

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
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Before: Lynn A. Robeson, Hearing Examiner

Board of Appeals Case No. S-786-B
(OZAH Case No. 11-43)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-786-B, filed on August 5, 2011, seeks to modify an existing special exception, for a fast-food, drive-through restaurant (a McDonald's) located in the Plaza del Mercado Shopping Center in the northwest quadrant of the intersection of Bel Pre Road and Layhill Road in Silver Spring, Maryland, in the C-1 (Convenience Commercial) Zone. The total special exception area consists of approximately 26,789 square feet, the bulk of which (i.e., 26,245 square feet) is comprised of Lot 3 of Tremoulis Property Layhill subdivision. Exhibit 1. The special exception area also includes approximately 434 square feet of the adjoining lot 2 within the same subdivision. Exhibits 1, 17(b). Petitioner McDonald's USA LLC, is the lessor of property which is owned by FLV Plaza del Mercado, LP. (Exhibits 1, 32, 33). The address of the subject property is 2207 Bel Pre Road, Silver Spring, Maryland. The Tax Account Number for Lot 3 is 16-13-00985218. Exhibit 1.

The Board of Appeals issued a notice scheduling the public hearing for January 23, 2012, on August 15, 2011 (Ex. 15(a)). Petitioner submitted a request to amend the petition on December 5, 2011, to shift the dumpster area to the west, show the location of a bike rack, and show additional building and lighting details (Exhibit 17, 18). The amendment request was duly noticed (Exhibit 19), and was routinely granted as unopposed. On January 13, 2012, the Petitioner submitted a request to waive the number of on-site parking spaces required by the Zoning Ordinance, pursuant to §59-E-4.5 of the Zoning Ordinance. Exhibit 23. In accordance with that section, the Hearing Examiner issued notice of the waiver request to adjoining and confronting landowners and local civic organizations on the same date the waiver request was received. Exhibit 25.

The application was opposed by Mr. Richard Kauffunger, who appeared at the public hearing and testified as an individual. Mr. Kauffunger believed that the modification of the existing special exception should be delayed until parking issues within the Plaza del Mercado shopping center have been resolved. T. 74-91.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated January 12, 2012, recommended approval of the petition, with conditions (Exhibit 26(b)). By letter dated January 13, 2012, the Planning Board for Montgomery County (Planning Board) also recommended approval of the special exception, with all but one of the conditions recommended in the Technical Staff Report. Exhibit 26(a).

The public hearing in this case took place, as scheduled, on January 23, 2012. The record of the case was held open for an additional ten business days to provide the Petitioner with additional time to submit its lease with the property owner, as required by Section 59-A-4.22(a)(6) of the Montgomery County Zoning Ordinance. 1/23/12 T. 110-111.¹ Petitioner submitted relevant excerpts from its lease on February 3, 2012, and the record closed on February 3, 2012.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject property is located at the northwestern quadrant of the intersection of Bel Pre Road and Layhill Road in Silver Spring, Maryland. It is in the C-1 (Convenience Commercial) Zone. Fronting on Bel Pre Road, consists of approximately 26,679 square feet of land on a pad site within the Plaza del Mercado shopping center. It is currently improved by an existing special exception for a McDonald's fast food drive through restaurant. The existing building was constructed prior to 1958 and pre-dated the need for a special exception. Exhibit 26(b), p. 7. A special exception, S-707, was required in 1979 to expand the existing restaurant. In 1981, the Board of Appeals extended the time to implement the 1979 special exception request. This special exception was modified in 2002 and 2005 to expand the hours of operation to 24 hours a day, 7 days a week. In 1981, the Board of Appeals approved a separate special exception, designated Board of Appeals case number S-786-B, in 1981 to permit the addition of a drive through and an outdoor play area. In 1987, this special exception was

¹ All transcript references (denoted as "T.") are to the transcript of the January 23, 2012, public hearing in this case.

modified to provide road improvements to Bel Pre Road. Exhibit 26(b), p. 3; Exhibit 13.

Uses immediately surrounding the subject property include a service station and retail shops to the east, Bel Pre Road to the south, and parking for the shopping center to the north and west. Exhibit 26(b), Attachment 2. Photographs of the existing use are included in Attachment 4 to the Technical Staff Report (Exhibit 26(b)), below and on the next page:



Figure 1: McDonalds northwest from Bel Pre Rd



Figure 2: McDonalds Drive-Through, northwest from parking area



Figure 3: Drive-Through, northeast from Bel Pre Rd

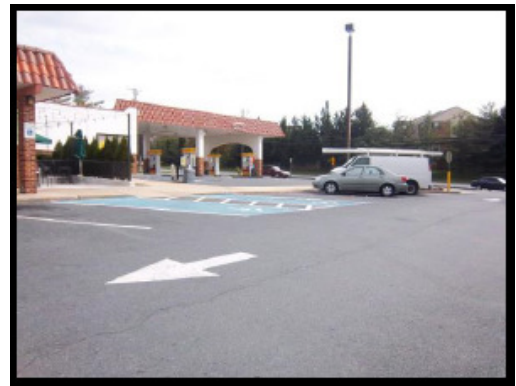


Figure 4: Shared drive-aisle southeast towards Bel Pre Rd

Technical Staff included an aerial photograph of the subject property showing the existing conditions in the Technical Staff Report (Exhibit 26(b), Attachment 2). This aerial photograph is shown on the next page.



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Currently, the existing drive thru lane is not separated from the surrounding shopping center parking lot. Parking spaces are located along the east side of the property adjacent to the site access (a northbound drive-aisle which leads into the shopping center). The drive aisle is two-ways at the

southern end to permit a right-turn only onto Bel Pre Road from the adjacent gas station, but becomes one-way northbound into the shopping center. Egress from that drive aisle to Bel Pre Road is right turn only. Those wishing to proceed left onto Bel Pre Road must travel west through the parking lot to the signalized intersection at Parker Farm. T. 57-68.

B. The Surrounding Area

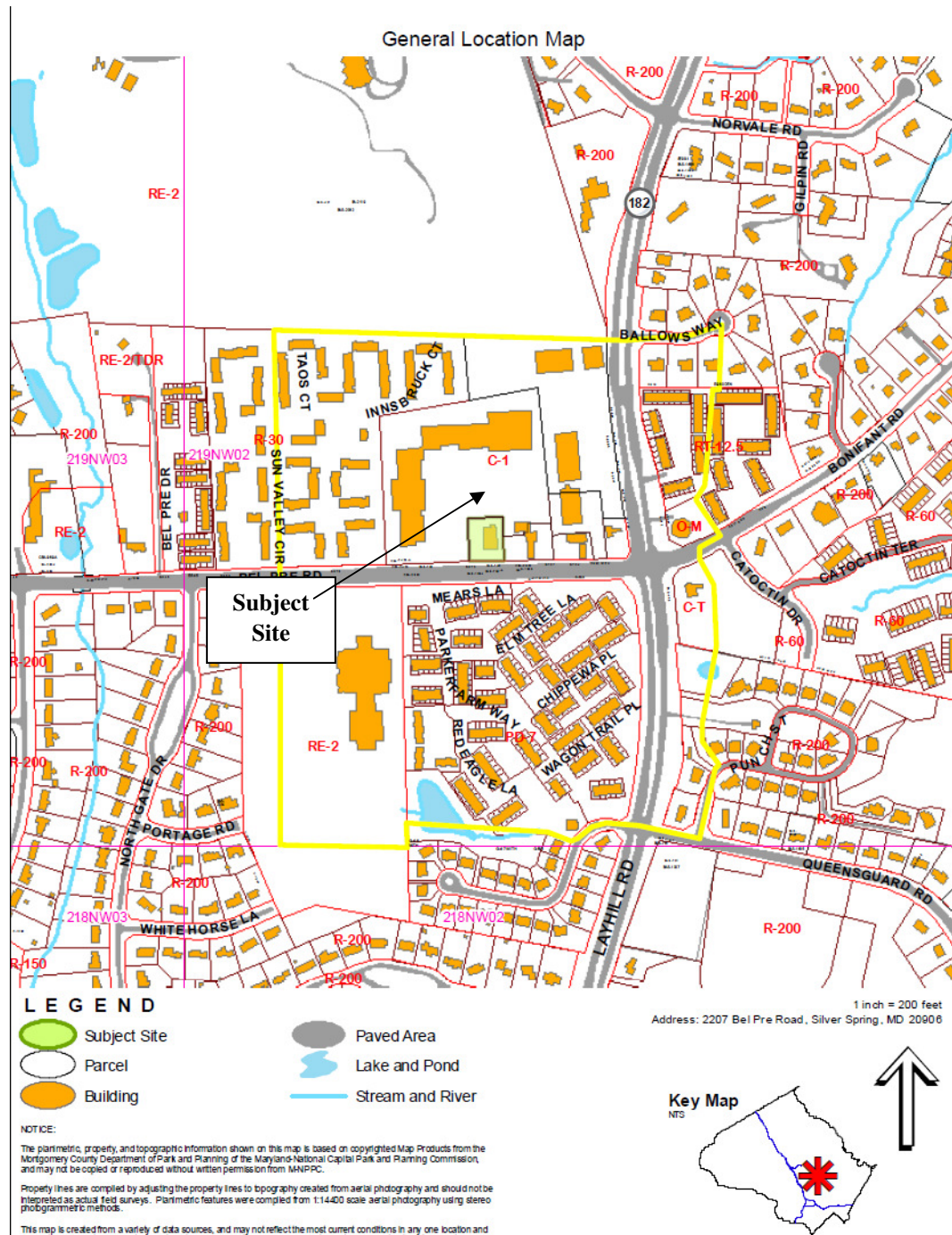
The surrounding area must be determined in order to judge the compatibility of the proposed use with those surrounding uses most impacted. Technical Staff found that the surrounding area “can be generally described as Ballows Way to the north, Queensguard Road to the south, Layhill Road, to the east, and Sun Valley Circle to the west.” Exhibit 26(b), p. 3. A location map outlining Staff’s “neighborhood” in yellow (Exhibit 26(b), Attachment 3) is reproduced on the next page.

The Parker Farms residential subdivision is directly across Bel Pre Road to the south of the site, residential homes border the western and northern side of the shopping center, and the Argyle Country Club is located to the north. The Layhill shopping center borders the eastern side of the Plaza del Mercado shopping center Exhibit 26(b), T. 21.

Staff concluded that this area is characterized by “multiple residential and transition zone classifications. Specifically, the site, which is C-2, is surrounded by RE-2, R-200, PD-7, R-30, O-M and C-T zones (see Attachment 3).” Staff further advises that there have been 17 special exception applications within the surrounding area on 14 different sites, including the subject property. Two of the seventeen were denied, three of the seventeen were modifications to existing special exception uses, and the majority of the approved special exceptions were approved prior to 1980. The existing special exception uses include automobile filling stations, a day care facility, pet shop, communications tower, and a recreational establishment. Exhibit 26(b), p. 3.

The Petitioner presented no evidence contradicting Staff’s delineation or characterization of the surrounding neighborhood nor did Mr. Kauffunger in opposition to the petition. Having no

evidence to the contrary, the Hearing Examiner agrees with Technical Staff as to the characterization and delineation of the neighborhood.



C. The Proposed Use

The subject application seeks to modify an existing special exception pursuant to Section 59-G-2.16 (Drive-in Restaurant) of the Zoning Ordinance to permit the demolition of the existing 3,562 square foot building and construction of a new 3,911 square foot building. It also proposes the following modifications to the site layout and circulation:

- 1) Designating a drive-thru entrance on the eastern side of the building with gateway signage advising drivers of maximum clearance heights;
- 2) Realigning the drive through lane to run approximately parallel with the northern and eastern sides of the building
- 3) Adding two new menu boards and drive-thru order stations with LCD displays and canopy elements;
- 4) Relocating the truck loading area to the eastern side of the building;
- 5) Constructing a new drive aisle with landscaping between the southern façade of the building and Bel Pre Road;
- 6) Removing an outdoor seating and concrete play area;
- 7) Removing an existing trash corral at the rear of the building and replacing with a new enclosed trash corral on adjacent property located on Lot 2; and
- 8) Replacement the existing retaining wall adjacent to the drive-thru lane on the western side of the building with the new retaining wall at the same place and also the same height;
- 7) Providing a total of 13 on-site and unlimited number off-site spaces (the existing restaurant requires a total of 47 parking spaces, eighteen of which are on-site and the balance of which are off-site in the adjacent parking area for the shopping center.

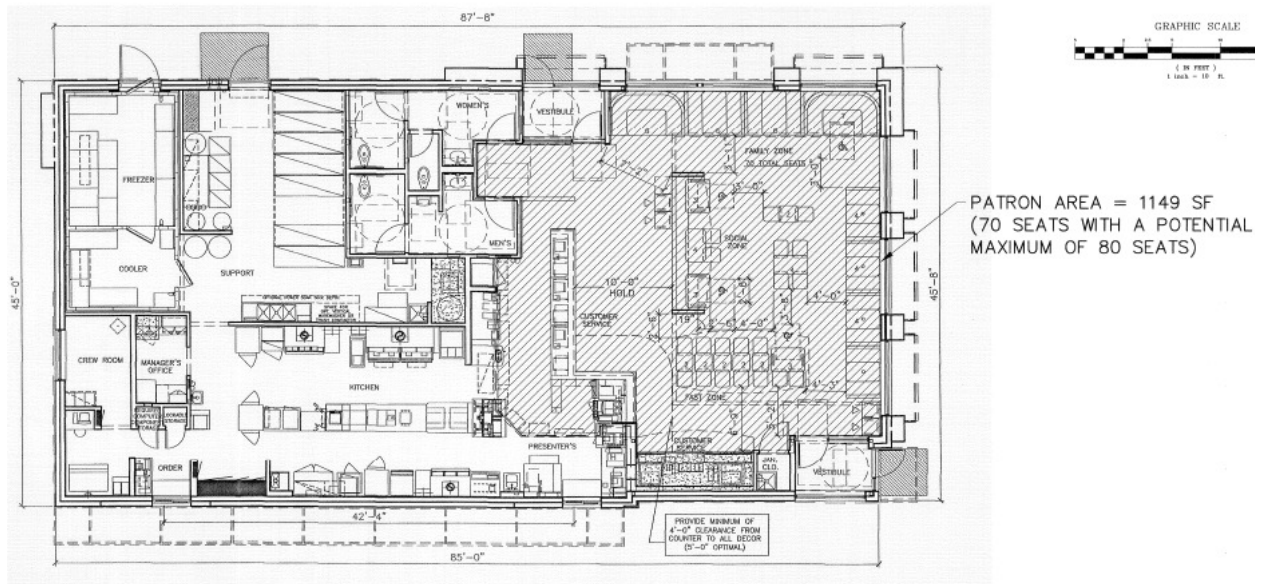
Petitioner proposes no changes to the existing operations, which are seven days a week, 24 hours a day. Staffing will occur at existing levels: 14 employees during the morning and evening peak hours, 16 employees during the lunch peak hour, and three employees during the overnight shift. Petitioner states that a manager will be on duty during every shift. Exhibit 26(b), pp. 2-3.

According to Mr. John Eidenberger, construction manager for McDonald's USA LLC, the Petitioner is proposing the modifications in order to update the existing site to the current system

wide model. The building will be more efficient, the architecture is more modern and aesthetically pleasing, the patron area provides a more casual dining experience, and there will be improvements to existing on-site circulation conflicts. T. 9-15. An exhibit submitted by the Petitioner depicting the updated exterior of the building (Exhibit 17(i)(duplicate)) is shown below:



The Petitioner's expert land planner and civil engineer, Mr. Richard Hurney, testified that 1,766 square feet of the existing 3,562 square feet is located in a cellar. The floor area attributable to the cellar space will be added to the first floor of the new building, which will be slab on grade. T. 11. While the modification will add 349 square feet to the existing gross floor area (for a total of 3,911 square feet), the patron area will be reduced by 715 square feet and 21 seats. Exhibit 26(b), p. 2. The revised floor plan for the building, showing the new space configuration, is shown in Exhibit 17(h), reproduced on the next page.



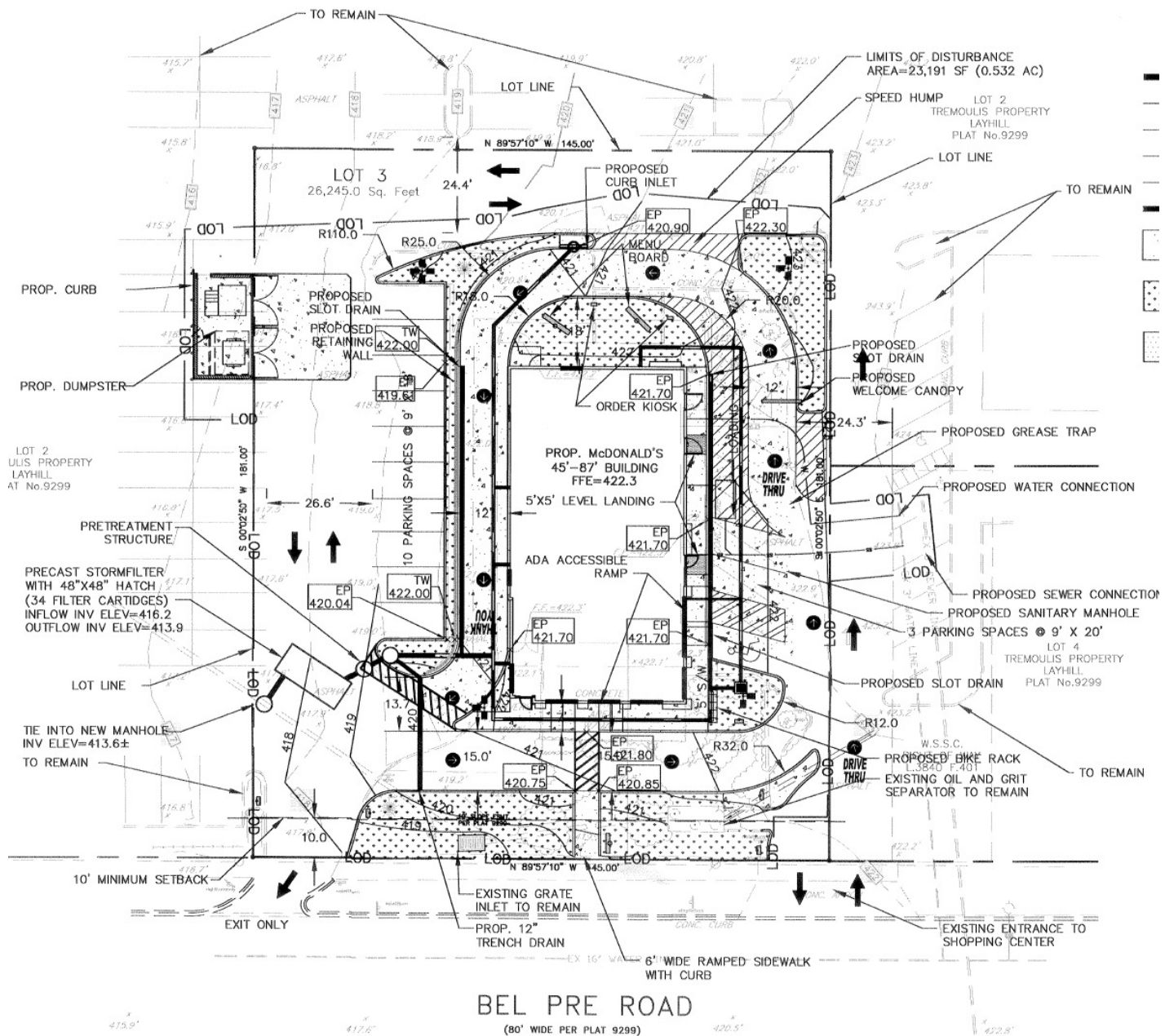
As indicated, the Petitioner proposes several site layout modifications. According to the Petitioner's expert transportation planner, Mr. Mike Workosky, there are several conflicting vehicles movements which occur under the existing site layout. Delays and queuing occur on the northbound drive aisle access into the shopping center when vehicles parked on the east side of the site back up to leave. Mr. Workosky opined that reducing the number of parking spaces on the east side of the building will alleviate that conflicting movement.

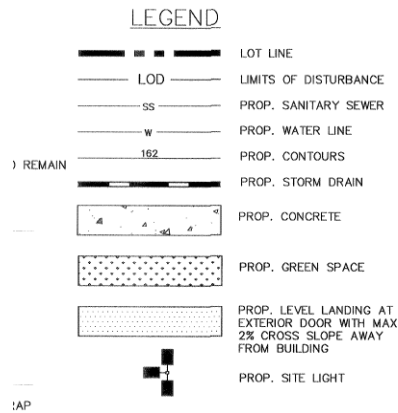
Mr. Workosky also testified that vehicles conflicts occur when vehicles attempt to enter the existing driveway lane directly from the shopping center parking lot. To prevent this, the proposed modification creates a dedicated drive through aisle beginning on the east side of the site (along the northbound drive aisle access to the shopping center), which continues counter-clockwise to the northern and western sides of the building. The drive-through lane is separated from both the existing shopping center access aisle and the shopping center parking lot by a landscaped berm with portions of raised concrete paving.

Mr. Workosky stated that other vehicular conflicts currently arise because the existing dumpster is located against the rear (northern side) of the restaurant. In order to empty the dumpster,

trucks must back up into the drive through lane, blocking the lane while unloading the dumpster. The proposed modification would move the dumpster location to a small portion of Lot 2 adjacent to the western property line of the adjacent parcel, thus eliminating this problem.

The proposed site plan (Exhibit 17(b)) is set forth below (the legend is shown on the following page):

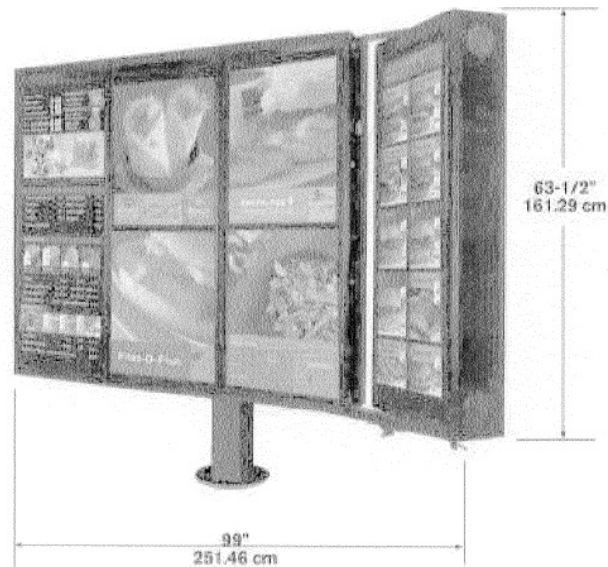




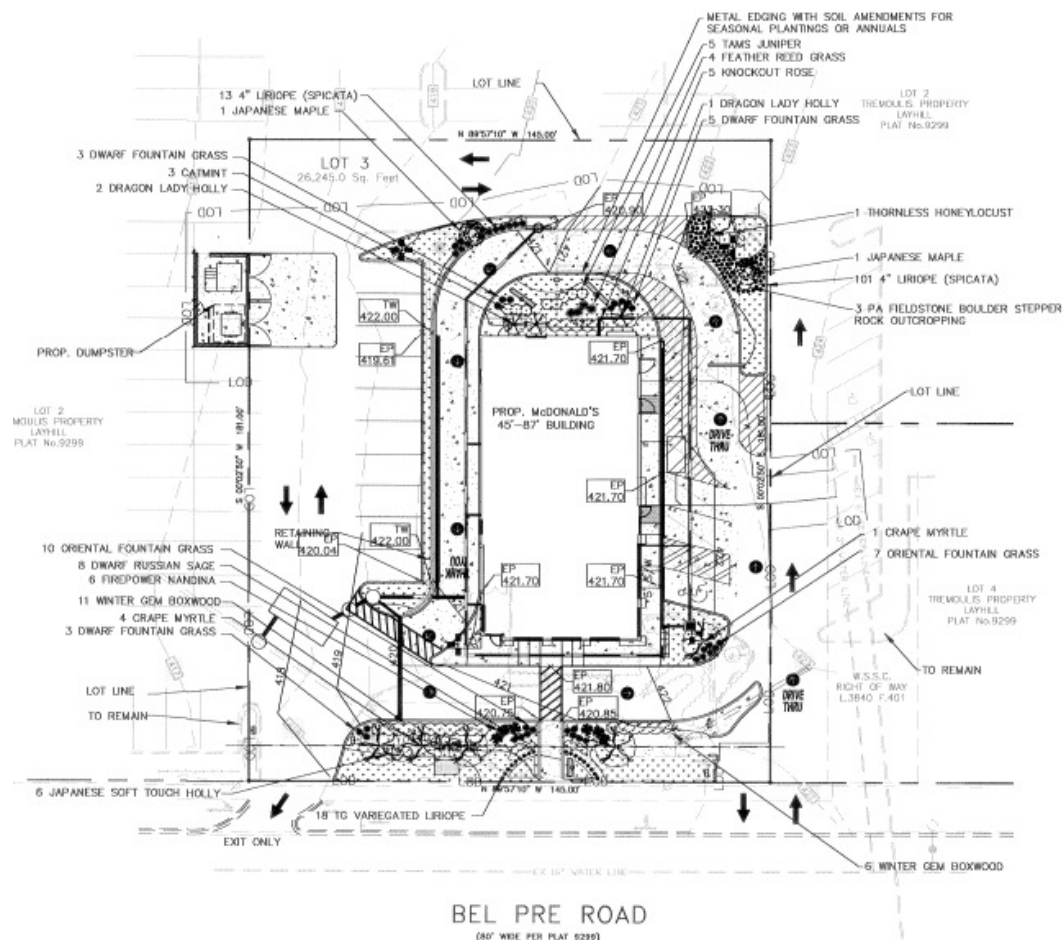
The Petitioner also proposes to eliminate the existing outdoor play area and add a front drive aisle to the property. Mr. Workosky testified that this is necessary because currently vehicles desiring to enter the drive through from the shopping center parking lot must either cut into the queue or exit the shopping center at the signalized intersection at Bel Pre Road, turn left onto Bel Pre Road, and re-enter the site at the northbound drive aisle accessing the shopping center. The front drive aisle permits vehicles to short-cut this procedure by allowing them to enter the drive through lane from the west at the southern end of the site and proceed counter-clockwise to the drive through lane. The Petitioner proposes a concrete curb at the southeast corner of the front drive aisle to prevent traffic exiting the gas station from conflicting with vehicles entering the drive-through lane from the west side of the property.

Petitioner's expert civil engineer and land use planner, Mr. Richard Hurney, testified that site operations will be made more efficient through installation of two modern ordering stations, allowing more people to order concurrently. The Petitioner submitted renderings of these (Exhibit 17(f)) shown on the following page.

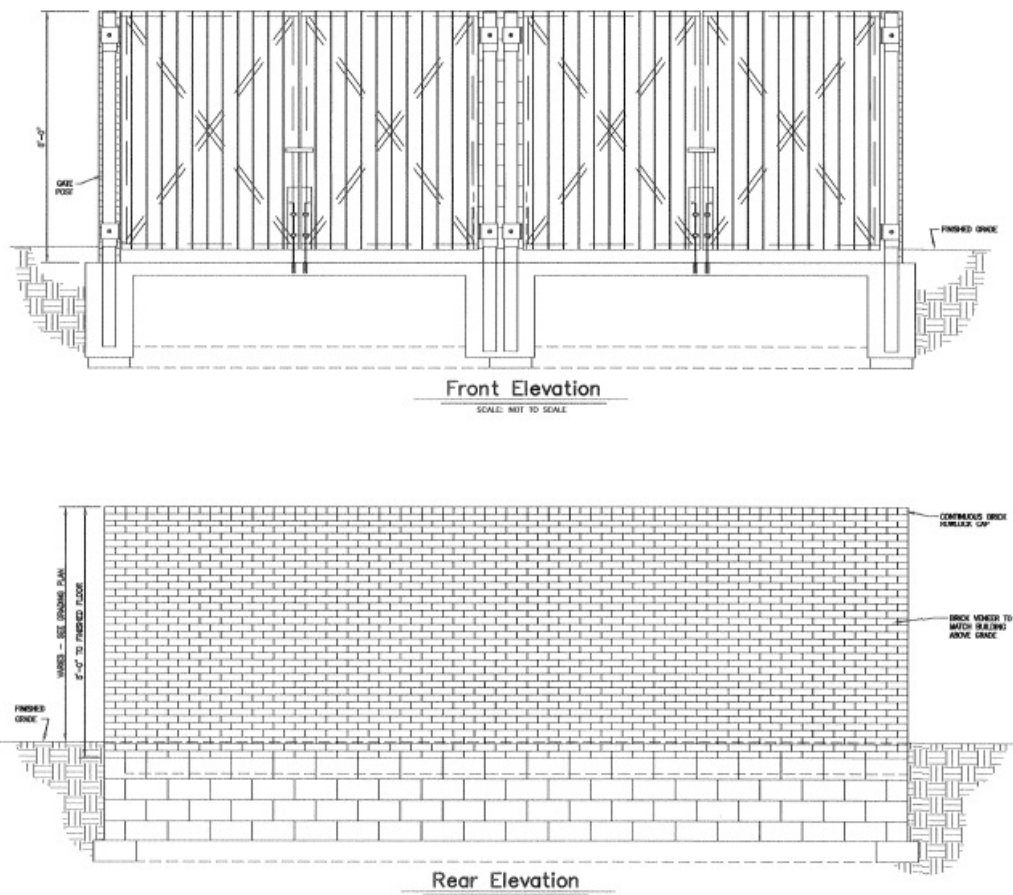
Petitioner submitted a landscape plan (Exhibit 17(g)), depicting the proposed landscaping on the berm creating the designated drive through lane and on the Bel Pre Road frontage of the site. Technical Staff advises that the "proposed landscaping plan will enhance the view from Bel Pre Road



with a planting bed that includes ornamental trees, evergreens, grasses and blooming herbaceous plants.” Exhibit 26(b), p. 4. The landscape plan (Exhibit 17(g)) is set forth below:



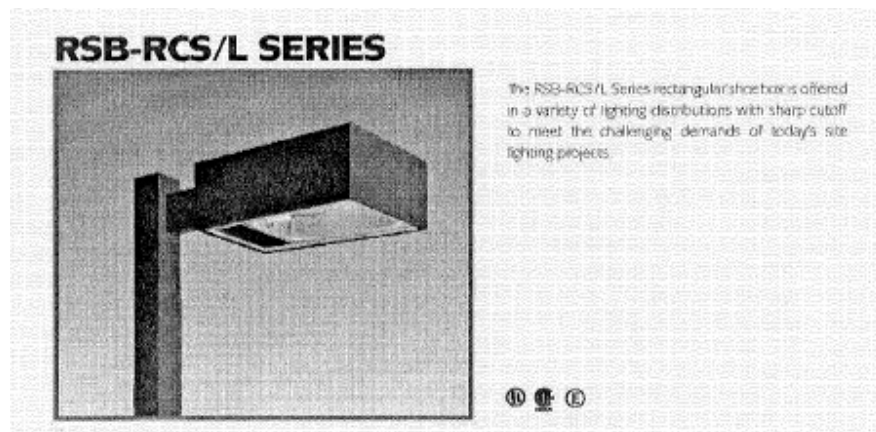
Mr. Hurney also testified that the trash corral will be located on a portion (approximately 434 square feet) of Lot 2. It is located adjacent to the property line. Mr. Hurney testified that the structure will meet the development standards of the C-1 Zone for Lot 2, as there are no side setbacks in the C-1 Zone. T. 31-33, 48-50. The trash corral will be enclosed by a masonry structure (T. 40) with brick veneer wall and a wooden board fence to access the dumpsters, as shown on Exhibit 17(d), below:



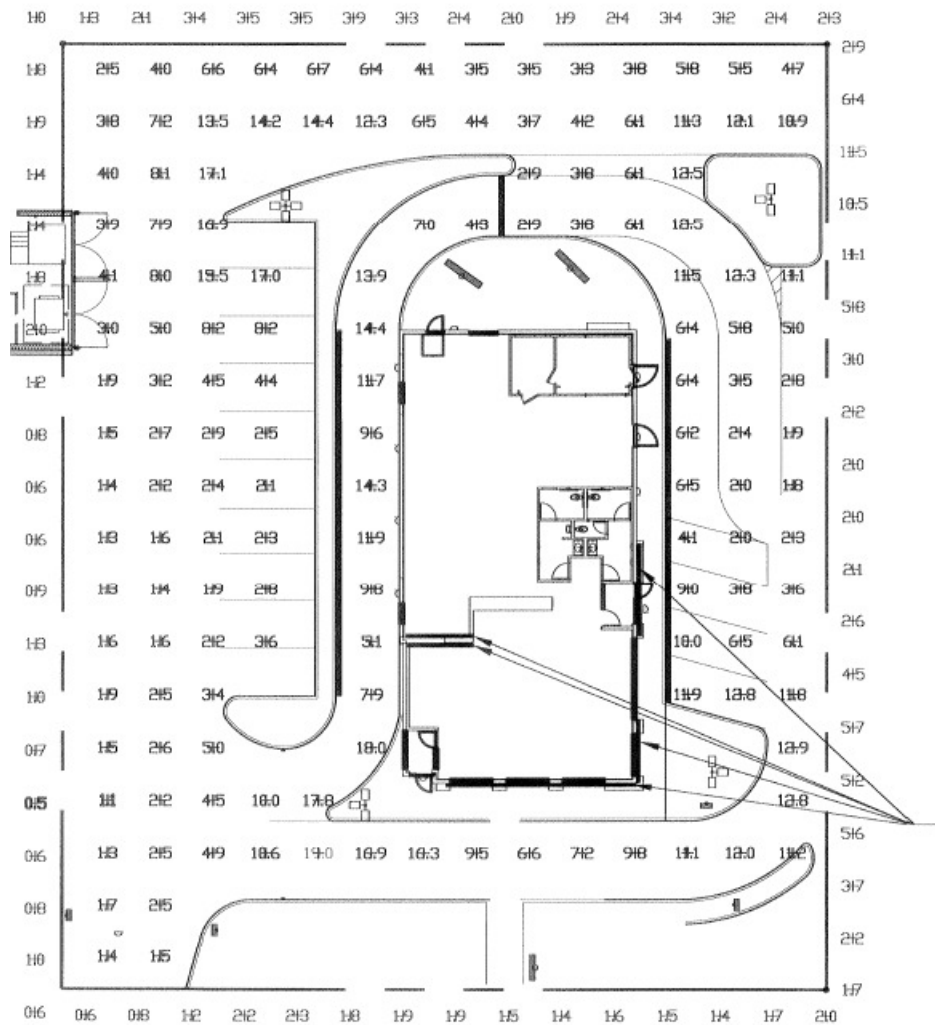
While the record does contain a “consent” from the owner of Lot 2 (the owner of the shopping center) to permit Petitioner to place the trash corral on that site (Exhibit 12), Technical Staff recommended a condition requiring Petitioner to submit a cross-access easement from the owner to use the property. The Hearing Examiner agrees with Technical Staff’s recommendation, particularly

in light of §59-A-4.22(a)(6) of the Zoning Ordinance, which requires the Petitioner to submit “the lease, rental agreement or contract to purchase by which the applicant's legal right to prosecute the petition is established.” While not a lease or rental agreement, a cross-access easement does establish Petitioner’s right to use the property and thus meets the intent of the cited section. The cross-access easement should also explicitly establish the Petitioner’s right to repair and maintain the trash corral as shown on the special exception plan.

Petitioner will use a “shoot block” type of lighting fixture on the exterior designed to direct light downward with no glare, illustrated below in Exhibit 17(j), (T. 41):



Petitioner also submitted a photometric plan (Exhibit 17(j), reproduced on the following page) showing that exterior lighting will result in an average of 2.6 footcandles at the property line. According to Mr. Hurney, the closest residential use is the Parker Farm subdivision directly south of the property across Bel Pre Road. In his opinion, the proposed lighting will not result in glare into the residential neighborhood because it is separated by the 80-foot right of way for Bel Pre Road and then the additional 50-foot building setback from the right of way. T. 42.



Technical Staff recommended approval of the special exception subject to the following conditions (Exhibit 26(b), p. 2):

1. All previous conditions of the special exception S-786 and S-707 shall remain in full force, unless modified by the current application.
2. Physical improvements are limited to those shown on the site and landscape plan submitted with the application, including modifications as provided in Condition 3 and Attachment 1. The applicant must maintain in good condition the proposed landscaped areas.
3. The project must provide a handicapped ramp on the south side of the building, leading into the pedestrian crossing, which crosses the drive-through exit.
4. The project must provide a pedestrian refuge at the end of the pedestrian crossing located on the southwest side of the drive-through lane's exit.

5. The project is subject to Site Plan review per §59-D-3 as required by § 59-C-4.341.2. The applicant must submit to the Board of Appeals any changes to the site, landscape and/or lighting plans stemming from the Site Plan review.
6. The applicant may not post the signs proposed until it obtains a signage permit from the Department of Permitting Services. A copy of the permit should be filed with the Board of Appeals. The applicant must submit to the Board of Appeals any changes to the signage details following Site Plan review by the Planning Board.
7. Prior to obtaining a building permit, the applicant must secure a cross-access easement from the owner of Lot 2, "Tremoulis Property," in order to use the proposed 434 square foot dumpster area, located on Lot 2.
8. The applicant obtain a waiver for providing 16 fewer parking spaces on-site than required pursuant to §59-E-4.5.

At the public hearing before the Planning Board, the Petitioner testified that it could not comply with condition #3 requiring a handicapped ramp on the south side of the building because the grade at that location was too steep. After considering the testimony, Technical Staff concurred, finding that a ramp at the southern portion of the site (recommended in condition #3) was not necessary and that the cross-walk proposed on the southwestern side of the site would serve the same purpose. Exhibit 26(a), p. 1. The Planning Board concurred with the Petitioner's request to remove condition #3 and recommended approval of the petition subject to the remaining conditions recommended by Technical Staff. Exhibit 26(a). Upon this evidence, and having no evidence to the contrary, the Hearing Examiner agrees with both Technical Staff and the Planning Board that the cross-walk recommended in condition #3 of the Technical Staff Report is not necessary.

D. Master Plan

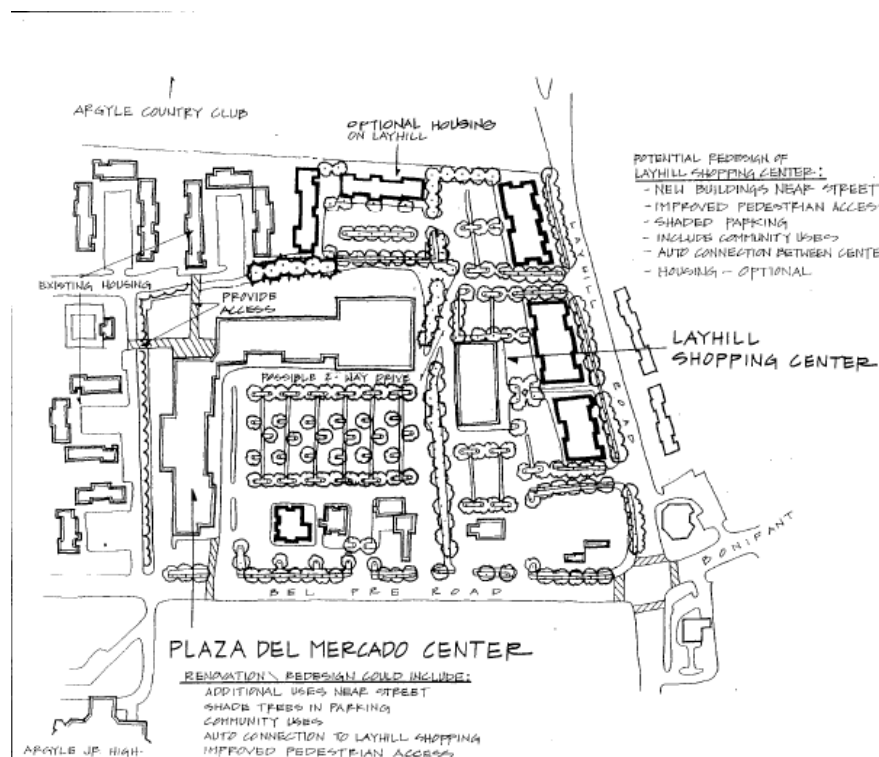
Technical Staff advises that the subject property is within the area covered by the *1994 Approved and Adopted Aspen Hill Master Plan* (Plan). The Plan includes a recommendation that access between the Layhill Shopping Center and the Plaza del Mercado be provided upon redevelopment to ease on-site circulation issues. *Plan*, p. 75. It also contains the following

recommendation for the redevelopment of the Plaza del Mercado shopping center (designated as a “major activity center” and Site No. 26 in the Plan) as a whole:

The conceptual illustration for the redesign of the shopping center sites shows an improved vehicle and pedestrian circulation, provides an attractive edge along Bel Pre and Layhill Roads and includes housing and public space. The following recommendations should be considered in addition to the general shopping center recommendations:

- Provide clear, well-lit and well-marked pedestrian circulation through both sites between residents, transit and stores.
- If redevelopment occurs, consider locating new structures near Bel Pre and Layhill Roads to frame the road corridor, conceal parking and animate the street.
- If the Layhill Shopping Center redevelops and housing is included, assure safe pedestrian connections to all uses and screening of private areas. Provide sensitive integration of community, commercial and residential uses in design.

Plan, p. 79. The conceptual illustration of the redevelopment of both the Plaza del Mercado and neighboring Layhill shopping centers, referred to above, is shown below (*Plan*, p. 52):



Technical Staff concluded that these Plan recommendations did not impact the subject property because they didn't apply to specific pad sites. Exhibit 26(b), p. 4. While that may be the case, the proposed application should not *interfere* with the ability to implement the Master Plan recommendations. *See, Richnarr Holly Hills v. Am. PCS, LP*, 117 Md. App. 607, 656 (1997)(issue is whether a particular proposed use would be so inimical or injurious to the announced objectives and goals of the comprehensive development plan so as not to be able to co-exist with the plan's recommendations.) The Hearing Examiner finds that the proposed special exception modification does not prohibit achieving the recommendations regarding further redevelopment, and it fact may further those goals as it improves existing vehicular and pedestrian circulation on the site, removes the outdoor play area, and adds landscaping along Bel Pre Road.

The Plan provides the following guidance on special exceptions in general and drive-in restaurants in particular:

- **Avoid excessive concentration of special exception and other nonresidential land uses along major transportation corridors.** Sites along these corridors are more vulnerable to over-concentration because they are more visible...It is also important in this area to minimize uses that might diminish the safety and reduce the capacity of the roadway by creating too many access points and conflicting turn movements.
- **Protect major transportation corridors and residential communities from incompatible design of special exception uses.** In the design and review of special exceptions, the following guidelines should be followed, in addition to those stated for special exception uses in the Zoning Ordinance:
 - a) Any modification or addition to an existing building to accommodate a special exception use should be compatible with the architecture of the adjoining neighborhood and should not be significantly larger than nearby structures.
 - b) Front yard parking shall be avoided because of its commercial appearance; however, in situations where side and rear yard parking is not available, front yard parking should be allowed only if it can be adequately landscaped and screened.
 - c) Close scrutiny should be given to replacing or enhancing the screening and buffering as viewed from abutting residential areas and the major roadways.

* * *

Legislation has been introduced to provide a greater distinction in the Zoning Ordinance to distinguish between drive-in restaurants, eating and drinking establishments, and convenience food and beverage stores. A clearer distinction between the uses would better represent what type of uses could be expected in community-oriented shopping centers and their suitability could be better determined. *Until these changes are made, future drive-through eating and drinking establishments should be closely scrutinized in neighborhood commercial areas in Aspen Hill.*

1994 Aspen Hill Master Plan, pp. 80-81 (bold in original, italics supplied).

Technical Staff concluded that the petition was in “significant compliance” with the Plan’s guidelines as to special exceptions. Staff concluded that the additional landscaping with ornamental trees, grasses, evergreens and blooming herbaceous plants would improve the buffering along Bel Pre Road, that the one-story building was in scale with the surrounding residential structures, and that recommendations regarding parking in the front yard were not applicable because the property is commercially zoned. Exhibit 26(b), p. 4. Staff did not address the language shown in quoted italics above. Because, however, this is an existing use and the Hearing Examiner finds that the modifications improve existing traffic and pedestrian conflicts, provide new landscaping buffering from Bel Pre Road, and reduce the amount of parking needed for the use, the petition substantially conforms with the Plan.

E. Public Facilities

As the petition does not require preliminary plan approval, the adequacy of public facilities must be determined by the Board of Appeals. Transportation Planning Staff advises that the modification is not subject to either Local Area Transportation Review (LATR) or Policy Area Mobility Review, because the modernization of the existing facility does not generate any additional trips due to the reduction in size of the patron area and number of seats. Exhibit 26(b), pp. 4-5, Attachment 5.

Mr. Workosky testified that he estimated the traffic impact under the LATR guidelines based both on gross square footage of the patron area and based on the number of patron seats. He used the number of patron seats as an additional method of calculating the number of trips estimated to be generated by the modified use because the existing use has 10 seats in the outdoor play area, which is not counted in the gross floor area of the patron area. Therefore, he believed that this method would better represent the traffic impact of the modification. T. 55. The modification will reduce the number of patron seats from 121 to 80 seats, thus for the purpose of LATR and PAMR, the modified will generate fewer trips. He acknowledged, however, that because the existing McDonald's has a "mature" market, and most of the customers will be repeat customers, the proposed use will generate roughly the same amount of traffic as it does today. T. 56.

Technical Staff advises that the remaining public facilities, such as water and sewer, are adequate to serve the proposed use. Exhibit 26(b), p. 8. Mr. Hurney testified that public water and sewer is already serving the existing facility, that a stormwater management concept plan for the reconstruction has been approved by the Department of Permitting Services, and police and fire services are adequate to serve the proposed use. T. 45.

F. Parking Waiver

The Petitioner seeks a waiver from the number of on-site parking spaces required to be provided by Section 59-E-3.7 of the Montgomery County Zoning Ordinance. Mr. Hurney testified that the existing special exception requires 47 spaces, 18 of which are provided on-site.² According to him, the modification requires 29 spaces, 13 of which are being provided on-site necessitating a 16-space waiver from the number of required spaces.

Section 59-E-4.5 permits the Board of Appeals to waive the number of on-site parking space required if the spaces are, "not necessary to accomplish the objectives in Section 59-E-4.2, and in

conjunction with reductions may adopt reasonable requirements above the minimum standards.”

Section 59-E-4.2 describes the following objectives for parking facilities:

- (a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.
- (b) The safety of pedestrians and motorists within a parking facility.
- (c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.
- (d) The provision of appropriate lighting, if the parking is to be used after dark.

Technical Staff recommended approval of the waiver because the approved site plan for the Plaza del Mercado shopping center (Site Plan No. 82006040) allocates 35 spaces for use by the restaurant. Exhibit 26(b), p. 10. The Petitioner presented evidence of an agreement with the owner of the shopping center permitting Petitioner unlimited use of the spaces in the adjacent shopping center parking lot. Technical Staff found that even though McDonald's is a separate use, the “site functions with the adjacent Plaza del Mercado, and site circulation and parking is addressed for both parcels” in the site plan for the shopping center. Exhibit 26(b), p. 10.

Mr. Kauffunger objects to the waiver request because he believes it would remove eight spaces from the eastern and rear sides of the building, thereby exacerbating an existing parking shortage at the shopping center. T. 84-87. Petitioner responds by pointing out that even though spaces are being removed from the special exception area, the reduced size of the restaurant actually results in a net gain in the total number of spaces available in the center. The parking requirements for a restaurant are determined by the gross floor area of the patron seating area.

² The record does not reveal whether a waiver was required previously. Technical Staff indicates that parking for

Because the modification reduces the size of the patron seating area, the overall parking requirement is reduced. In addition, Mr. Hurney pointed out that there are ten patron seats in the outdoor play area that were not counted when determining the parking requirement of the existing use. Therefore, not only is the number of spaces required by the Zoning Ordinance reduced but the actual need for parking is reduced as well. Finally, Mr. Hurney testified that 13 space of the 29 required spaces will be provided on-site. Under existing conditions, eighteen of the 47 required spaces are provided on-site. T. 91-105.

The Hearing Examiner finds that the Petitioner's parking waiver request meets the objectives for parking facilities set forth in §59-E-4.2 of the Zoning Ordinance and recommends approval of the request. The proposed modifications to the existing special exception add perimeter landscaping and buffering around the site, resolves several conflicting vehicle movements and improves vehicular and pedestrian safety. Traffic congestion at the drive aisle into the shopping center will be reduced due to the elimination of the parking spaces on the east side of the building.

In addition, the modifications to the existing special exception will increase the number of parking spaces available within the shopping center. This is because the proposed modifications reduce the size of the patron area (which is the basis for calculating the parking requirements) and because the outdoor play area will be removed. Therefore, not only will the *required* parking be reduced, actual demand for parking spaces will be reduced as well. Under existing conditions only approximately 38% of the required parking is provided on-site ($18/47=38\%$). As reconfigured, the use will be able to accommodate approximately 45% of its required parking on-site ($13/29=45\%$). Therefore, both from the perspective of an overall reduction in spaces, and the number of spaces that can be located on-site, the proposed

the proposed use was based on the shopping center as a whole.

modifications will increase the number of available parking spaces available for the shopping center.

G. Environmental Issues

Technical Staff reports that there are no environmental issues associated with the redevelopment of the site. There are no streams, wetlands or environmental buffers on the subject property. A Natural Resources Inventory/Forest Stand Delineation has been approved for the subject property and the property is exempt from the requirements of the County's Forest Conservation Law (*Montgomery County Code*, Chapter 22A) because the property is less than 1.5 acres and has no existing forest, specimen, or champion trees on-site. Exhibit 26(b), p. 5.

H. Community Response

Mr. Richard Kauffunger appeared as an individual opposing the petition. He testified that parking is difficult at the Plaza del Mercado shopping center, partly because parking spaces at the northern part of the center (behind the major retail structure) are inconvenient and little used. He stated that the center lost its anchor store about 6 months ago and that a second grocery store decided not to come to the shopping center due to insufficient parking. He believed that the modification would remove 8 spaces from the existing site, and that the requested waiver would further exacerbate parking problems at the shopping center. He requested that the special exception should be delayed until the shopping center parking issues could be resolved. T. 74-91.

III. SUMMARY OF THE HEARING

The Petitioner called three witnesses. Mr. Eidenberger, construction manager for McDonald's USA LLC, testified the Petitioner is requesting the modifications. T. 8-17. Mr. Richard Hurney qualified as an expert in civil engineering and land planning. He described the proposed changes and

testified that the application met the general and special standards for approval of a special exception use set forth in Sections 59-G-1 and 59-G-2 of the Zoning Ordinance. T. 17-50. Mr. Mike Workosky testified for the Petitioner regarding LATR/PAMR requirements, and site circulation. T. 50-68. As noted, Mr. Kauffunger presented testimony in opposition to the petition. T. 74-91. Portions of their testimony are set forth herein where relevant. A complete summary of the testimony presented at the public hearing is set forth in Appendix A to this Report, which is attached hereto and incorporated herein.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale

of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a drive-in restaurant. Those characteristics of the proposed use which are “necessarily associated” with drive-in restaurants will be considered inherent adverse effects, while those characteristics that are not necessarily associated with drive-in restaurant uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a drive-in restaurant include (Exhibit 32, p. 13):

- (1) the building housing the restaurant,
- (2) parking facilities,
- (3) lighting,
- (4) noise generated by vehicles using the drive-in,
- (5) vehicular trips to and from the site by patrons and employees, and
- (6) long hours of operation.

Technical Staff concluded that there are no non-inherent characteristics of the modifications proposed because the impact on existing conditions is “minimal” and there are no unusual on-site conditions. Exhibit 26(b), p. 6. In past special exception petitions for drive-in restaurants, the Hearing Examiner has found that an outside play area is a non-inherent impact of the use. *See,*

Hearing Examiner's Report and Recommendation, BOA Case No. 2736. Because the outdoor play area is being removed, and having no evidence to the contrary, the Hearing Examiner also finds that there are no non-inherent impacts of the proposed modification to the existing drive-in restaurant use.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff reports, the other exhibits and the testimony of the Petitioner's witnesses provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A drive-in restaurant use is a permissible special exception in the C-1 Zone, pursuant to Code § 59-C-4.2(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.16 for a drive-in restaurant use, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant

the special exception must include specific findings as to master plan consistency.

Conclusion: The property is located within the area covered by *1994 Approved and Adopted*

Master Plan. For all the reasons discussed at length in Part II. D. of this report, the Hearing

Examiner finds that the planned use is consistent with the Aspen Hill Master Plan.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: Technical Staff found that the proposed modification will be in harmony with the general character of the neighborhood because it modernizes and upgrades the existing use, is commercially zoned, and reduces the number of peak hour trips generated by the property. Exhibit 26(b), p. 7. Mr. Hurney testified that the scale of the new building is similar to what exists today, but will be more architecturally pleasing. Both Mr. Hurney and Mr. Workosky testified that the revised site layout will increase the safety of vehicular and pedestrian circulation on the site. While the Petitioner requests a parking waiver for the subject property, the evidence demonstrates that there is ample parking in the adjacent shopping center parking lot and the modification will actually *increase* the number of available spaces in the center. Based on this evidence, the Hearing Examiner finds that the proposed use is in harmony with the general character of the neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Technical Staff determined that the proposed use will not be detrimental to the surrounding community as it has existed prior to 1958 and because Petitioner does not propose

changing the existing operations. Exhibit 26(b), p. 7. The Hearing Examiner finds that the modification request is not detrimental to the community because it improves the appearance of the site aesthetically, adds additional landscaping, improves circulation both on-site and in relation to the adjacent shopping center parking lot, and reduces the amount of required parking.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff concluded that the proposed modifications will not cause objectionable impacts. Mr. Hurney testified that the light fixtures will be designed to through light downward and prevent glare, resulting in an average of only 2.6 foot candles at the property line. Given the width of the right of way between the site and the closest residential properties across Bel Pre Road in addition to the 50-foot building setback from the right of way, he also stated that no objectionable glare from the use will reflect on those properties. Given this evidence, the Hearing Examiner agrees that this standard has been met.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The Hearing Examiner finds, as did Technical Staff, that this standard has been met. The property is commercially zoned and is surrounded on three sides by commercial uses. In addition, the petition proposes to modify an existing special exception, and therefore does not intensify the number of special exception uses in the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at*

the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: For the reasons set forth in answer to previous sections, the evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *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.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, as discussed in Part II. D. of this report. The site has both public water and sewer access, and DPS has approved a stormwater concept plan. By its nature, the use does not burden public schools. Police and fire protection are presumed adequate by the Growth Policy unless those agencies specify otherwise, which they have not.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, by the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: This modification does not require approval of a preliminary plan and thus, the Board of Appeals must make the determination as to whether public facilities are adequate to serve the use.

Technical Staff reports that no LATR or PAMR review is required because the modifications will reduce the number of trips generated by the use. Mr. Workosky testified to this as well based on the reduction in size of the patron seating area and the number of patron seats.

Mr. Hurney, the applicant's civil engineer, also testified that public water and sewer are available to the site, a stormwater concept plan has been approved by the Department of Permitting Services, and that fire and police facilities are adequate to serve the use as reconfigured. Based on this evidence, the Hearing Examiner finds that public facilities are adequate to serve the use if modified as proposed.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff agreed with Petitioner's traffic engineer, Mr. Workosky, that the modifications will improve on-site vehicular and pedestrian safety, as described at length in Section II.C. of this Report. The Hearing Examiner agrees that the improvements will improve traffic safety by alleviating existing traffic delays and queuing at the drive aisle entrance, minimizing the ability of traffic in the center to enter the drive-through lane, and allowing vehicles approaching from the west to enter the site without exiting the shopping center and re-entering the property from Bel Pre Road.

In addition, the Hearing Examiner finds that pedestrian access is safe and adequate due to the proposed cross-walk located in the southern side of the site. The Hearing Examiner agrees with the Planning Board that the condition #3 of the Technical Staff Report is unnecessary, especially given that the grade at that location is too steep to provide ADA access. Exhibit 26(a).

C. Specific Standards

The testimony and the exhibits of record, including the Technical Staff reports, provide sufficient evidence that the specific standards required by Section 59-G-2.16 are satisfied in this case, as described below.

Sec. 59-G-2.16. Drive-in restaurants.

A drive-in restaurant may be allowed, upon a finding, in addition to findings required in division 59-G-1, that:

(a) The use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.

Conclusion: Technical Staff found that the proposed use will not constitute a nuisance because it replaces a use that has existed on the site since the 1950's. Technical Staff advises that McDonald's will continue "to use state of the art filters and ventilation systems to control any odor that should arise from grease and other uses inherently associated with a drive-in restaurant." Exhibit 26(b), p. 12. The relocated trash dumpster will be enclosed by a brick veneer wall with wooden access gates. The Hearing Examiner agrees with Technical Staff that the proposed modifications improve the current impact of the use and therefore meet this standard.

(b) 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: The improvement in traffic safety was discussed at length above. Technical Staff found the use at this location will not create a traffic hazard or nuisance. Exhibit 26(b), p. 12. The Hearing Examiner agrees and so finds.

(c) The use of the proposed location will not preempt frontage on any highway or public road in such manner so as to substantially reduce the visibility and accessibility of an interior commercial area zoned or proposed for commercial use which is oriented to the same highway or public road.

Conclusion: Technical Staff reports “The proposed modification does not preempt the frontage on any highway or public road to substantially reduce the visibility and accessibility of the Plaza del Mercado, which also fronts Bel Pre Road.” Exhibit 26(b), p. 13. Having no evidence to the contrary, the Hearing Examiner so finds.

(d) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot wide planting strip on the outside of such wall or fence, planted in shrubs and evergreens 3 feet high at the time of original planting and which shall be maintained in good condition. Location, maintenance, vehicle sight distance provisions, advertising and parking areas pertaining to screening shall be as provided for in the requirements contained in article 59-E.

Conclusion: This section is not applicable because the use itself does not abut a residential zone. As noted by Technical Staff, the Petitioner additionally is providing “landscaping along the site’s frontage which includes a variety of shade and shrub trees, ground cover and perennials within a 15-foot landscape strip.” Exhibit 26(b), p. 13. Based on this evidence, the Hearing Examiner concludes that this standard has been met.

(e) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from, such use are prohibited.

Conclusion: The proposed use will not have product displays, parked vehicles or other obstructions which adversely affect visibility at intersections or at entrances and exits to and from the use. The parked vehicles will be located to the side and rear of the site.

(f) *Lighting is not to reflect or cause glare into any residential zone.*

Conclusion: The proposed lighting will not reflect or cause glare into any residential zone. Mr. Hurney testified that the Petitioner will use lighting fixtures which direct light downwards thereby preventing glare and that the nearest residential development was almost 130-feet from the restaurant, across Bel Pre Road. The Hearing Examiner finds that the lighting proposed will not reflect or cause glare into any residential zone.

(g) *When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot, as defined in section 59-A-2.1, and such driveways shall not exceed 25 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 60 feet from the centerline of any abutting street or highway.*

Conclusion: As the subject property is not a corner lot, this requirement does not apply.

D. Additional Applicable Standards

59-G-1.23. General development standards.

(a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Technical Staff advises that the proposed use satisfies the development standards in the C-1 Zone, as summarized in Table 1 reproduced from the Technical Staff Report (Exhibit 26(b), p. 9) on the next page.

Mr. Hurney testified that the trash enclosure also meets the applicable development standards for Lot 2, which is also in the C-1 Zone, as there are no side yard setbacks. Having no evidence to the contrary, the Hearing Examiner finds this standard has been met.

Table 1: Applicable Development Standards – C-1 Zone

Development Standards – R-60/Acc. Apt.	Requirement	Provided
Maximum Building Height (measured from the average elevation of finish grade surfaces along the front, sides and rear of the building)	30'	±22'
Minimum Green Area	10%	±14%
Minimum setbacks- Front Yard Side Yard Rear Yard	10' None None	±38' ±35', ±60' ±55'
Floor Area	None	3,911 GFA 1,149 s.f. (patron area)
Minimum parking	25/1,000 s.f. of patron area (1,149 sf patron = 29 spaces)	13
Accessory Structure	none	none

(b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As set forth previously, the Petitioner requires a waiver of 16 spaces from the number of on-site parking spaces required by §59-E-3.7 of the Zoning Ordinance. For the reasons set forth in Section II.F. of this Report, the Hearing Examiner recommends approval of the waiver request and finds that the modifications proposed meet the requirements of Division 59-E of the Zoning Ordinance.

(c) *Minimum frontage* * * *

Conclusion: Not applicable to this special exception.

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff advises that Environmental Planning Staff has approved an NRI/FSD

for the subject property and the property is exempt from the forest conservation requirements because it is less than 1.5 acres and there are no forests, specimen trees or champion trees on the site. Exhibit 26(b), p. 11. Based on this evidence, the Hearing Examiner finds that a forest conservation plan is not required under Chapter 22A of the Montgomery County Code.

- (e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable. A water quality plan is not required since the site is not in a Special Protection Area. Exhibit 26(b). Petitioner's storm water management concept plan has been approved by the Department of Permitting Services (DPS). T. 46-47.

- (f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: Signage information is contained on Petitioner's signage plan (Exhibit 17(f)). Technical Staff reports that the proposed sign locations and configurations "generally meets the standards under Article 59-F." Exhibit 26(b), p. 11. The Hearing Examiner finds that the signage proposed thus far is consistent with the type of use proposed, and compliance with Article 59-F can be achieved by obtaining the required permits.

- (g) *Building compatibility in residential zones. . . .*

Conclusion: Not applicable. The site is not in a residential zone.

- (h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for*

a recreational facility or to improve public safety:

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The site is not in a residential zone. Mr. Hurney testified that the lighting is designed to shine downwards, and will not produce additional glare on the nearest residential neighborhood south of Bel Pre Road. Petitioner's Photometric Plan demonstrates that the light will be approximately 2.6 foot candles at the edge of the property. Based on this evidence, the Hearing Examiner finds this standard is met.

59-G-1.25. County need.

In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, 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:

- (1) Eating and drinking establishments—Drive-in restaurant.*

Conclusion: As there are no changes in the operations of the existing use, Technical Staff found that the need for the facility was established when the existing and prior special exceptions were approved. Staff advises that there is no net change of drive-through uses in the area, as the proposed modification is "replacing the existing building and the use and operations remain the same." Exhibit 26(b), p. 12. The Hearing Examiner agrees with Technical Staff and so finds.

59-G-1.26. Exterior appearance in residential zones.

* * *

Conclusion: Not applicable. The site is not in a residential zone.

Based on the testimony and evidence of record, I conclude that the modifications to the existing drive-in restaurant use proposed by Petitioner, as conditioned below, meets the specific and

general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this Report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-786-B, seeking to modify a special exception for a drive-in restaurant use at 2207 Bel Pre Road, Silver Spring, Maryland (Lot 3 and a portion of Lot 2 in the Temoulis Property Layhill subdivision), be GRANTED, with the following conditions:

- 1) Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
- 2) The Applicant must limit development on the property to a drive-in restaurant with 3,911 gross square-feet of floor area. The use may have no more than 1,149 square feet of indoor patron area.
- 3) The Applicant must provide 13 parking spaces on-site.
- 4) All previous conditions of the special exception S-786 and S-707 shall remain in full force, unless modified by the current application.
- 5) Physical improvements are limited to those shown on the site plan (Exhibit 17(b), signage plan (Exhibit 17(f)), and landscape plan (Exhibit 17(g)) submitted with the application. The applicant must maintain in good condition the proposed landscaped areas.
- 6) The project must provide a pedestrian refuge at the end of the pedestrian crossing located on the southwest side of the drive-through lane's exit.
- 7) The project is subject to Site Plan review per §59-D-3 as required by § 59-C-4.341.2. The applicant must submit to the Board of Appeals any changes to the site, landscape and/or lighting plans stemming from the Site Plan review.
- 8) Petitioner may not post the signs it proposes until it obtains a permit therefor from DPS. A copy of the permit should be filed with the Board of Appeals. Any changes to the signage details shown on Exhibits 55, 59(a) and 59(b) must be submitted to the Board of Appeals for review following Site Plan Review by the Planning Board.
- 9) Prior approval by the Board of Appeals, the applicant must secure a cross-access easement from the owner of Lot 2, "Tremoulis Property," in order to use the proposed 434 square foot dumpster area, located on Lot 2. The cross-access easement must establish the right of the Petitioner to maintain and repair the trash enclosure as shown on the site plan Exhibit 17(b) and the Site Details Plan (Exhibit 17(f)).

10) Pursuant to §59-E-4.5, the Board of Appeals must approve a waiver of 16 parking spaces from the number of on-site parking spaces required by §59-E-3.7 of the Zoning Ordinance.

11) Petitioner 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 special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception 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.

Dated: March 2, 2012

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'L' and 'R' followed by a long horizontal flourish.

Lynn A. Robeson
Hearing Examiner

APPENDIX A

Summary of Testimony

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1. Mr. John Eidenberger:

Mr. Eidenberger is the construction manager for the McDonald's Corporation. He testified that McDonald's leases the subject property from Federal Realty. The property is within a larger shopping center also owned by Federal Realty. The existing restaurant is outdated and no longer meets the current McDonald's model. The newer model places more emphasis on the casual dining environment and a more varied visual architectural look that includes a flattened roofline, more earth tones, and more indirect lighting to highlight the building architecture. McDonald's is also incorporating more efficiencies into this building, particularly upgrading the existing drive through. T. 9-10.

Mr. Eidenberger stated that he has been to the site several times. It is located on a pad within the Plaza del Mercado Shopping Center and is currently improved with a McDonald's restaurant and drive through. McDonald's proposes to demolish the existing structure completely and rebuild an entirely new structure. T. 17. The current building has a cellar; the floor area of the cellar will be added to the first floor. T. 11. McDonald's also will be upgrading the drive through by adding an additional order station to better channel vehicle movements through the site. Petitioner will also be adding a front drive aisle in front of the restaurant with additional landscaping. According to Mr. Eidenberger, the front drive aisle is intended to improve existing poor circulation on the site. They also propose to move the trash corral, currently attached to the building, to a separate location in order to make vehicle movement surrounding the site more efficient. T. 14-15.

Mr. Eidenberger testified that McDonald's is not proposing any changes to existing operations. Currently, the restaurant operates 24 hours per day, 7 days a week, which will remain the same. Deliveries occur three times per week at one delivery per truck. The number of staff, 14 employees during the morning peak, 16 during the lunch peak hours, 14 during the

evening peak hours, and three during the overnight shifts, will remain the same. A manager will continue to be on-site 24 hours a day, seven days a week. T. 15. Mr. Eidenberger testified that McDonald's controls their own deliveries, and therefore has the ability to schedule them outside of peak hours. T. 69.

Mr. Eidenberger stated that both the existing and proposed drive throughs serve 60 percent of the customers that use the restaurant. While he was not sure whether there was a specific designated area for the McDonald's parking spaces in the shopping center, he believed it likely that there was no defined area. T. 70. He further testified that McDonald's is willing to submit either a lease or access easement for the dumpster area located on Lot 2. T. 71.

Mr. Eidenberger stated that McDonald's has become a mature company and the proposed rebuild at this site is representative of changes that are occurring system wide to update service to their customers. T. 16.

2. Mr. Richard Hurney:

Mr. Hurney qualified as an expert in civil engineering and land use planning. T. 19-20. He testified that the property is located in the northwest quadrant of Layhill and Bel Pre Roads and is within the Plaza del Mercado Shopping Center. The restaurant pad site and the contiguous area of the shopping center are both in the C-1 Zone. T. 21. Residential uses are located to the east and west of the shopping center, the Argyle Country Club is to the north and the Parker Farm development is to the south. T. 21.

Mr. Hurney described the existing conditions on the property. The building was constructed between 30-40 years ago. Access to the site is from Bel Pre Road into the shopping center. The access is both for left and right turns from Bel Pre Road which is a five lane arterial highway. Egress is a right turn only on the western side of the C-1 property onto Bel Pre Road. The current building contains 3,562 square feet, 1,766 square feet of which is the cellar. The

building is set back approximately 55 feet from the right of way line, however, there is a playground area in the front of the store which extends to approximately 30 feet from the right of way line. The existing use requires 47 parking spaces, which under the Zoning Ordinance are based on the patron area of the store. Presently, 35 parking spaces are provided off-site on the adjacent shopping center parking lot by agreement with the property owner. T. 22-23.

Currently, the northbound access aisle provides access both to the subject site and to the remaining shopping center. There is a two-lane drive aisle in the rear of the property which serves both the drive-through and patrons of the shopping center. T. 24.

He testified that the current layout results in several conflicting traffic movements. The existing drive through loops around the building generally manner as is being proposed. In the rear of the site, however, the drive through converges with the two-way drive aisle on the north side of the property. Because the dumpster is located on the rear of the building, access to the dumpster interferes with vehicles using the drive through lane. T. 22. There are circulation inefficiencies for those desiring to access the site from the shopping center itself. According to Mr. Hurney, in order to access the drive-through, shopping center patrons must either cut into the drive-through queue or exit the shopping center onto either Bel Pre Road or Layhill Road and re-enter the shopping center from those roads. T. 24. In addition, vehicles currently exit the gas station located to the east of the northbound drive aisle by driving through the pumps and out the drive aisle. T. 26. Mr. Hurney also testified that pedestrians entering the shopping center from Bel Pre Road must walk up one of the drive aisles to get to the site. T. 27.

According to Mr. Hurney, the proposed building will have a more efficient interior layout and the exterior changes will result in fewer conflicting traffic movements. The entrances to the site will remain the same. The drive-through will be separated from the existing northbound access to the shopping center on the east site of the property by a median and landscape berm to

segregate the shopping center traffic from the drive through traffic. T. 24. In the rear, the area of the two-lane shopping center drive aisle will be separated from the drive-through lane to remove conflicts with the ordering stations and the shopping center traffic. The drive-through flow will continue around the north side of the building to the pick-up windows on the west side of the building and then either proceed right to exit or proceed back into the shopping center. Petitioner is proposing a new drive aisle in front of the building which permits patrons driving from the north and west sides of the shopping center to enter the drive-through without having to exit back onto Layhill or Bel Pre Roads and to re-enter the site. Even with the new front drive aisle, Mr. Hurney testified that there is sufficient area for a landscaping strip approximately 20 feet wide along Bel Pre Road. T. 24. An additional landscape strip has been added to prevent those exiting from the northbound shopping center drive aisle from entering the site. The Petitioner has also added a pedestrian crosswalk in front of the site which ties into the sidewalk along Bel Pre Road which meets the accessibility requirements of the Americans with Disabilities Act ("ADA"). The purpose of this is to improve pedestrian safety. T. 27.

With regard to parking, Mr. Hurney testified that there are ADA accessible parking spaces along the eastern portion of the building to provide handicapped access. T. 27. The Petitioner requested that a condition recommended by Staff, requiring a handicapped cross-walk in the southwest portion of the site, be removed because the existing grade was between 7-8%, in excess of the ADA standards. T. 29. They have put a small island to serve as a pedestrian refuge against left hand turning movements from cars entering from the shopping center. T. 30.

The dumpster will be moved from the rear of the building to a parcel of property located on Lot 2 adjacent to the west side of the site. T. 30. This permits trucks emptying the dumpster to come in from the east and reduces existing conflicts with traffic in the drive through. According to Mr. Hurney, the Petitioner has obtained permission from the shopping center

owner to place the dumpster area on Lot 2 immediately adjacent to the existing pad site. The dumpster area is included within the special exception area. T. 30-31.

Mr. Hurney further testified that the parking requirements for the site are based on patron area. The proposed building will have less patron area than the existing restaurant. T. 34. Under the Zoning Ordinance, Mr. Hurney stated that the proposed use will require 29 parking spaces. Thirteen of these will be provided Lot 3; the balance of the required parking spaces will be provided on the shopping center property. The Petitioner has an agreement with the shopping center owner that permits McDonald's to use 35 spaces on within the shopping center parking lot. As only 29 will be required, the proposed use has a total of 48 spaces, in excess of the Zoning Ordinance requirements. T. 34-35.

Petitioner has also redesigned the site circulation to better accommodate unloading of delivery trucks. Currently, trucks proceed up the access aisle on the east side of the building, but there is no specified area for loading. Under the proposed layout, they have added an area to the west of the drive-through aisle which allows for delivery trucks to unload in that area. The loading area, the shopping center, and the drive through are now three distinct lanes and therefore may operate concurrently without conflict. T. 35-36.

According to Mr. Hurney, the proposed use is consistent with the 1994 Aspen Hill Master Plan ("Plan") which covers the subject property. The Plan has specific recommendations for the re-development of the Plaza del Mercado shopping center. T. 37. The Plaza del Mercado shopping center is zoned C-1, including the area of Lot 2 where the dumpster will be located. The C-1 Zone requires a 10-foot front building setback from Bel Pre Road. The proposed setback is approximately 45 feet, in excess of the requirements of the zone. T. 38-39. Other than the front building setback, no other side or rear setbacks are required within the zone. As a result, the property exceeds setbacks on all sides. T. 39. According to Mr. Hurney, the proposed

use complies with all general and special standards for approval of a special exception. T. 40-44. Petitioner proposes to use downward box lighting. The nearest residential development, Parker Farms, is across an 80-foot right of way and is setback approximately 50 feet from the right of way. The need for the special exception has been established in prior special exception approvals. Nor will it adversely impact the general character of the neighborhood because the use already exists and the proposed changes will result in a more aesthetically pleasing facility. Site circulation will be improved and there are no changes to the existing operations of the site. T. 43. In his opinion, the upgraded building will enhance the older shopping center. T. 44. All public facilities, including public water and sewer, police and fire are available and adequate to serve the property. T. 45. In addition, the special exception complies with all of the development standards for the C-1 Zone. T. 45.

Petitioner is requesting a waiver from the parking requirements of Division 59-E of the Zoning Ordinance. A parking waiver is justified because of the ability to use the spaces in the surrounding shopping center. T. 49.

On rebuttal, Mr. Hurner testified that the Zoning Ordinance requires 25 parking spaces for every 1,000 square feet of patron area. T. 92. The existing patron area is approximately 1,864 square feet, which requires a total of 47 parking spaces. T. 93. Currently, eighteen of those spaces are provided on-site. T. 93. There is one parking ADA compliant parking space on the east side of the building towards the ordering station. As a result, there are currently 8 or 9 existing spaces. T. 94. In addition to the enclosed patron area, there are ten seats currently in the outdoor play area. T. 96. The required 47 parking spaces do not take into account the tables in the outdoor play area as that does not constitute gross floor area. T. 94-95.

The patron area for the proposed restaurant is 1,149 square feet in floor area and the outdoor seating is being removed. T. 98. The new parking requirement will be 29 spaces, of

which thirteen are provided on site and an additional 35 are available in the shopping center parking lot for a total of 48 spaces. T. 98. When he visited the site numerous times, as recently as the week before the hearing, he observed that there were always a number of empty spaces available in the shopping center. T. 100.

He also stated that the dumpster area on Lot 2 consists of approximately 434 square feet and there are no development applications pending for that lot. When the site plan for the shopping center was approved in 2005, the center's owner was required to include sufficient parking for all uses on the site, including the McDonald's site. T. 103. Therefore, there is a net increase of 15 parking spaces within the shopping center because the special exception proposed requires only 29 rather than the existing 47 spaces. T. 103. Therefore, even if you take into account the spaces being removed, overall the shopping center has a net increase of 15 available parking spaces rather than a reduction of eight spaces. T. 104.

3. Mr. Mike Workosky:

Mr. Workosky qualified as an expert in transportation planning. T. 52. He testified that the proposed use is not subject to the requirements of either Local Area Transportation Review ("LATR") or Policy Area Mobility Review ("PAMR"). T. 54. According to Mr. Workosky, this is because the proposed use generates fewer trips than the existing use; therefore, the proposal to modify the special exception does not generate any additional trips. T. 55.

Mr. Workosky explained that the gross floor area of the proposed building is less than that of the existing building. The gross floor area is one of the variables used to calculate the number of trips generated by the development. In addition, he looked at the number of seats in the patron area because there is an existing outdoor play area with seating that is not included within the gross floor area. The existing building contains 121 seats; the proposed reconstruction reduces the number of seats to 80. T. 55. Because, however, the existing use has an established

market, he acknowledged that it may still generate roughly the same number of peak hour trips that occur today. T. 56.

Mr. Workosky also described the existing site circulation. There is a full movement driveway on Bel Pre Road which permits both left and right turns into the shopping center from that road. There is another intersection between to the west, Parker Farm, which is signalized. This intersection permits full movements as well. T. 56. These access points remain unchanged from the existing conditions. The two-way drive aisle northbound from Bel Pre Road into the shopping center (on the eastern side of the site), allows access to the service station and other uses to the east. Currently, there is parking along the eastern side of the building. Vehicles head toward the north end of the building and turn left to enter the drive aisle. They order at the northern end of the building and move counterclockwise toward the western side to the pick up windows. There is a right out only onto Bel Pre Road on the west side of the property. T. 56-58. If vehicles wish to turn left onto Bel Pre, they exit the drive aisle and turn right onto the shopping center drive aisle, turn left to the western side of the shopping center and proceed to the signalized intersection at Parker Farm. T. 56-58.

When he visited the site during typical peak hours, the queue ranged from seven to nine vehicles which occupied full length of the western side of the aisle to the ordering station. Some of the conflicts which occur are due to vehicles which attempt to enter the drive aisle from the shopping center on the northern side of the site. T. 58-59.

Mr. Workosky opined that the proposed site plan will improve the existing traffic conditions. The improvements will increase stacking in the drive aisle by approximately two to three vehicles. Traffic approaching the western side of the property will not need to pull in and get out of their car to order; rather, they may enter the drive through from the front drive aisle instead of having to go out to Bel Pre Road. T. 61. Truck deliveries will use the northbound

shopping center entrance from Bel Pre Road. Trucks will be able to turn left or right from Bel Pre, pull into the loading area, and exit the site. T. 62. While there is some conflict with the drive aisle, deliveries are not scheduled for the peak hours. T. 62. The curbed island on the southeast corner of the site is designed to allow traffic to proceed north but restrict it from turning right and exiting the northbound drive aisle onto Bel Pre Road. The island prevents someone from turning right and coming back out to Bel Pre Road. T. 62-63.

Mr. Workosky testified that there are parking spaces along the east side of the site which are available for general public use. They are reducing the number of parking spaces by placing the loading area in that location. He observed that when traffic enters from Bel Pre Road, vehicles will wait for someone to pull out of the spaces on the east side of the site, sometimes causing queuing. The elimination of parking spaces in this area should reduce the queuing in the drive aisle. T. 64-65. In his opinion, the elimination of some of the parking spaces on the east side of the property will improve vehicle circulation at the access. T. 66. In addition, the special exception modification will improve vehicular and pedestrian traffic safety on the site. T. 67.

On rebuttal, Mr. Workosky testified that during his visits to the shopping center, he did not perceive any shortage of parking spaces. Most of the spaces were in the southeastern part of the main parking field, directly in front of the grocery store and to the west of the subject site. T. 106. He visited the site on a Thursday during peak hours, and parking conditions were the same on a visit on Saturday during the mid-day hours. T. 106.

He also testified that the parking spaces located along the northbound driveway access to the shopping does cause some delays and queuing at that site. In his opinion, reducing the number of parking spaces along the eastern portion of the property will help alleviate these queuing problems. T. 106.

4. Mr. Richard Kauffunger:

Mr. Kauffunger testified that he has been deeply involved in land use issues as a citizen advocate for over 25 years. T. 74. He was successful in getting a traffic light installed at the entrance to the shopping center. T. 76. He visited the Starbucks located on the eastern side of the property last week and spoke with the manager there. According to Mr. Kauffunger, Starbucks' biggest complaint was having McDonald's customers use their parking spaces, especially their handicapped space. T. 77. He also visited the Shell gas station on the eastern side of the site and they had the same complaint. According to Mr. Kauffunger, this is just a symptom of the parking problems which have occurred there for many years. T. 78.

Mr. Kauffunger stated that there is "no question" that the proposed modifications to the existing special exception are "much better". T. 79. He has experienced traffic conflicts during truck deliveries and has observed conflicts with vehicles entering the northbound access to the shopping center and customers backing out of parking space along that drive aisle. T. 79.

Despite the fact that he believes the modification is an improvement over existing conditions, Mr. Kauffunger testified that there has long been an issue about the number of parking spaces within the entire Plaza del Mercado shopping Center. T. 79. Parking has been such an issue that when a fast food chain located there an entire trash area behind the Shell station had to be removed to add parking spaces. T. 80. In addition, there is parking behind the northern row of shops that are never used because access is by a one-way single land drive aisle. T. 81. According to Mr. Kauffunger, parking has been an issue since the time of the Master Plan.

Mr. Kauffunger stated that parking remains a concern because the center has lost Giant Food and they have been without a food store for approximately 6 months. T. 83, 89. He testified that the community does not want to consume so much parking that another food store is not able to locate in the shopping center. He believes that the loss of 8 spaces from the subject

property exacerbates this problem. T. 84-88. He would like to see the parking issue resolved before the special exception modification is granted. T. 88. He suggested that McDonald's reduce the patron area to reduce the amount of required parking. T. 90-91.