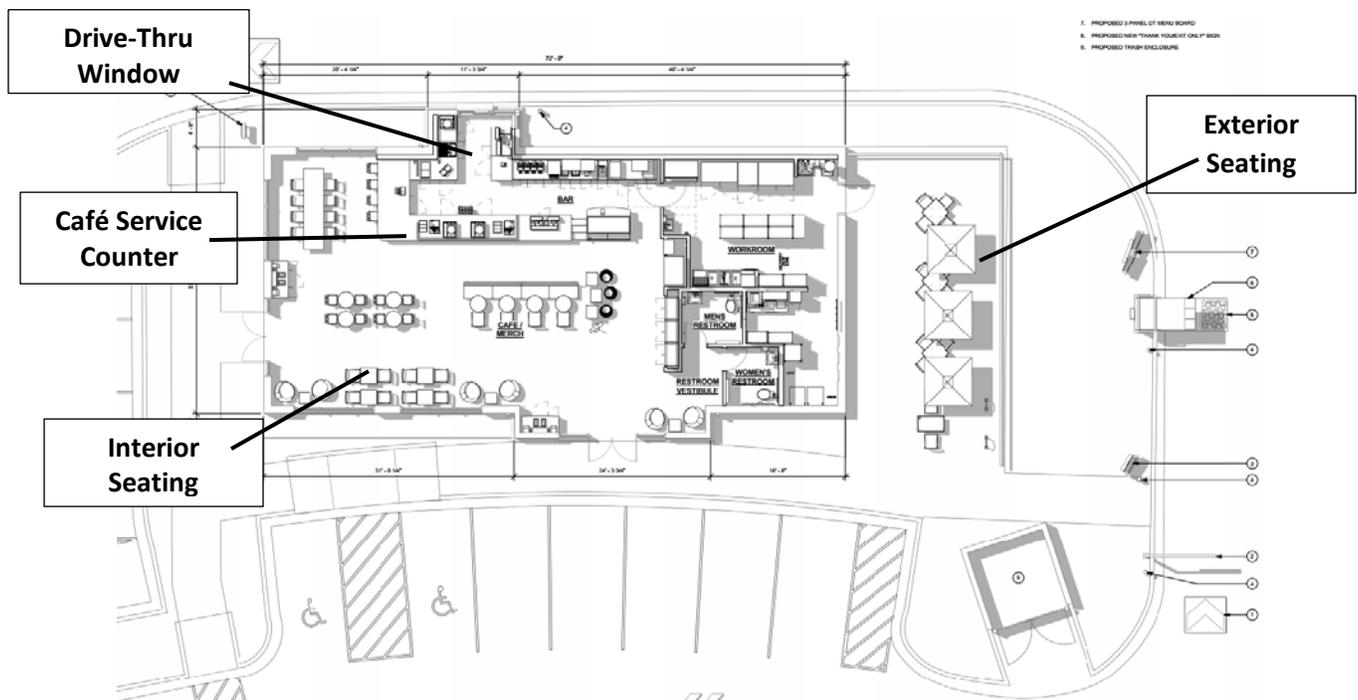
Ms. Sunderland described the architecture of the new restaurant. The building exterior consists of a masonry product which fits in with the exterior stucco used in the main shopping center. Not only does the material elevate the design above that of the existing shopping center, it is also more durable than stucco. A masonry band trims the top of all the windows and the awnings, to give a continuous horizontal break. Tower elements at the front door and at the drive-thru both have an “oko” skin, which is a concrete board that also gives a different texture to elevate the design of the restaurant. T. 39-40.

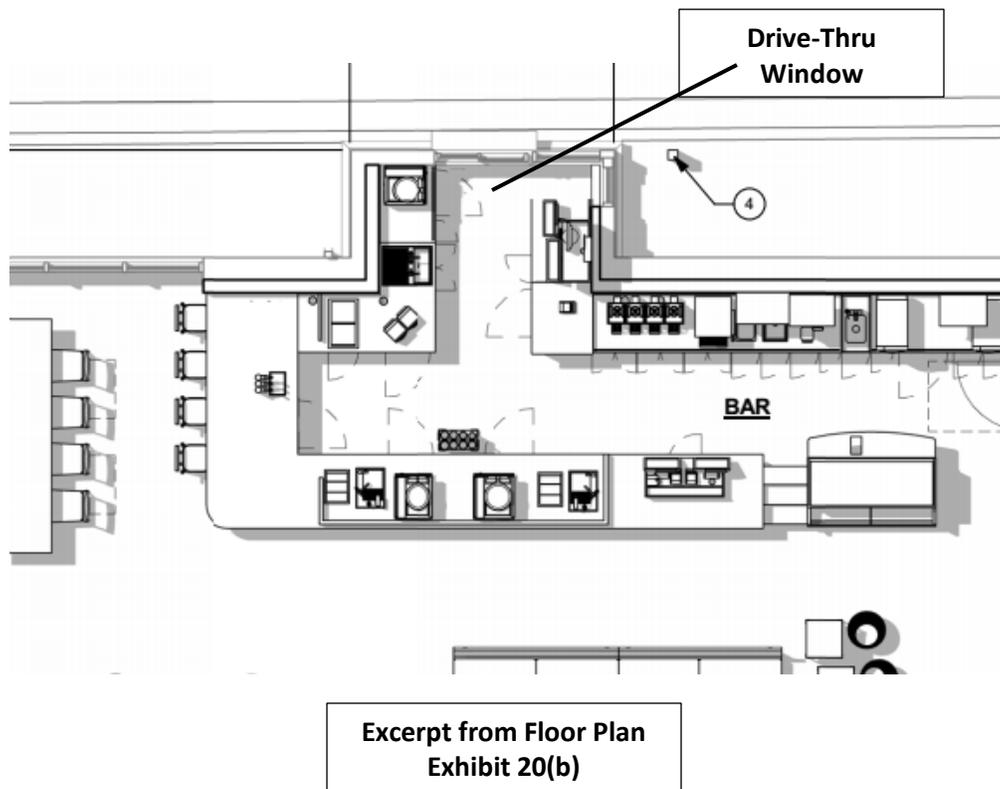
2. Operations

Ms. Sunderland described the proposed operations of the drive-thru restaurant. The number of employees on any shift ranges between 4 and 8 individuals at a time. Many of the employees are college students, and individual employees work at flexible times. The store’s peak hours are between 6:00 a.m. and 9:30 a.m. The largest employee shifts will occur at that time. Some stores also have an afternoon peak that occurs roughly between 4:00 p.m. and 5:30 p.m. She is not sure that this store will experience an afternoon peak. T. 40-42. Coffee and food supply deliveries are scheduled when the store is closed. The delivery company is given a key to the store. Trash-pick is scheduled during off-peak store hours so that it doesn’t conflict with the drive-thru. T. 45-46.

Ms. Sunderland testified that the drive-thru at the proposed location will operate more efficiently than at Starbucks’ existing store because the Starbucks has modified the interior and exterior design. The revised interior floor plan gives employees filling the drive-thru orders direct access to the cold beverage station. As a result, they do not impede employees serving customers in the café. On the exterior, the drive-thru lane has six vehicle lengths between the order box and the drive-thru window. The existing store has only three vehicle lengths between the order box

and the service window. This gives employees more time to make the drinks and increases the speed of the queue. She testified that the first order may be completed within 3 minutes of placing the order at the box. Subsequent orders will take two minutes. She acknowledged that queues could possibly be as long as 12 cars for brief periods, but this will occur much less often and will dissipate more quickly than at the existing store. A floor plan showing the interior layout of the restaurant and an excerpt of the drive-thru window are shown below and on the following page (Exhibit 20(b)):





3. Site Circulation

Mr. Lenhart opined that internal circulation within the shopping center and on the pad site would remain safe and efficient with the addition of the drive-thru restaurant. The pad site is located immediately to the southeast of the nearest shopping center access, which is from Old Columbia Pike. That access is controlled by a signalized intersection that has turning lanes. The access from Md. Route 198 is un-signalized, but also has turning lanes for traffic entering and exiting the site. A “spine road” or main internal drive aisle connects the two access points to the shopping center. Smaller drive aisles lead from the spine to the three pad sites on the east side of the shopping center (i.e., Starbucks, Green Turtle, and Roy Rogers). A large parking field is located to the southwest of the pad site.

The shopping center has different peak periods than the Starbucks restaurant. Starbucks’ peak period will be between 6:00 a.m. and 9:00 a.m. According to Mr. Lenhart, the peak hours

Mr. Lenhart opined that volumes during the store's peak, on average, would be contained within the dedicated drive-thru lane. There may be more vehicles at times, but it's unlikely there would be more than 8 or 9 vehicles waiting, all of which could be contained within the drive-thru lane and the two extra spaces adjacent to the building. T. 56-57.

Even if the queue were to reach 12 vehicles, Mr. Lenhart testified that it would dissipate quickly due to the new design employed by Starbucks. If there were 12 vehicles in the queue, three of the possible queuing spaces would block cars from exiting. In his opinion, however, vehicles generally permit parked cars to exit, as the queued vehicle will not lose its place in line. He also opined that, if the line is that long, vehicles will park in the western parking field and enter the store by foot. The drive-thru aisle does not block pedestrian access from the parking field to the aisle. T. 57.

Mr. Lenhart disagreed with Mr. Smoot's suggestion to have the queue redirected to the east past the Starbucks pad site (this suggestion is summarized in Part II.E of this Report). This alternative would require vehicles to travel as far east as the Roy Rogers restaurant and then turn around and proceed west past the Green Turtle to reach the Starbucks drive-thru. He opined that it would be too difficult to sign and orient people to travel that far south of their destination and then to loop back toward the Starbucks. He opined that lengthy queues will be infrequent and re-directing the traffic would be unnecessary. T. 57-58.

4. Site Landscaping, Screening, Lighting and Signage

Starbucks proposes landscaping consisting of shade trees, deciduous shrubs, perennials, and grasses on the pad site. Excerpts from the landscape plan (Exhibit 17(k)) are shown on the following page.

Mr. Fox testified that perimeter landscaping for the larger shopping center has already been approved as part of the preliminary plan, including the 10-foot landscaped strip at the edge of the drive-thru lane. Additional landscaping was not required by the 2004 Zoning Ordinance. Starbucks has provide on-site landscaping that exceeds the amount required by the 2004 Zoning Ordinance. T. 23-25.

Starbucks proposes a combination of signs and logos on the property as well as directional signs for the drive-thru. The north side of the building (closest to Old Columbia Pike) will have a Starbucks logo disc and directional sign for the drive-thru. The south side of the building will have the same. The western side will have a board-mark with the words “Starbucks Coffee” as well as a directional sign for the drive-thru. Ms. Sunderland testified that the proposed signage will meet all Zoning Ordinance requirements. T. 42.

D. Environmental Issues

Staff advises that the environmental requirements for the shopping center as a whole were considered during and after approval of the preliminary plan. The pad site itself has no sensitive environmental features, such as wetlands, streams, protected soils, etc. A Storm Drain and Grading Plan and Final Forest Conservation Plan were approved for the larger shopping center parcel in 2009 and 2014, respectively. Exhibit 50, p. 12.

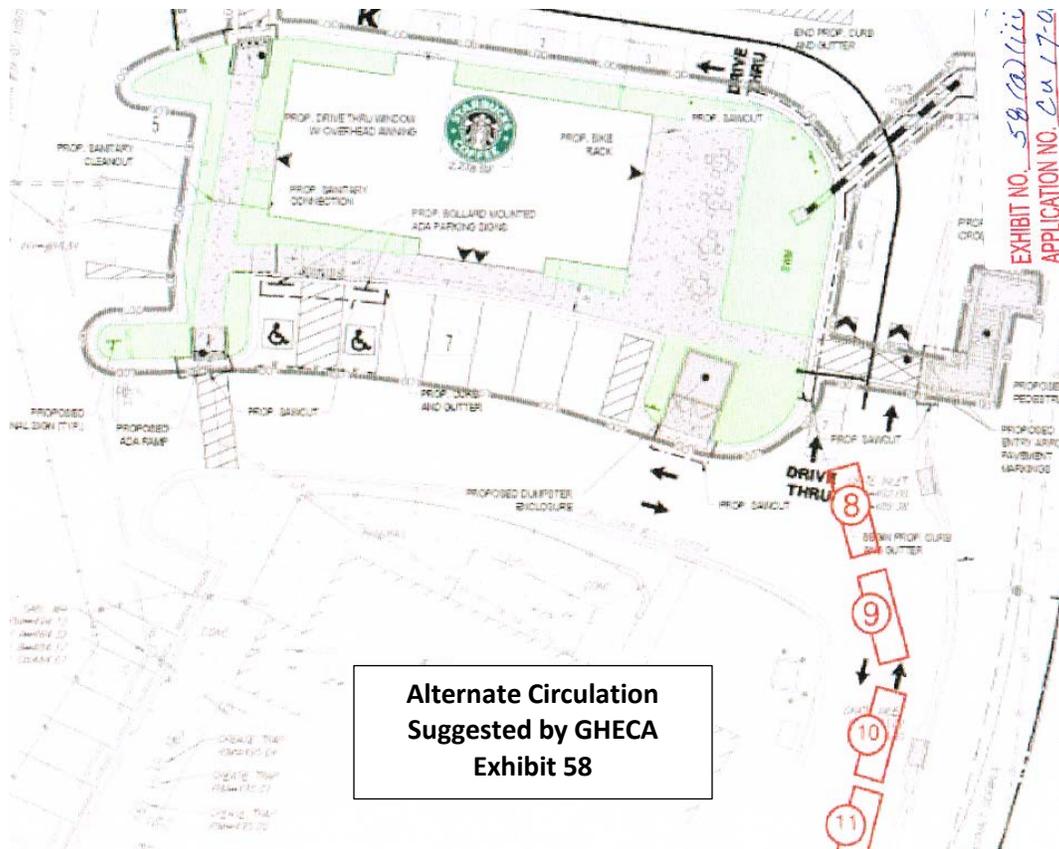
E. Community Response

No opposition appeared at the public hearing before the Hearing Examiner. Some correspondence was submitted to Planning Staff expressing concern about lengthy queues experienced at Starbucks’ current location in the older shopping center on the opposite side Route 29. Exhibits 57, 58. Mr. Sebastian Smoot, President of the Good Hope Estates Civic Association (GHECA) submitted photographs of queues at the existing Starbucks store. He stated that these

queues can be more than 12 cars long at times. He believes that queues of 12 cars at the current site will block the parking spaces located on the south side of the restaurant. Exhibit 58(a). He suggested an alternative route for the queue that, in his opinion, would add additional room for vehicles waiting for the drive-thru. That route would have vehicles drive east past the Starbucks pad site, proceed along the drive aisle adjoining the Roy Rogers, and loop back to the Starbucks restaurant following the drive aisle on the east side of Roy Rogers and the Green Turtle. A photograph of the queues at Starbucks' existing location (submitted by Mr. Smoot) and a graphic of the alternative circulation pattern are shown he suggested are shown below and on the following page (Exhibit 58).



Photograph of Existing
Starbucks
Exhibit 58



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 for a drive-thru restaurant. *2014 Montgomery County Zoning Ordinance*, §59.3.5.14.E.

This case is unusual because the development is subject to two different Zoning Ordinances. The physical improvements on the site must comply with requirements of the 2004 Zoning Ordinance. These include the development standards of the C-2 Zone (Section 59-C.4.35) and parking requirements (Art. 59-E) of the 2004 Zoning Ordinance. The 2014 Zoning Ordinance governs the use standards for the project (*i.e.*, Section 59-3.5.14.E) and the general findings

applicable to all conditional uses (Section 59-7.3.1.E.). The use requirements and general standards for approval (in the 2014 Zoning Ordinance) are discussed in Part III.A. and C of this report. Parts III.B and D review the physical improvements under the standards of the 2004 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 2014 Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner’s findings for each standard, are set forth below. The major topics of discussion are further divided under the following headings:

1. Substantial conformance to the Master Plan and compatibility with the surrounding area;
2. Adequate public services and facilities;
3. No undue harm from non-inherent adverse effects; and
4. Need for the proposed use.

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;***

Conclusion: The development is subject to a preliminary plan approved in 2006. Mr. Lenhart testified that the proposed restaurant does not exceed the adequate public facilities approval included in the preliminary plan. T. 49-50. Mr. Fox testified that development of the pad site

conforms to the requirements of the preliminary plan, as confirmed by Staff. T. 29; Exhibit 51, p. 13.

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;

Conclusion: The development standards that must be applied to this use are the standards of the C-2 Zone as it existed under the 2004 Zoning Ordinance. Whether the drive-thru restaurant complies with these standards is discussed in Part III.B. of this Report. The use standards to be applied are contained in Article 59-3 of the 2014 Zoning Ordinance, and are discussed in Part III.C. of this report. The bulk of the general requirements of Article 59-6 of the 2014 Zoning Ordinance do not apply to this application. Article 6 of the 2014 Zoning Ordinance contains detailed standards governing site landscaping, parking, lighting, drive-aisles, loading areas, and other aspects of site design, which are grandfathered and reviewed under the 2004 Zoning Ordinance. The review of parking, lighting and signage requirements are contained in Part III.D. of this Report. The requirements for signs are not necessarily part of or dictated by the existing site design, and may be reviewed under the 2014 Zoning Ordinance.

1. Substantial Conformance with the Master Plan and Compatibility of the Proposed Use

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

Conclusion: The property lies within the geographic area covered by the *Burtonsville Crossroads Neighborhood Plan, approved and adopted December 2012* (Master Plan or Plan). The Plan designates the Burtonsville Town Square Shopping Center as part of the “Village Center Business 29 Neighborhood.” *Plan*, p. 39. The Plan acknowledges that the west side of Route 29 is predominantly commercial, but recommends residential redevelopment of the east side. It

recognizes that the Burtonsville Town Square Shopping Center is unlikely to redevelop during the life of the Master Plan. However, the Plan does include certain goals for new development in the Business 29 neighborhood. These themes include promoting connectivity of local streets, pedestrian and bicyclists' paths and sidewalks, and transit stops. *Plan*, p. 39-40. Staff concluded that the application promotes this goal by providing a pedestrian link to a sidewalk that runs parallel to the nearest access road. Starbucks will also provide a stairway linking the eastern side of the site with a sidewalk on Old Columbia Road. Exhibit 50, p. 10-11.

A second objective of the Plan is to boost the area economy through a mix of uses and new implementation tools. Staff concluded that the proposed use complements the existing mix of neighborhood retail uses in the shopping center. *Id.*

Another goal of the Plan is to preserve tributary headwaters and maintain the rural character of the area. Staff concluded (*Id.* at. 11):

The Project complies with the approvals issued by the stormwater management plan approved by the Dept. of Permitting Services (DPS) in 2009 for the shopping center development. The Project is located within the limits of disturbance shown on the approved stormwater management plan. The property is highly disturbed and not located in a rural edge area. Therefore the Project supports this policy.

The uncontroverted evidence in this case supports a finding that the proposed development conforms to the recommendations of the Master Plan. The environmental goals of the Master Plan were met through the preliminary plan approval. The evidence and testimony also demonstrate that this development will be complementary to the existing uses in the shopping center and will replace a less efficient store on the other side of Route 29, upgrading the mix of retail uses in the area and meeting a defined need within the neighborhood (see, Part III.A.5 of this Report.)

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

Conclusion: This provision is a mix of Master Plan analysis and compatibility considerations. The Master Plan issues have been discussed in the preceding section. Compatibility is a question that crosses a number of topics, including the nature of the surrounding uses; any potential adverse impacts; the design of the proposed building, including its height, density and architecture; traffic generation; and other issues discussed in other sections below.

The character of the surrounding area, as defined by the Hearing Examiner, is predominantly commercial with associated commercial uses. The drive-thru restaurant is located on a pre-existing pad site, which is well incorporated into the overall design and circulation of the shopping center. The one possible adverse impact that arose in review is the potential for the drive-thru queue to block the parking on the south side of the pad site. The Hearing Examiner is persuaded by both Ms. Sunderland's and Mr. Lenhart's testimony that this scenario is unlikely due to the more efficient design of the interior floor plan and the increased vehicle storage within the drive-thru. The Hearing Examiner concludes that the use will be harmonious with the surrounding commercial area.

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: Because the defined neighborhood is almost exclusively commercial, this standard arguably does not apply. Even assuming at some point the older shopping center across the street redevelops with residential uses, this use is well incorporated into the design of the existing shopping center and the evidence demonstrates that it provides a needed product in the area, thus complementing the potential residential development across Route 29.

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

As the subject property consists of a leased area within a previously approved subdivision, no new subdivision is required. Typically, the Hearing Examiner would determine the adequacy of transportation facilities when no subdivision is required under the Planning Board's Guidelines (Guidelines) for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013.⁴ In this case, however, the adequate public facilities approval from the 2006 preliminary plan is still valid. The preliminary plan was approved for 250,000 square feet of retail and 10,000 square feet of commercial office. According to records

⁴ After this application was filed but before the Planning Board's review, the Council adopted a new Subdivision Staging Policy (SSP). *Council Resolution 18-671*, adopted November 15, 2016. The new SSP applies to *preliminary plans* filed after January 1, 2017, but is silent on its application to conditional uses. Because the adequate public facilities determination under the preliminary plan is still valid, the question of which SSP applies is irrelevant except to whether any taxes will be due at the time of building permit. Because any taxes due will be assessed at building permit, the Hearing Examiner need not make a finding on this.

of the Maryland State Department of Assessments and Taxation, approximately 123,590 square feet of the 250,000 approved has been constructed. The addition of the 2,278-square foot restaurant remains well under the amount approved in the preliminary plan. T. 49-50. In addition, Mr. Lenhart testified that recent SHA traffic counts reveal that all intersections continue to operate within the levels permitted by the Planning Board's LATR Guidelines. T. 52.

Based on this evidence and the testimony of Mr. Lenhart, the Hearing Examiner finds that there are adequate transportation facilities to serve the proposed development.

The evidence also reveals that other public facilities remain adequate to serve the use. The applicant has already constructed storm drains pursuant to the approved preliminary plan and storm drainage plan. Exhibits 17, 26, 50. Water and sewer is available to the site. Exhibit 50. Because the use is commercial, it will not impact public schools.

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 conditional use. 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 adverse effect causes “undue” harm to the surrounding neighborhood.

Technical Staff listed the following physical and operational characteristics that are necessarily associated with (*i.e.*, inherent in) a drive-thru restaurant (Exhibit 50, p. 15):

- Vehicle and pedestrian trips to and from the restaurant;
- Circulation system for the drive-thru facility;
- Parking for customers and employees;
- Varied hours of operation;
- Noise or odors associated with vehicles and a drive-thru facility; and
- Lighting.

Staff concluded that there were no non-inherent characteristics of the use as proposed. Exhibit 50, p. 15. The evidence demonstrates that there is only one potential adverse impact of the use as proposed: the potential for the drive-thru queue to block cars parked on the south side of the restaurant. There is no evidence to determine whether this is within the realm of an inherent or non-inherent adverse impacts. However, both Mr. Lenhart and Ms. Sunderland testified that this would be unlikely to happen, both because the queue will dissipate quickly and the dedicated drive-thru aisle (along with two additional parking spaces) will hold more vehicles than Starbucks’ existing store. The Hearing Examiner finds that the conditional use has no non-inherent adverse impacts that would cause undue harm to the community.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: The subject property is in the CRT (Commercial Residential Town) Zone and not a Residential Detached zone. This requirement is not applicable.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

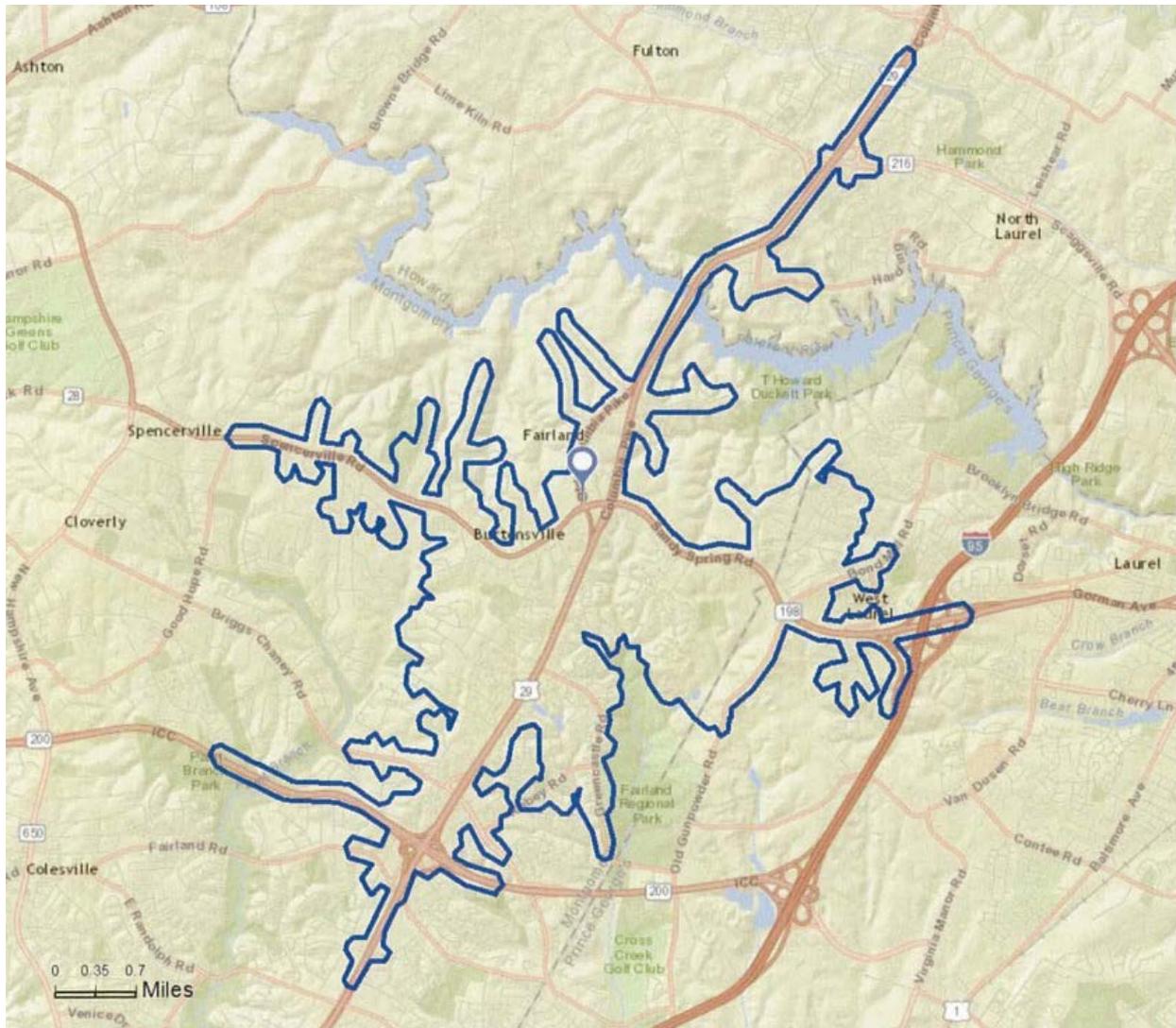
Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed to mitigate adverse impacts, meets the standards required for approval.

**4. Need for the Drive-Thru
(§59-7.3.1.E.6 of the 2014 Zoning Ordinance)**

A drive-thru restaurant is one of the conditional uses that must prove that there is a need for the use to serve existing county residents:

6. 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 due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

Conclusion: Mr. Edward Steere, Starbucks' expert in market analysis, testified that the Starbucks drive-thru is needed to serve the existing population and would not result in a saturation of these types of uses. Mr. Steere identified a trade area based on locations that could be reached within a five-minute drive, which he opined is the distance customers will drive to find a drive-thru restaurant specializing in coffee. The northern market area travels in a spine along Route 29 from Scaggsville and Maple Lawn in Howard County towards the Burtonsville Shopping Center. It is shaped that way because there is little commercial development between Maple Lawn and the Burtonsville Town Square Shopping Center. The eastern edge of the trade area expands to the interchange with U.S. Route 95 and Md. Route 190A, the western edge extends to Good Hope Road, and the southern boundary ends at Briggs Chaney Road. T. 65-66. A graphic of the area, from Mr. Steere's market analysis, is shown on the following page (Exhibit 6, Attachment C).



**Starbucks Market Area
Exhibit 6, Attachment C**

Mr. Steere testified that there are no other drive-thru restaurants in the market area whose primary product is coffee, although there are other drive-thru restaurants, including a nearby McDonalds and the Roy Rogers in the existing shopping center. T. 67. Mr. Steere testified that he estimated demand by gathering demographic statistics for households in the area, including the number, average size, education levels, home ownership and average income. He accounts for demand from business and office workers in the area by estimating the number of office workers and assuming that each will spend \$10.00 per week on drive-thru food. His study concluded that

the total residential income available in the area (based on the number of households times the average income) was \$673 million dollars. To that income, he added \$2.5 million in purchases from the business community. Thus, the total annual income in the trade area is approximately \$9 million dollars.

Mr. Steere testified that he then relied on a consumer expenditure study to determine what percentage of the annual income is spent on foods purchased outside of the home. The study concludes that consumers pay .96 percent of their annual gross income on specialty foods outside of the home. Applying that rate to the \$9 million, the annual trade area demand for snack products is \$6.5 million.

Mr. Steere opined that there were no other drive-thru restaurants with a “niche” specializing in coffee in the trade area. Unlike other drive-thru restaurants in the market area, Starbucks’ primary niche is coffee; it serves food just to accompany the coffee. Coffee products are not the primary niche for fast food restaurants like McDonalds, Wendy’s or Roy Rogers. Dunkin Donuts, while they do serve coffee, specializes in breakfast foods and desserts. The Dunkin Donuts in the Burtonsville Town Square Shopping Center is combined with a Baskin Robbins. The Dunkin Donuts in Maple Lawn does not have a drive-thru. Mr. Steere also pointed out that the proposed restaurant is replacing an existing successful store in the area. Thus, Starbucks had already identified the need and is simply moving it to another location. T. 68-71.

The uncontroverted evidence in this case supports a finding that there is a need for a Starbucks drive-thru at this location. This is not only supported by the market analysis performed by Mr. Steere; it is also supported by the fact that this restaurant will replace an existing successful restaurant within the trade area. The Hearing Examiner finds that there is a need for the facility to serve existing populations in the area and will not result in a saturation of similar uses.

**B. Development Standards of the Zone
(§59-C-4.35 of the 2004 Zoning Ordinance)**

In order to approve this conditional use, the Hearing Examiner must find that the application meets the development standards of the C-2 Zone, as they existed under Section 59-C-4.35 of the 2004 Zoning Ordinance.

Conclusion: Staff concluded that the application meets the development standards of the C-2 Zone and included a table comparing the minimum development standards to what is provided on the conditional use plan (Exhibit 51, p. 9, shown below):

C-2 Section	C-2 Standard	Project/Center	Complies?
Building Height (59-C-4.351)	<ul style="list-style-type: none"> • 3 stories max. • 42 ft. height max. 	<ul style="list-style-type: none"> • 1 story max. • 22 ft. height max. 	Yes
Floor Area (59-C-4.652)	1.5 FAR for entire shopping center	0.11 FAR (or 125,868 sq. ft.+/- developed)	Yes
Building Setbacks from Lot Lines (59-C-4.353)	<ul style="list-style-type: none"> • Front: 10 ft. min. • Rear: Not required, but no yard less than 3 ft. 	<ul style="list-style-type: none"> • Front: 76 ft. to Old Columbia Pike • Rear: Same as required 	Yes
Green Area (59-C-4.353)	10% of lot area of shopping center	33.3% +/- of lot area of shopping center	Yes
Parking (59-E-3.7)	25 spaces per 1,000 sq. ft. of patron area and 15 spaces per 1,000 sq. ft. of patron outdoor area	36 spaces (12 on lease site, 24 within shopping center), 1,330 available at shopping center	Yes

The Applicant’s expert in civil engineering, Mr. Fox, also testified that the development meets all of the standards of the C-2 Zone. Based on this evidence, and having no evidence to the contrary, the Hearing Examiner concludes that the use as proposed meets all standards of the C-2 Zone.

**C. Use Standards Specific to a Drive-Thru Restaurant
(Section 59-3.5.14.E of the 2014 Zoning Ordinance)**

The specific use standards for approval of a drive-thru restaurant are set out in Section 59-3.5.14.E.2.b of the 2014 Zoning Ordinance:

b. Where a Drive-Thru is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

i. The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.

Conclusion: As described previously, the Hearing Examiner has found that the proposed drive-thru lane will operate efficiently and safely due to interior and exterior design factors that speeds existing service. Pedestrians that park in the parking field southwest of the pad site do not have to cross the drive-thru lane to enter the restaurant. There will be pedestrian connections to a sidewalk paralleling the access road and connecting to Old Columbia Pike. The Hearing Examiner finds that vehicle and pedestrian circulation for the proposed use will not create a traffic nuisance or disrupt pedestrian circulation.

ii. The use of the proposed location will not preempt frontage on any highway or public road in a way that reduces the visibility and accessibility of an interior commercial area zoned or proposed for commercial use that is oriented to the same highway or public road.

Conclusion: Staff found this standard had been met because the restaurant will be located on an existing pad site. Testimony at the public hearing indicated that the pad site is above the roadway, making it difficult to see even the building itself. The site lies immediately east of one of the main access drives for the center, which is a signalized intersection. The shopping center's parking area includes a main "spine" drive aisle with secondary aisles accessing the pad sites. There is no evidence in this record that the pad site will obstruct or reduce visibility or accessibility of interior commercial uses.

iii. Product displays, parked vehicles, and other obstructions that adversely affect visibility at intersections, or at entrances and exits to and from the Drive-Thru are prohibited.

Conclusion: Mr. Fox testified that there would be no outdoor product displays. He also opined that site layout has been designed to insure the clear visibility of the drive through entrance and exit as previously discussed. T. 28. The drive-thru aisle will operate more efficiently than Starbucks' existing site and there will be several directional signs guiding vehicles through the drive-thru. No intersections will be impacted because access is from the interior of the shopping center. The Hearing Examiner finds that this standard has been met.

iv. When a Drive-Thru occupies a corner lot, the ingress or egress driveways must be located a minimum of 20 feet from the intersection of the rights-of-way, and such driveways must not exceed 25 feet in width. In areas where no master plan of highways has been adopted, the street line must be considered to be a minimum of 60 feet from the centerline of any abutting street or highway.

Conclusion: The conditional use area is not a corner lot, but a small portion of a larger shopping center. The Hearing Examiner finds that this standard does not apply to the proposed development.

D. General Development Standards

In addition to the development standards of the C-2 Zone, parking, loading and landscaping standards of the 2004 Zoning Ordinance apply to the subject property.

1. Parking and Loading Requirements (Article 59-E of the 2004 Zoning Ordinance)

Conclusion: The application must meet the parking standards of the 2004 Zoning Ordinance. For restaurants, Section 59-E-3.7 requires "Twenty-five parking spaces for each 1,000 square feet of floor area devoted to patron use within the establishment and 15 parking spaces for each 1,000 square feet of ground area devoted to patron use on the property outside the establishment." Mr. Fox testified that 36 total spaces are required. There are 12 spaces within the pad site. The required

number of additional spaces are within a large parking field to the south and west of the pad site. Starbucks has unrestricted rights to use this parking area under its lease with the shopping center owners. Because Starbucks's peak store hours are in the morning and the shopping center's peak hours are in the evening, there should be ample parking for the restaurant. The Hearing Examiner finds that the parking requirements of the 2004 Zoning Ordinance have been met.

The 2004 Zoning Ordinance contains requirements for landscaping in parking areas. Section 59-E-2.72 requires a ten-foot landscaped strip around the perimeter of a parking area adjacent to the right of way. This has already been constructed as a result of the preliminary plan approval. T. 22. Section 59-E-2.73 requires that a minimum of 5% of the internal area of a surface parking facility be landscaped with shade trees. This, too, has already been applied to the larger parcel. Starbucks's landscape plan, however, shows additional shade trees on the pad site, exceeding what was required by the prior Zoning Ordinance.

Section 59-E-1.34 of the 2004 Zoning Ordinance governs loading spaces for commercial development: "For any building or land used for commercial or industrial purposes, adequate space for off-street parking to accommodate the loading and unloading of materials shall be provided, consistent with the size and proposed use of the building. Such space, whether inside or outside a building, shall be in addition to the schedule of requirements in section 59-E-3.7 and shall be designed so as not to impede normal vehicular and pedestrian circulation." The loading space for food deliveries is located north of the drive-thru lane and does not obstruct customer circulation on the site. Ms. Sunderland testified that food deliveries occur when the restaurant is closed. The application meets this standard.

2. Outdoor Lighting

Section 59-E-2.6 of the 2004 Zoning Ordinance states:

Adequate lighting shall be provided for surface parking facilities used at night and for structured parking as required by construction codes. Lighting shall be installed and maintained in a manner not to cause glare or reflection into abutting or facing residential premises, nor to interfere with safe operation of vehicles moving on or near the premises.

Conclusion: Mr. Fox testified that the property did not face or abut any residential premises, so that part of the above section does not apply to the proposed use. He also testified that the lighting proposed would enhance the safe operation of vehicles circulation within and near the site by illuminating the property at night. The application meets this standard.

3. Signage

Conclusion: The signs proposed are described in Part II.C.4 of this Report. The Hearing Examiner finds that the signs proposed are compatible with the surrounding commercial area. The applicant must obtain a permit for the signage from the Department of Permitting Services, which is a condition of approval of the conditional use.

IV. CONCLUSION AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59-3, and 59-7 of the 2014 Zoning Ordinance, and the requirements of Section 59-C-4.35 and Article 59-E of the 2004 Zoning Ordinance. Based on the foregoing findings and conclusions, the application of Starbucks for a conditional use under Section 59-3.5.14.E. of the Zoning Ordinance to build and operate a drive-thru restaurant at 15600 Old Columbia Pike, Burtonsville, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. Hours of operation are seven days a week between 5:30 a.m. and 11:00 p.m.
2. All coffee and food deliveries shall be made when the store is closed.
3. All trash pick-up shall occur during non-peak store hours.

4. Physical improvements to the Subject Property are limited to those shown on the Conditional Use Site Plan (Exhibits 64(a), 13(b), 20(a), 13(d), Landscape Plan (Exhibits 13(e) and 13(f), and Lighting Plan (Exhibit 13(g)).
5. The Applicant must obtain a sign permit issued by the Department of Permitting Services or the Sign Review Board, as appropriate, and must file a copy of any such sign permit with OZAH. The final design of the proposed sign must be in compliance with the Zoning Ordinance, or the Applicant must first obtain a sign variance from the Sign Review Board.
6. 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, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 9th day of March, 2017.



Lynn A. Robeson
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it 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